



FEDERAL TRADE COMMISSION

[File No. X160032]

Chemence, Inc.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement; Request for Comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Write “Chemence, Inc.; File No. X160032” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Julia Solomon Ensor (202-326-2377), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Website, at this web address:
<https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Chemence, Inc.; File No. X160032” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Due to protective measures in response to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you file your comment on paper, write “Chemence, Inc.; File No. X160032” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Chemence, Inc. and James Cooke ("Respondents").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves Respondents' advertising, labeling, sale, and distribution of cyanoacrylate "superglue" products as made in the United States. According to the FTC's complaint, Respondents represented that the cyanoacrylate "superglue" products they manufactured and supplied to trade customers were all or virtually all made in the United States. In fact, significant proportions of the chemical inputs, and overall costs, to manufacture Respondents' cyanoacrylate "superglues" are attributable to foreign materials. In numerous instances, foreign materials accounted for more than 80% of materials costs and more than 50% of overall manufacturing costs for these products. The complaint also alleges that, by distributing promotional materials containing

misrepresentations regarding the U.S. origin of their products, Respondents provided trade customers the means and instrumentalities to commit deceptive acts or practices. Based on the foregoing, the complaint alleges that Respondents engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act, and violated a 2016 federal court order in the process.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S. Origin Claims, Part I prohibits Respondents from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits Respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and Respondents have a reasonable basis substantiating the representation.

Part III prohibits Respondents from providing third parties with the means and instrumentalities to make the claims prohibited in Parts I or II.

Parts IV through VI are monetary provisions. Part IV imposes a judgment of \$1,200,000. Part V includes additional monetary provisions relating to collections. Part

VI requires Respondents to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate.

Part VII is a notice provision requiring Respondents to identify and notify certain third-party trade customers of the FTC's action within 30 days after the issuance of the order, or within 30 days of the customer's identification, if identified later. Respondents are also required to submit reports regarding their notification program.

Parts VIII through XI are reporting and compliance provisions. Part VIII requires Respondents to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part IX requires Respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part X requires Respondents to maintain certain records, including records necessary to demonstrate compliance with the order. Part XI requires Respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondents' personnel.

Finally, Part XII is a "sunset" provision terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

Statement of Commissioner Rohit Chopra In the Matter of Chemence, Inc.

Summary

- Made in USA fraud harms both consumers and honest competitors. Yet for decades, FTC Commissioners pursued a no-money, no-fault settlement strategy to tackle this problem, ignoring Congressional authority to penalize bad actors.
- Over the last two years, the Commission has begun to turn the page on its checkered record, obtaining significant judgments for Made in USA fraud and initiating a rulemaking to trigger damages and penalties.
- Today's action against Chemence and a top executive is another step forward in protecting the Made in USA brand and restoring the Commission's law enforcement credibility.

For markets to function fairly, the Federal Trade Commission must be a credible watchdog, ensuring that companies have an incentive to follow the law and adhere to the agency's rules and orders. Corporate defendants that blatantly lie about their products have been able to convince Commissioners that their conduct caused no harm, allowing them to extract settlements with virtually no consequences whatsoever. Robert Pitofsky, who served as a Commissioner and later as the agency's Chairman, described these no-money, no-fault orders as "scandalously weak."¹

Longstanding FTC policies recognize that blatant deception harms consumers and diverts sales from honest competitors.² But, over the years, Commissioners quietly adopted a permissive approach toward corporate fraud, while bringing down the hammer on small, fly-by-night operations. Going hard on small businesses can give the

¹ See Irving Scher et al., *Part II – FTC Improvement Act*, 45 ANTITRUST L.J. 96, 117 (1976).

² For example, the Commission's Policy Statement on Deception notes that "[t]he prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers." FTC Policy Statement on Deception, 103 F.T.C. 174, 175 (1984) (appended to Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984)), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

appearance of active enforcement, even as more established companies face few consequences for their wrongdoing.

However, there are promising signs that this is changing. One of the best examples of our moving away from lax enforcement is our Made in USA fraud program. Today, the Commission is announcing another action against an established corporate actor, showing we are turning the page on our permissive policy of the past.

