Dissenting Statement of Commissioner Rebecca Kelly Slaughter,

Regarding the Matters of Sandpiper/PiperGear and Patriot Puck

April 17, 2019

Let me cut to the quick: I have changed my vote on these particular cases because I now believe that I got this wrong the first time around.

I misunderstood an important aspect of the FTC's authority, and then I repeated my misunderstanding to a wider audience. So I write to clear up this misunderstanding, to say thank you to the public commenters whose insightful contributions helped me to better understand these issues, and to explain why I have changed my vote on these matters. I now vote against approving these consent orders with Patriot Puck and Sandpiper/PiperGear, both brazen violators of the Federal Trade Commission Act's prohibition against deceiving consumers by claiming a wholly imported product is "Made in U.S.A."

Last September, I voted in support of the FTC's publishing for public comment the proposed consent orders that placed the offending companies and one executive under order but did not require admissions of liability or exact a financial cost. Notably, the FTC's approach to these particular cases was consistent with the agency's approach to all "Made in U.S.A." cases over recent decades and across administrations of both parties. In a concurring statement,[1] I wrote that the companies and executive would be placed under order and therefore subject to civil penalties for any future deception or other violations of the order. I noted that these prospective penalties are quite big, that record-keeping requirements would tend to keep the companies honest, and that these types of orders had mostly kept previous "Made in U.S.A." deceivers from re-offending. All of this remains true.

I based my earlier vote on two interrelated factors: (1) the resolutions of these matters were negotiated before the current set of Commissioners took office and (2) I did not believe that we had a legal basis to seek more aggressive monetary remedies. I therefore concluded that it would not be an efficient use of our limited resources to renegotiate these settlements with little chance of better outcomes. Instead, I thought that it made sense to consider alternative approaches on a forward-looking basis. I wrote that we could look to pursue "additional remedies," such as disgorgement of ill-gotten gains,[2] admissions of liability, and notice to consumers, in future "cases in which consumers paid a clear premium" in terms of price.

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[1] *See* Concurring Statement of Comm'r Slaughter, joined by Chairman Simons, *In re Nectar Sleep, Sandpiper/PiperGear, and Patriot Puck* (Sept. 12, 2018), https://www.ftc.gov/system/files/documents/public_statements/1407368/182_3038_nectar_sandpiper_patriot_rks_and_jjs_concurring_statement_0.pdf.

[2] Disgorgement is an equitable remedy that is distinct from the tool of civil penalties; the purpose of disgorgement is to put the lawbreaker in the same position that it would have been in without the lawbreaking, whereas the purpose of civil penalties is to punish and deter. It seems uncontroversial to note that disgorgement remedies would have the effect of deterring some lawbreaking since they would tend to reduce fraud's upside, even though they do nothing to increase fraud's downside.

My earlier concurring statement contained no inaccuracy, but, in a follow-up tweet[3] and in testimony before the Senate,[4] I expressly linked the notion of price premium with "our limited authority." This was my misunderstanding: I had understood that the FTC had the authority to disgorge ill-gotten gains only where there was evidence of a price premium paid by consumers for American-made goods over cheaper imports.[5] To be clear: Our authority has no such limitation. Instead, that consideration was prudential: The FTC historically has opted against expending large resources to pursue disgorgement remedies with first-time "Made in U.S.A." violators. This strategy has favored bringing more companies under order to stop their violations over pursuing fewer, more resource-intensive cases that might impose on lawbreakers more severe consequences.

This is a fair approach in light of other important consumer-protection priorities. I will continue to support it in appropriate cases. But it is reasonable to question, as Commissioner Chopra and many commenters have, whether more widespread compliance could be better achieved by the FTC's seeking more aggressive remedies in egregious cases. I am persuaded that, for brazenly deceptive representations that a wholly imported product is "Made in U.S.A.," consent orders without disgorgement or admissions fail to exact a meaningful cost from the lawbreaking company and its executives sufficient for effective general deterrence.

