

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

In the Matter of Resident Home LLC.

Commission File No. 2023179

October 7, 2021

That didn't take long. Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act¹—remedies that, in fairness to the agency, were blessed by appellate courts for decades²—the Commission now votes to accept monetary remedies not permitted by Section 19.

We commend staff for their diligent work on this case, and remain committed to continued Made in the U.S.A. enforcement.³ But we believe that the monetary redress in this case exceeds our authority, and so we respectfully dissent.

In 2018, the Commission entered an administrative order against Nectar Brand LLC, also d/b/a Nectar Sleep, DreamCloud LLC, and DreamCloud Brand LLC (“Nectar Order”) and its successors and assigns for making “Assembled in USA” claims for wholly-imported mattresses. Despite being under order, over at least two periods between December 2018 and June 2020, the Complaint alleges that Nectar deceptively advertised DreamCloud mattresses as “proudly made with 100% USA-made premium quality materials”.

Since entry of the Nectar Order, the 2018 Respondent underwent several changes to its corporate structure. In 2019, Resident Home LLC was created as the parent company of Nectar Brand LLC and DreamCloud Brand LLC. We do not have reason to believe that Resident Home LLC is a successor or assign of Nectar Brand LLC and is covered by the Nectar Order.

This state of play left the Commission with at least two choices. It could choose to pursue an order enforcement action in federal court and seek civil penalties.⁴ Alternatively, or in addition to taking action against Nectar Brand, LLC, it could choose to pursue a *de novo* administrative action and seek a new order that would cover the company, its corporate parent Resident Home LLC, and Resident Home's CEO Ran Reske, while ensuring that any future violations would

¹ *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).

² See, e.g., *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-1113 (9th Cir. 1982); *FTC v. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011).

³ See, *In the matter of Chemence, Inc.*, File No. X1600321 (Feb. 2021), <https://www.ftc.gov/enforcement/cases-proceedings/X160032/chemence-inc>; *In the matter of Gennex Media*, File No. 2023122 (Apr. 2021), <https://www.ftc.gov/enforcement/cases-proceedings/2023122/gennex-media-matter>; *In the matter of Williams-Sonoma, Inc.*, File No. 2023025 (July 2020), <https://www.ftc.gov/enforcement/cases-proceedings/202-3025/williams-sonoma-inc-matter>. Unlike Commissioners Chopra and Slaughter, we have supported every Made in U.S.A. enforcement action brought during our tenure.

⁴ The Commission statement and Commissioner Chopra's separate statement assert that evidence clearly showed that DreamCloud violated an administrative order. Despite the majority's paean to the value of vindicating Commission orders, we do not plead an order violation in the complaint. We support the FTC's longstanding view that order obligations should reflect pleadings.

result in a civil penalty. While valid justifications support any of these approaches, the Commission ultimately determined that seeking a new, broader order would best protect consumers.

In choosing to proceed only administratively, the Commission gave up its ability to obtain civil penalties; but it can still seek redress on behalf of injured consumers pursuant to Section 19 of the FTC Act. While the process is somewhat convoluted, Section 19 permits the Commission to secure certain monetary relief, including, *inter alia*, “the refund of money” and “the payment of damages”.⁵ As the legislative history underscores, the purpose of this relief is to allow the Commission to act “to make specific consumers whole...”.⁶ Section 19 allows the Commission to obtain refunds for specific, identified injured consumers.⁷ It expressly precludes “the imposition of any exemplary or punitive damages”.⁸ Under Section 19, the FTC does not have authority to obtain disgorgement of ill-gotten gains, another (more penal⁹) form of equitable monetary relief.

Despite these clear limitations, the Commission’s proposed order includes monetary redress of \$753,300, with any remainder not used for redress to be disgorged to the Treasury. The complaint does not include details that would help the public understand how the Commission arrived at this amount, and we are not at liberty to reveal non-public information. But our view of the facts is that the figure obtained far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages. The majority points to language in Section 19 that also authorizes redress of injury to “other persons” (besides consumers) resulting from the unlawful practices alleged.¹⁰ We have seen no evidence of such harm in this matter. No one quibbles that the amount of money here exceeds any reasonable estimate of injury.¹¹ It might plausibly be consistent with a penalty or with the disgorgement of ill-gotten gains, but we have no authority to obtain such relief under

⁵ 15 U.S.C. 57b(b).

