



THE ADVOCACY DIVISION OF CONSUMER REPORTS

October 12, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: In the Matters of Sandpiper of California and PiperGear USA and Patriot Puck

Consumers Union, the advocacy division of Consumer Reports,¹ thanks the Federal Trade Commission (“FTC” or “Commission”) for the opportunity to comment on the proposed consent agreements in two “Made in the USA” deceptive advertising cases: Sandpiper/PiperGear USA² and Patriot Puck.³ Both of these companies claimed that their products were made in the United States, whereas in reality, they were manufactured overseas and imported.⁴ This behavior was facially fraudulent, and both companies aggressively promoted their “Made in the USA” attributes as a primary selling point. The Commission’s proposed redress: to stop making these claims, and to file occasional compliance reports.⁵ Consumers Union disagrees with the sufficiency of these remedies, which are under the circumstances far too light. With these

¹ Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, privacy and data security, financial services and marketplace practices, food and product safety, telecommunications and technology, travel, and other consumer issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world’s largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 6 million members and publishes its magazine, website, and other publications.

² Sandpiper of California and PiperGear USA, 83 Fed. Reg. 47154 (Fed. Trade Comm’n Sept. 18, 2018), <https://www.federalregister.gov/documents/2018/09/18/2018-20271/sandpiper-of-california-and-pipergear-usa-analysis-to-aid-public-comment> [hereinafter “Sandpiper”].

³ Patriot Puck, 83 Fed. Reg. 47161 (Fed. Trade Comm’n Sept. 18, 2018), <https://www.federalregister.gov/documents/2018/09/18/2018-20272/patriot-puck-analysis-to-aid-public-comment> [hereinafter “Patriot Puck”].

⁴ In the Matter of Sandpiper of California, Inc. and PiperGear USA Inc., FTC File No. 182 3095 (Complaint) at ¶¶ 7-8, https://www.ftc.gov/system/files/documents/cases/sandpiper_complaint.pdf; In the Matter of Underground Sports Inc., d/b/a Patriot Puck, FTC File No. 182 3113 (Complaint) at ¶¶ 10-11, https://www.ftc.gov/system/files/documents/cases/patriot_puck_complaint.pdf.

⁵ Sandpiper, *supra* note 2; Patriot Puck, *supra* note 3.

proposed consent orders, the defendants will face negligible consequences for indisputable violations of the law, and future wrongdoers will hardly be deterred by these weak settlements. At the very least, the Commission should have demanded disgorgement of ill-gotten gains to ensure that the defendants could not keep the money they fraudulently obtained from consumers. We encourage the Commission to reconsider these proposed orders.

The companies involved in these “Made in the USA” schemes committed fraud on its customers, and they should be held accountable for their behavior. Consumers apparently preferred the products advertised by the defendants as “Made in the USA” to other products offered at the same price, and gave them their money in exchange for products with the (falsely) advertised attributes.⁶ That defendants should not be allowed to retain the monies they made from that fraud should not be controversial. The FTC has the legal authority to request redress for the defendants’ behavior under Section 13(b) of the FTC Act.⁷ The courts have ruled again and again that the FTC can request disgorgement in cases involving routine fraud.⁸ Further, a number of district courts have affirmed that the FTC has the authority to order redress under 13(b) for *any* Section 5 violation.⁹ The Commission has routinely demanded disgorgement in other settlements.¹⁰ Disgorgement is the appropriate minimum response to the actions at issue in this proceeding.

Courts have determined that disgorgement should be tied to the defendants’ “unjust gains,” as long as the FTC can reasonably approximate that sum (and the defendant is unable to show that it is inaccurate).¹¹ Given that the “Made in the USA” claims were central to products’

⁶ Fed. Trade Comm’n, Statement of Commissioner Rohit Chopra In the Matters of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck at 3-4 (Sept. 12, 2018),

https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf.

⁷ See 15 U.S.C. § 53(b); Fed. Trade Comm’n, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority* (Revised July 2008),

<https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

⁸ See, e.g., *FTC v. World Travel Vacation Brokers, Inc.*, 861 F. 2d 1020 (7th Cir. 1988),

<https://law.justia.com/cases/federal/appellate-courts/F2/861/1020/138861/>; *FTC v. Bronson Partners et al.*, 654 F. 3d 359 364 (2d. Cir. 2011),

https://scholar.google.com/scholar_case?case=11704521390303959096&hl=en&as_sdt=6&as_vis=1&oi=scholar; for more on Section 13(b) authority, see David Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* at 20,

https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

⁹ See, e.g., *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558 562 (D. Md. 2005),

https://scholar.google.com/scholar_case?case=11163478180994723502&hl=en&as_sdt=6&as_vis=1&oi=scholar; *o* *FTC v. 1st Guar. Mortg. Corp.*, at 44 fn 158 (S.D. Fla. 2011),

<https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330guarantyorder.pdf>.