FTC's Flawed Made in USA Enforcement Strategy

Consumers prefer goods that are produced domestically, and they are even willing to pay more for them.³ This gives bad actors an incentive to unlawfully parade their products with the “Made in USA” brand. Government enforcement can ensure that this strategy does not pay off.

However, for decades, there was bipartisan consensus at the Federal Trade Commission that Made in USA fraud should not be penalized. Even in egregious cases, most matters were resolved with no-money, no-fault settlements, and many violators received nothing more than closing letters. In 1994, Congress authorized the Commission to do more – granting the agency new authority to trigger penalties and damages for Made in USA fraud – but past Commissioners declined to even propose implementing this new authority, allowing it to languish for a quarter century.⁴

³ See, e.g., Kong, Xinyao and Rao, Anita (June 8, 2020). “Do Made in USA Claims Matter?,” University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2019-138, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468543.

⁴ See generally Statement of Commissioner Rohit Chopra Regarding Activating Civil Penalties for Made in USA Fraud (Apr. 17, 2019), <https://www.ftc.gov/public-statements/2019/04/statement-commissioner-rohit-chopra-regarding-activating-civil-penalties>. In fact, under pressure from interest groups in the 1990s, Commissioners tried to weaken the Made in USA standard in light of globalized supply chains. Request for Public Comment on Proposed Guides for the use of U.S. Origin Claims, 62 Fed. Reg. 25020 (May 7, 1997), <https://www.govinfo.gov/content/pkg/FR-1997-05-07/pdf/97-11814.pdf>. See also Bruce Ingersoll, *FTC May Ease Its Guidelines For the 'Made in USA' Label*, WALL STREET J. (May 6, 1997), <https://www.wsj.com/articles/SB862863598530948000>. This effort was widely opposed, and it failed. See Matthew Bales, Jr., *Implications and Effects of the FTC's Decision to Retain the "All or Virtually All" Standard*, 30 U. MIAMI INTER-AM. L. REV. 727 (1999).

This lack of deterrence contributed to brazen Made in USA fraud, as seen in some of the Commission’s recent cases. In 2018, the FTC sued Patriot Puck, which branded its product as “The Only American Made Hockey Puck.” In fact, according to the Commission’s lawsuit, these pucks were made in China.⁵ That same year, the FTC sued a seller of military bags and other gear, charging the firm with inserting fraudulent Made in USA labels into imported products, and marketing these products on military bases.⁶ These practices harmed both consumers and honest competitors.⁷

Even firms that the FTC warned were seemingly undeterred. In 2017, the FTC required iSpring Water Systems to stop mislabeling its products. Last year, iSpring violated this order.⁸ In 2018, the FTC warned Williams-Sonoma to stop falsely marketing products as Made in USA;⁹ earlier this year, they were charged with doing it anyway.¹⁰ The fact that these repeat offenders were caught is a testament to our staff’s vigilance, but offenders’ willingness to break the law twice demonstrates the flaws of the strategy pursued by past Commissions.

Recently, we have seen how that strategy is changing. iSpring was ordered to pay a civil penalty, and the company admitted that it broke the law. Williams-Sonoma was

⁵ Press Release, Fed. Trade Comm’n, FTC Approves Final Consents Settling Charges that Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Made False ‘Made in USA’ Claims (Apr. 17, 2020), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-approves-final-consents-settling-charges-hockey-puck-seller>; Statement of Commissioner Rohit Chopra In the Matter of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck (Sep. 12, 2018), <https://www.ftc.gov/public-statements/2018/09/statement-commissioner-chopra> (hereinafter Dissenting Statement on No-Consequences Made in USA Settlements).

⁶ *Id.*

⁷ In fact, one competitor formally complained to the FTC that it lost out on a valuable Army and Air Force exchange listing based on Sandpiper’s deception. *See* Advantus, Corp. (Comment #5) at 3–4, https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155955.pdf.

⁸ Press Release, Fed. Trade Comm’n, Marketer of Water Filtration Systems to Pay \$110,000 Civil Penalty for Deceptive Made-in-USA Advertisements in Violation of 2017 Order (Apr. 12, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/marketer-water-filtration-systems-pay-110000-civil-penalty>.

