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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matters of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck

September 12, 2018

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 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/recalls/withdrawals/ucm129575.htm>

² Fed. Trade Comm'n, Tests for Defective Drywall (Dec. 2009), <https://www.consumer.ftc.gov/articles/0124-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-dollars-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 U.S.-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/rngs/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).

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 ¶¶ 6-7.

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 ¶ 7.

¹⁰ Compl. at ¶ 9.

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

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 refunds are

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-heavy-medal-london/post/us-olympic-uniforms-spark-fury-in-congress/2012/07/13/gJQABvJmhW_blog.html?utm_term=.3d96e391f1dd

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. 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

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.

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.