

materially and measurably increase sales. When a newly launched product attracts a slew of positive reviews, this can lead to a herd effect that generates massive revenue, because these reviews may affect how e-commerce platform algorithms prioritize listings. Given these effects, the Commission was in a strong position to estimate ill-gotten gains. But rather than relying on evidence and analysis, Chairman Simons, Commissioner Phillips, and Commissioner Wilson relied on a less rigorous approach

³ Comments are available at *Fed. Trade Comm'n., Sunday Riley Modern Skincare, LLC; Analysis To Aid Public Comment*, Docket ID FTC-2019-0086 (Oct. 25, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0001> [Hereinafter Sunday Riley AAPC].

⁴ See Audrey Cooper, Comment No. 06 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 29, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0006>; Ivy M., Comment No. 08 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 29, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0008>; Anonymous Consumer, Comment No. 10 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0010>; Nupur Patel, Comment No. 21 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 1, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0021>; Anonymous Consumer, Comment No. 22 on Sunday Riley AAPC, FTC File No. 1923008 (Nov 4, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0022>.

⁵ See Jeffrey Heft, Comment No. 03 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0003>; Anonymous Consumer, Comment No. 04 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0004>; Terri Morgenson, Comment No. 5 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0005>; Anonymous Consumer, Comment No. 10 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0010>; Anonymous Consumer, Comment No. 11 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0011>; Kristina, Comment No. 16 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0016>; Linda Pan, Comment No. 20 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 1, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0020>;

Victoria Burns, Comment No. 28 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 18, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0028>; Anonymous Consumer, Comment No. 32 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 18, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0032>; Anonymous Consumer, Comment No. 42 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 25, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0042>; Sophia Brunetti, Comment No. 45 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 27, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0045>.

⁶ Consumer Reports added that “[a]llowing companies to engage in and profit from egregious behaviors with merely a prospect of penalties if caught a second time and some limited recordkeeping responsibilities will hardly strike fear in the heart of potential fraudsters. Given the Commission’s limited staff and capacity to police an \$18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC. Those that do shouldn’t get what amounts to a “Get Out of Jail Free” card for their first offense.” See Maureen Mahoney on Behalf of Consumer Reports, Comment No. 46 on Sunday Riley

calculating restitution is the total revenue of the enterprise. See, e.g., *FTC v. Kuykendall*, 371 F.3d 745, 764 (10th Cir. 2004)

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¹¹ See Compl. ¶ 8, *In re Legacy Learning Sys. Inc.*, Docket No. C-4323 (2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110610legacylearningcmpt.pdf>. Importantly, Legacy Learning Systems required its affiliates to comply with F4.3t2Tf 1 (a)13.6 (9.3 (/)5 (doc,)20 (nca)13.3 (nd s)238.4 o11 (nt)5 (J ET o5 (l)5c)-2.3he.004 Tc 0

consequences from other regulators, but that should not justify no-consequences settlement by this regulator.¹⁷

Ultimately, even if there were concern that seeking full redress is excessive, is the logical conclusion to then ask for zero? As I noted when this matter was proposed for public comment, there is extensive literature on the impact of fake reviews,¹⁸ and the Commission has authority to compel production of granular sales data from both Sunday Riley and Sephora. If necessary, I am confident we could have developed a reasonable estimate of back-dated gains, as we did in 2011, rather than presuming fake reviews are harmless or applying a different legal standard because Sunday Riley's conduct doesn't resemble that of other FTC defendants.

If Commissioners believe that moving the agency toward a more lenient approach against fake reviews is in the public interest, they should state such. Alternatively, they could acknowledge that this settlement was mistaken and commit that they will change course. But claiming it was unrealistic to go beyond a no-money, no-fault order is not credible, and it will undermine us in future cases.¹⁹

Ending No-Consequences Settlements

As detailed in the comments to the official public docket and my initial statement, the majority's approach does not bode well for honest businesses looking to compete online. Sunday Riley's alleged conduct was illegal, indefensible, and wrong – but it was understandable. As explained by one leading e-commerce consultant, “Incentives are incredibly high for brands to create fake reviews or incentivize reviews,” and many brands feel “If I don't do this, then I'm not staying level with my competition, I'm literally just falling behind.”

that at some point, Sephora detected Sunday Riley's scheme, leading it to delete certain reviews.²¹ But, as alleged in the complaint, Sunday Riley simply adjusted its tactics, directing employees to conceal their IP addresses to evade further detection.²² It is unclear whether Sephora took any further action, and Sunday Riley's scheme became public only when a whistleblower came forward.

Given this spotty private policing, it is critical that in the rare circumstances when law enforcement steps in, we send an unambiguous message that posting fake reviews is not worth the risk. Today's no-money order, fear, will have the opposite effect, sending the message that if you get caught and attract law enforcement scrutiny, the price you'll pay is zero.²⁴

The problems with no-money orders were once widely understood. More than four decades ago, Robert Pitofsky, who would go on to serve on the Commission twice, including as its Chair, called no-money cease-and-desist orders "scandalously weak."²⁵ He, too, argued that they did little to deter wrongdoing and nothing to redress victims.²⁶ Yet the Commission continues to rely on them, even in cases, like this one, involving allegations of dishonesty and fraud.

When companies engage in egregious misconduct, a no-money, no-fault settlement is ineffective, especially when there appear to be no material disputes of fact. The Commission should formally signal that it is terminating its no-money, no-fault settlement approach for dishonest or fraudulent conduct by:

- x Publishing a Policy Statement on Equitable Monetary Remedies. The Commission should issue a Policy Statement on Equitable Monetary Remedies. At a minimum, it should establish a rebuttable presumption that the Commission will not pursue no-money settlements in cases involving dishonesty or fraud.²⁷ This will help establish consistency in our enforcement program, ensuring that fraud carries consequences regardless of whether it is committed by a fly-by-night operation or by an established firm like Sunday Riley.

²¹ Sunday Riley Complaint, supra note 12, ¶ 9.

²² *Id.*

²³ See [throwawayacctSRiley/Sunday Riley Employee: We Write Fake Sephora Reviews](#) (Oct. 15, 2018, 4:21 PM),

through the roof? Supra note 20.

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²⁸ See 15 U.S.C. § 57a
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