⁶ S. Rept. 93-151, 93d Cong., 2d Sess., at 27-28 (May 14, 1973).

⁷ See *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993).

⁸ 15 U.S.C. 57b(b).

⁹ See *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020).

¹⁰ 15 U.S.C. 57b(b) (“The court...shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be.”); see also Joint Statement of Commissioner Slaughter, Chair Khan, and Commissioner Chopra *In the Matter of Resident Home*, 2, FN4 File No. 202317.

¹¹ In his separate statement, Commissioner Chopra misrepresents our position in *LendingClub*. In that case, the Commission would have been entitled to consumer redress for injuries under Section 19. In *LendingClub*, unlike here, the settlement amount was not punitive; it reflected the monetary harm suffered by consumers. See, *In the matter of LendingClub Corporation*, File No. 1623088 (July 2021), <https://www.ftc.gov/enforcement/cases-proceedings/162-3088/federal-trade-commission-v-lendingclub-corporation>.

Section 19.¹² The Commission makes clear in its statement that the purpose of the monetary relief in question is to penalize, not to make consumers whole.¹³

The Supreme Court handed down its decision in *AMG Capital Management, LLC v. FTC* in April,¹⁴ and made clear that the words of a statute matter. Those words trump the policy preferences of commissioners. That decision should have been a wake-up call, a reminder to the Commission that, no matter how egregious the conduct or righteous our cause, the Commission is not entitled to go beyond the bounds of what the law permits. If we continue to flout the limits of our authority, the Commission should fully expect additional rebukes from the courts.

The *AMG* decision has significantly impacted the ability of the FTC to pursue wrongdoers and remediate law violations through the imposition of monetary relief. So we reiterate our call to Congress to pass legislation to restore the ability of the FTC to seek monetary remedies under Section 13(b) of the FTC Act in appropriate circumstances. But the law says what it says, and we do not support using the cloak of a settlement to overstep the authority we have.¹⁵

If the goal in this case were to maximize money paid by the Respondents as punishment and to deter others from engaging in similar conduct, the Commission was free to enforce the original Nectar Order and seek civil penalties. That was the road not taken. In choosing this road, with a new and broader order, the Commission is obligated to limit monetary relief to the amount necessary to redress injury, as explicitly authorized by Section 19. Because this settlement exceeds those clearly delineated bounds, we must respectfully dissent.

¹² The majority is correct that Section 19 permits “damages”. The majority, though, is not entitled to its own facts. The facts alleged in the complaint and Analysis to Aid Public Comment provide no basis for a Section 19 damages remedy of this amount. Although we cannot share the underlying analysis with the reader, the monetary remedy far exceeds any reasonable estimate of Section 19 damages. As the majority makes clear in the Commission statement, it is assessing a penalty under cover of Section 19.

¹³ In his separate statement, Commissioner Chopra also claims that we do not support consequences for Made in the U.S.A. fraud. By that logic, Commissioner Chopra’s votes against privacy enforcement in cases like *Facebook* and *Google/YouTube* show his enthusiasm for their business models and distaste for enforcement against large technology platforms. The issue here is the Commission trying to eat its Section 19 cake and have its civil penalties too. We cannot do both, however we feel about policy. *See* Statement of Rohit Chopra *In the Matter of Resident Home LLC*, Commission File No. 202317. *See also*, Dissenting Statement of Commissioner Rohit Chopra *In re: Facebook, Inc.*, Commission File No. 1823109 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rohit Chopra *In the Matter of Google LLC and YouTube, LLC*, Commission File No. 1723083 (Sep. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf.

¹⁴ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

¹⁵ The majority is correct that, as a practical matter, the government has the ability to extort that to which it is not entitled under law. As we have said on other occasions, though, just because we can does not mean that we should. Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, *U.S. v. iSpring Water Systems, LLC*, Commission File No. C4611 (Apr. 12, 2019), https://www.ftc.gov/system/files/documents/public_statements/1513499/ispring_water_systems_llc_c4611_modified_joint_statement_of_commissioners_phillips_and_wilson_4-12.pdf.