Reasonable minds may differ on particular litigation strategy, but in my view the two cases on which we vote today are so egregious that the usual first-time-violation consent order is insufficient. In particular, I am persuaded that we should seek disgorgement of ill-gotten gains and an admission of liability in these cases—and I understand that, if the companies refuse to agree to such terms, we would have to expend substantial resources for, and take on the risk associated with, litigation. But doing so would send an unmistakable message that there will be meaningful consequences for brazenly mislabeling wholly imported products as American-made—even the first time that a fraudster gets caught.

Seeking disgorgement and admissions is one way to enhance our Made-in-U.S.A. enforcement program, but it is not the only one. I am always eager to see the Commission think creatively about the most effective use of its authorities, and the strategies that Commissioner Chopra has suggested, such as Made-in-U.S.A. rulemaking[6] to enable use of civil penalties or using section 5(m)(1)(B) of the FTC Act,[7] are worth pursuing. They hold the promise of maximizing general deterrence while minimizing resource expenditures.

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[3] *See* Rebecca Kelly Slaughter (@RKSlaughterFTC), Twitter (Sept. 12, 2018, 1:14 p.m.), https://twitter.com/RKSlaughterFTC/status/1039970526138183687.

[4] *See Fed. Trade Comm'n Oversight: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, Ins. & Data Safety of the S. Comm. on Commerce*, Nov. 27, 2018, at 1:37:56 ("I would add that Commissioner Chopra's point about financial penalty authority is a well-taken one. . . . In order for us to get a monetary remedy right now, we have to show a monetary harm—show a price premium and make that demonstration. That can be very difficult to do."), https://www.c-span.org/video/?c4791166/commissioner-slaughter-musa.

[5] This misunderstanding was mine alone; Chairman Simons, who joined the statement, did not share it. *See* Concurring Statement of Chairman Simons, *In re Sandpiper/PiperGear and Patriot Puck* (Apr. 17, 2019).

[6] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320933, 108 Stat. 1796, 2135 (1994), *codified at* 15 U.S.C. § 45a.

[7] Commissioner Chopra explores these strategies in more detail in his statement. *See* Dissenting Statement of Comm'r Chopra, *In re Sandpiper/PiperGear and Patriot Puck* (Apr. 17, 2019).

I read every public comment filed in response to the proposed consent orders, and I extend my thanks to all who took the time to write us. Even the single-sentence comments are useful in underscoring that deceptive claims of "Made in U.S.A." are repugnant to consumers from all regions and ideologies.[8] That this view is so widely and deeply held supports adding a corresponding measure of targeted enforcement resources to rooting out this pervasive deception. I am particularly grateful to the longer comments filed by consumer and industry groups that provided relevant case law and legal background.[9] They make a compelling case not only that seeking disgorgement is within the FTC's authority but also that doing so could be a strategic use of our scarce resources to promote truth in country-of-origin claims. With the aid of these richly sourced comments and further reflection on my part, I came to the view that we could and should seek disgorgement and other remedies even in cases of first-time violators when their violations are egregious.

Serving in this office is an immense privilege, one that I try my best to honor each day. An important part of my effort to do so is to keep an open mind, even after I have already voted and stated a view about a case, and to approach all my work with the humility that I will on occasion make the wrong call. I will strive to be forthright in these occasions and learn from my mistakes. The public-comment process is a vital mechanism for public officials to receive valuable information and perspectives, as was especially true here for me. I expect that in most cases my initial vote will not change but that still I will learn from the insightful comments that the public submits. I will continue to think critically about the important decisions that the Commission faces every day and make best use of all the information available to me, especially information that challenges my initial view.

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[8] *See, e.g.*, Cmt. of Concerned Citizens (Oct. 11, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/10/00003-155942.pdf.

[9] *See, e.g.*, Cmt. of Consumers Union (Oct. 12, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/10/00006-155952.pdf; Cmt. of All. for Am. Mfg. (Oct. 12, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155951.pdf.