¹⁰ See, e.g., *FTC v. Uber Technologies*, Case No. 3:17-cv-00261 at ¶ 12 (2017),

<https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf>; *FTC v. Herbalife*, Case No. 2:16-cv-05217 at ¶1 (2016), <https://www.ftc.gov/system/files/documents/cases/160715herbalifecmplt.pdf>.

¹¹ *FTC v. Bronson Partners et al.*, *supra* note 8.

appeal, the FTC should arguably seek all revenues made during the period in which the illegal activity occurred.¹² At the very least, however, they should obtain the defendants' *profits* derived from misleading consumers.¹³

In proposing these settlements, the Commission appears to be incorrectly looking for evidence of a “price premium”—that consumers agreed to pay more for a product that was “Made in the USA —before demanding disgorgement.¹⁴ This idiosyncratic condition is not justified by any economic or other policy considerations, nor any legal requirements. It does not matter at all whether consumers paid more for the defendant’s products—the core concept behind disgorgement is that companies shouldn’t profit from fraud. Price after all is only one product aspect that consumers consider, and here defendants heavily promoted another aspect (fraudulently, it turns out). If defendants were able to sell products and generate profits at the same prices as competitors by differentiating those products based on invalid “Made in the USA” claims, they should not be permitted to retain those profits (at the very least). Evidence of price premiums or about *how* individual consumers value certain aspects of products may be difficult if not impossible to obtain. Fortunately, such evidence is unnecessary in assessing how much money defendants made by selling incorrectly labeled products. Even in a legal proceeding, the FTC is not obligated to demonstrate individual reliance or injury before obtaining legal redress;¹⁵ evidence of the same certainly cannot be a condition of negotiating a settlement. Creating an artificial standard by demanding counterfactual evidence of how successful defendants would have been if they hadn’t chosen to defraud consumers waters down the FTC’s already weak standards for holding companies accountable for wrongdoing.

Further, the Commission’s enforcement actions are supposed to deter future bad behavior, both by the present defendants, but also by other companies who may be tempted to engage in similar behaviors. The current settlements insufficiently disincentivize future lawbreaking. Allowing 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

¹² FTC v. Robert J. Febre et al., 128 F.3d 530 at ¶ 28 (7th Cir. 1997), <https://www.courtlistener.com/opinion/747643/federal-trade-commission-v-robert-j-febre-individually-and-as-an-officer/>.

¹³ FTC v. Direct Marketing Concepts, Inc., 648 F. Supp. 2d 202 3 (D. Mass. 2009), <https://www.courtlistener.com/opinion/2443970/ftc-v-direct-marketing-concepts-inc/>.

¹⁴ Statement of Commissioner Rohit Chopra, *supra* note 6, at 3; Fed. Trade Comm’n, Statement of Commissioner Rebecca Kelly Slaughter In the Matters of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck at 2 (Sept. 12, 2018), https://www.ftc.gov/system/files/documents/public_statements/1407368/182_3038_nectar_sandpiper_patriot_rks_and_d_jjs_concurring_statement_0.pdf; Rebecca Kelly Slaughter, Twitter Post (Sept. 12, 2018), <https://twitter.com/RKSlaughterFTC/status/1039970526138183687>.

¹⁵ FTC v. Ameridebt, 373 F.Supp.2d 558, 564 n.6 (2005).

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.

In addition to requesting disgorgement in the appropriate cases, including for the fraudulent behavior displayed by the defendants, the Commission should also follow the recommendation of Commissioner Chopra and consider mandating notice and refunds in certain cases. Consumers should be able to get their money back, particularly when the fundamental appeal of a product was based on a falsehood. However, the Commission provides no indication that it has conducted an analysis as to whether the defendants have the capacity to offer refunds to defrauded customers. Moreover, as Commissioner Chopra notes, if it appears unlikely that the company will be able to offer refunds or pay redress, consumers should at least be notified of the fraudulent behavior as is practicable.¹⁶

Ultimately, the FTC needs more authority (including civil penalty authority) to sufficiently disincentivize corporate misbehavior.¹⁷ But it is irresponsible for the Commission to not exercise its existing powers to demand the disgorgement of ill-gotten gains. It is also wrong to impose unsubstantiated policy limitations on its remedial authority especially given the relatively weak and insufficient legal authority to safeguard consumers under Section 5. The Commission should reconsider the settlements at issue in this proceeding, and moving forward, commit to using the full range of its enforcement authority to hold companies accountable for their misbehavior.

Respectfully submitted,

Justin Brookman
Director, Consumer Privacy and Technology
Washington, DC

Maureen Mahoney
Policy Analyst
San Francisco, CA

¹⁶ Statement of Commissioner Chopra, *supra* note 6, at 4-5.

¹⁷ See, Comments of Consumers Union, Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P1812201 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0052-d-0018-154961.pdf.