



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

June 21, 2022

Via email: plf@pacificlegal.org
Caleb Kruckenberg
Attorney
Pacific Legal Foundation

Re: *In the Matter of Resident Home, LLC*, Matter No. 2023179

Dear Mr. Kruckenberg:

Thank you for commenting on the Federal Trade Commission's proposed consent agreement in the above-referenced proceeding. The Commission has considered your comment and placed it on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii).

In your comment, you state the FTC lacks authority to issue a Final Order containing Part X of the Decision and Order, titled "Monetary Relief." Therefore, you argue, the FTC should revise or rescind the proposed Order.

The proposed settlement, however, is lawful. Section 19 of the FTC Act, 15 U.S.C. § 57b(a)(2), authorizes the FTC to obtain monetary relief, including compensatory damages, from Respondents that have violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), at the close of administrative litigation. To prevail, the FTC must show that the unfair or deceptive act or practice at issue in the administrative proceeding is one that a reasonable person "would have known under the circumstances was dishonest or fraudulent." *Id.*¹ Although the Supreme Court recently held that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), does not authorize the FTC directly to obtain court-ordered monetary relief, the Court specifically stated that "[its opinion does not] prohibit[] the Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers." *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021).²

¹ As you note, although Section 19 authorizes a broad range of equitable relief, the provision specifies the Commission may not seek exemplary or punitive damages.

² In your letter, you argue that because the Court described Section 19 as "limited" multiple times in the AMG decision, the Commission is not entitled to monetary relief. However, your argument takes that discussion, which has no bearing on this matter, out of context. The Court referenced Section 19's limits to explain that because the provision includes specific parameters under which the Commission can seek monetary relief, it is unlikely Congress intended to grant duplicative, broader powers under Section 13(b). Specifically, the Court identified the following "important limitations that are absent in §13(b):]" (1) a statute of limitations; and (2) a requirement that, to prevail, "a reasonable man would have known under the circumstances that the conduct at issue was dishonest or fraudulent." *AMG Capital Mgmt.*, 141 S. Ct. at 1349. Neither of these limitations applies to this case. First, the statute of limitations for Section 19 actions is not triggered. The Commission began its Section 5 process well within three years of the underlying violation and is collecting monetary relief at the time of settlement. Second, as

In this case, the Complaint alleges Respondents knew or consciously avoided knowing that Resident Home LLC (“Resident”) made false claims that its DreamCloud mattresses were “proudly made with 100% USA-made premium quality materials.” A reasonable person in Respondents’ position would have known this conduct was dishonest or fraudulent because (1) DreamCloud mattresses are wholly imported or incorporate significant imported materials; and (2) Resident subsidiary Nectar Brand, LLC was the subject of a 2018 FTC Complaint and Order finding exactly this conduct deceptive in violation of Section 5. The Complaint reflects a preponderance of evidence demonstrating Resident violated Section 5 and knew or should have known the violation was dishonest or fraudulent. Therefore, if the FTC proved these allegations in administrative litigation, it would likely prevail in a follow-on Section 19 action for monetary relief.

The parties to this matter effectively agreed to pre-settle the FTC’s Section 19 claim for monetary relief, thus avoiding lengthy litigation and unnecessary costs. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 317 (3d Cir. 2011) (“[C]ourts are afforded wide discretion to give effect to joint compromises that timely advance the interests of the parties without wasteful litigation.”). “[I]t is well established that parties to a suit have the right to agree to anything they please in reference to the subject matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.” *Sullivan*, 667 F.3d at 317 (citing *Pac. R.R. v. Ketchum*, 101 U.S. 289, 297 (1879); *Sansom Comm. by Cook v. Lynn*, 735 F.2d 1535, 1548 (3d Cir. 1984)). *See also All Indirect Purchaser Actions v. Infineon Techs. AG (In re Dynamic Random Access Memory Antitrust Litig.)*, No. M-02-1486-PJH, 2013 U.S. Dist. LEXIS 188116, at *196 (N.D. Cal. Jan. 7, 2013).

The agreed-upon judgment represents the parties’ estimate of consumer injury³ in settlement of eventual Section 19 proceedings. According to the Order, any funds that cannot be used to redress consumers will be sent to the United States Treasury. This is appropriate, consistent with the FTC’s routine disposition of excess redress funds, and does not transform Section 19 damages to a prohibited punitive sanction. *See, e.g., FTC v. Nat’l Urological Grp.*, No. 1:04-CV-3294-CAP, 2014 U.S. Dist. LEXIS 203622, at *7-8 (N.D. Ga. Aug. 19, 2014) (“[D]isgorgement of excess funds to the United States Treasury does not transform compensatory sanctions to punitive sanctions.”).

Therefore, after considering your comment, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without

alleged, the conduct in this matter meets the “dishonest or fraudulent” standard. Therefore, the Court’s references to “limits” on Section 19 do not apply to the Commission’s proposed settlement.

³ A presumption of consumer reliance on a marketer’s misrepresentations arises when the Commission demonstrates: (1) a defendant has made material misrepresentations; (2) the representations were widely disseminated; and (3) consumers purchased the product at issue. *FTC v. Figgie Int’l*, 994 F.2d 595, 605-06 (9th Cir. 1993). If the defendant does not present evidence rebutting the presumption of reliance, “injury to consumers has been established.” *Id.* at 606.

modification. The final Decision and Order and other relevant materials are available on the Commission's website at <http://www.ftc.gov>. It helps the Commission's analysis to hear from a variety of sources in its work, and we thank you again for your comment.

By direction of the Commission.

April J. Tabor
Secretary