⁹ Closing letter to Danielle M. Hohos, Esq., Deputy General Counsel for Williams-Sonoma, Inc. (June 13, 2018), https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf.

¹⁰ Press Release, Fed. Trade Comm’n, Williams-Sonoma, Inc. Settles with FTC, Agrees to Stop Making Overly Broad and Misleading ‘Made in USA’ Claims about Houseware and Furniture Products (Mar. 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/03/williams-sonoma-inc-settles-ftc-agrees-stop-making-overly-broad>.

required to pay \$1 million to resolve the Commission's allegations – a small sum, perhaps, for Williams-Sonoma, but a record for the FTC's Made in USA enforcement program. And in July, the Commission *finally* proposed codifying the Made in USA standard into a rule.¹¹ This rule would help to end the agency's reliance on no-money settlements, allowing the Commission to seek civil penalties, damages, and other sanctions for Made in USA violations.¹²

Turning the Page

Today's action against Chemence and its top executive marks another turning point for the FTC's enforcement strategy. Chemence is an established player in the adhesives and sealants business. The order announced today imposes real consequences – a major difference from the Commission's past Made in USA settlements.

First, the proposed order requires Chemence to forfeit \$1.2 million in revenue stemming from the company's failures. This is another record judgment for the FTC's Made in USA enforcement program, and it represents a sea change from the era of no-money settlements. It is encouraging to see the FTC reducing its reliance on no-money orders, both here and in other program areas.

Second, this order reminds businesses that FTC orders are not suggestions.¹³ The FTC's complaint highlights false compliance reports filed by Chemence, and charges the company's president personally for his involvement in the alleged violations.¹⁴ This stands in stark contrast to other actions against repeat offenders, where the FTC granted

¹¹ Press Release, Fed. Trade Comm'n, FTC Issues Staff Report on Made in USA Workshop, Seeks Comment on Related Proposed Rulemaking for Labeling Rule (June 22, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-issues-staff-report-on-made-in-usa-workshop>.

¹² Of course, not every Made in USA violation requires a lawsuit, or justifies a large judgment. But seeking and accepting no money and no meaningful consequences undermines our credibility.

¹³ Memorandum from Commissioner Chopra to FTC Staff Regarding Repeat Offenders (May 14, 2018), <https://www.ftc.gov/public-statements/2018/05/commissioners-memorandum-2018-01-repeat-offenders>.

¹⁴ Compl. ¶¶ 13-16, *In the Matter of Chemence, Inc. et al.*, Docket No. X160032.

broad releases to executives who oversaw egregious violations. The approach in this matter is far more effective.¹⁵

Third, the proposed order requires Chemenice to notify consumers of this action. Notice confers benefits in cases like this. It helps to erase any competitive advantage a firm realized through deception, and it accords consumers the dignity of knowing what happened. I have long argued we should seek notice in Made in USA and other matters,¹⁶ and I am pleased to see this provision incorporated into this enforcement action.

Our new approach is a critical step forward for protecting the Made in USA brand, and a model for other FTC enforcement areas. There is more work to do, including finalizing a Made in USA fraud rule, but we are clearly moving in the right direction.

While it is tempting for any government agency to think that the status quo is working well, we do our best work when we engage in self-critical analysis and strive for continuous improvement. I congratulate all of the agency's staff who fought for this outcome, as well as the many stakeholders who have worked with us to turn the page on the policy inherited from our predecessor Commissioners.¹⁷ These efforts to reboot the Made in USA enforcement program represent real progress.

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¹⁵ In addition, by filing this case administratively, the Commission has triggered civil penalties for future violations, even if in the absence of a final Made in USA fraud rule.

¹⁶ Dissenting Statement on No-Consequences Made in USA Settlements, *supra* note 4, https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf.

¹⁷ *See, e.g.*, Press Release, Truth in Advertising, Inc. (TINA.org), Ad Watchdog TINA.org Petitions FTC for Made in USA Rule (Aug. 22, 2019), <https://www.truthinadvertising.org/made-in-usa-press-release/>; Consumer Reports (Comment #6), <https://www.ftc.gov/policy/public-comments/2018/10/12/comment-00006-0>; Alliance for American Manufacturing (Comment #5), <https://www.ftc.gov/policy/public-comments/2018/10/12/comment-00005-0>.