



November 25, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Sunday Riley Modern Skincare, LLC; File No. 192 3008

Consumer Reports¹ thanks the Federal Trade Commission (“FTC”) for the opportunity to comment on the proposed consent agreement with Sunday Riley Skincare for false advertising.² We strongly urge the FTC to revise this settlement as it establishes a weak precedent for companies that engage in astroturfing. By settling this case with no disgorgement of revenues or other meaningful consequences, future wrongdoers are unlikely to be deterred and will feel empowered to pollute the marketplace of information with fraudulent testimonials.

According to the complaint, the CEO, Sunday Riley, and others repeatedly directed employees over several years to create fake online profiles to write positive reviews of their skincare products on Sephora’s website, and to downvote negative reviews.³ This is outrageous behavior, even in the context of a beauty industry that has long profited from exaggerated claims and digital manipulation of ads.⁴ But under the proposed settlement Sunday Riley will face no

¹ Consumer Reports is an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumer Reports is the world’s largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 6 million members and publishes its magazine, website, and other publications.

² In the Matter of Sunday Riley Modern Skincare, LLC, Fed. Trade Comm’n, File No. 192-3008 (Agreement Containing Consent Order) (Oct. 21, 2019), https://www.ftc.gov/system/files/documents/cases/192_3008_sunday_riley_acc0_0.pdf [hereinafter SUNDAY RILEY CONSENT AGREEMENT].

³ In the Matter of Sunday Riley Modern Skincare, LLC, Fed. Trade Comm’n at ¶ 10 (Complaint), https://www.ftc.gov/system/files/documents/cases/192_3008_sunday_riley_complaint_0.pdf [hereinafter SUNDAY RILEY COMPLAINT].

⁴ Jie G. Fowler, Timothy H. Reisenwitz, and Les Carlson, *Deception in Cosmetics Advertising: Examining Cosmetics Advertising Claims in Fashion Magazine Ads*, MARKETING DEPARTMENT FACULTY PUBLICATIONS at

real consequences for its clearly fraudulent actions. The FTC has merely asked that Sunday Riley no longer break the law.⁵

The Importance of Honest Reviews

Consumers rely on online reviews to make purchasing decisions—as Sunday Riley herself pointed out, favorable online ratings “directly translates to sales[.]”⁶ As noted by the *New York Times*, “Even as researchers are finding that reviews are less reliable, more people are relying on them.”⁷ According to Pew, 82% of adult consumers consult online reviews, and almost half of those consumers always or nearly always check them before making a new purchase.⁸ Those numbers are even higher for consumers under fifty.⁹ Consumers’ reliance on online reviews is reflected in the fact that favorable restaurant reviews on Yelp correlate with 5-9% increases in revenue.¹⁰ Online reviews are particularly important for more expensive merchandise, such as Sunday Riley’s pricey skincare line, where consumers have more to lose if a product turns out to be a dud.¹¹

Consumers rely on these online reviews in part because the marketplace is not adequately policed: only about 25% of consumers claim that government regulations help consumers feel confident about their purchases. In contrast, nearly twice as many consumers say that online reviews give them that confidence.¹² There’s a dearth of useful information about skincare products, and the cosmetics industry is notorious for “puffing” (making claims that cannot be substantiated) and manipulating ads (retouching, wearing eyelash extensions in mascara ads) to make the products appear better than they are.¹³ Unlike in other countries, cosmetics companies in the U.S. are largely self-regulated.¹⁴ Several commenters to the record have outlined their

201-202 (2015), <http://digitalcommons.unl.edu/marketingfacpub/32>; Alene Dawson, *Clamping Down on Beauty Product Claims*, L.A. TIMES (Oct. 28, 2012), <https://www.latimes.com/fashion/alltherage/la-ig-beauty-crackdown-20121028-story.html>.

⁵ SUNDAY RILEY CONSENT AGREEMENT, *supra* note 2, at 6-7; Sunday Riley Modern Skincare, LLC; Analysis to Aid Public Comment, (Oct. 25, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0001>.

⁶ SUNDAY RILEY COMPLAINT, *supra* note 2, at ¶ 10.

⁷ David Streitfeld, *Online Reviews? Researchers Give Them a Low Rating*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/09/technology/online-reviews-researchers-give-them-a-low-rating.html>.

⁸ Aaron Smith and Monica Anderson, *Online Reviews*, PEW RESEARCH CTR. (Dec. 19, 2016), <https://www.pewresearch.org/internet/2016/12/19/online-reviews/> [hereinafter ONLINE REVIEWS].

⁹ *Id.*

¹⁰ Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Harvard Business School Working Paper, No. 12-016 at 4 (Sept. 2011), https://www.hbs.edu/faculty/Publication%20Files/12-016_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf.

¹¹ *How Online Reviews Influence Sales*, SPIEGEL RESEARCH CENTER at 7 (June 2017), https://spiegel.medill.northwestern.edu/_pdf/Spiegel_Online%20Review_eBook_Jun2017_Pv2.pdf.

¹² ONLINE REVIEWS, *supra* note 8.

¹³ *Clamping Down on Beauty Product Claims*, *supra* note 3.

¹⁴ U.S. Food and Drug Administration, *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, But Are FDA Regulated* (last updated July 24, 2018), <https://www.fda.gov/cosmetics/cosmetics-laws-regulations/fda-authority-over-cosmetics-how-cosmetics-are-not-fda-approved-are-fda-regulated>.

desperation to find effective products. One person noted that they have “spent thousands upon thousands on products that promise results” in treating acne¹⁵—something that is less of a concern in European countries, where universal health care enables more consumers to consult dermatologists to get prescriptions for scientifically tested skin treatments,¹⁶ and there are stricter requirements about acceptable ingredients for cosmetics, as well as mandatory testing for safety.¹⁷

Reliable reviews are particularly important in the skincare world because of the dramatic range in prices among products that purport to do similar things. Without effective reviews, consumers otherwise have no way of knowing whether the additional price leads to better results, precisely because of the lack of mandatory pre-market testing and standards. Sunday Riley exploited this by instructing employees to say in online reviews that their products were better than lower-priced brands. Sunday Riley is a high-end skincare brand, with prices ranging from \$22 at minimum to over \$150 for their products.¹⁸ Since algorithms determine whether or not a consumer even sees a review, it’s possible that lower-priced products would not be displayed or prominently displayed to consumers—leaving them with fewer opportunities to learn about effective, reasonably priced products.

Sporadic Regulator Intervention Has Been Insufficient to Deter Fake Reviews

Consumers place a great deal of faith in online reviews because they appear to be unbiased reports from fellow shoppers, but that faith is misplaced.¹⁹ Fake reviews are a widespread problem, which is borne out by recent research. One recent study showed that, for at least some products, up to 30% of reviews are fake.²⁰ Research from earlier this month had even more dramatic findings—that nearly half of reviews for clothes and apparel are faked—and, on average across all product lines, 39% of the reviews are false.²¹ Another study found that online

¹⁵ Comment submitted by Anonymous (Nov. 12, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0023>.

¹⁶ Ann M. Morrison, *10 Ways to Age Like a Frenchwoman*, N.Y. TIMES (July 14, 2010), <https://www.nytimes.com/2010/07/15/fashion/15Frenchside.html>.

¹⁷ Oliver Milman, *U.S. Cosmetics Are Full of Chemicals Banned by Europe -- Why?* THE GUARDIAN (May 22, 2019), <https://www.theguardian.com/us-news/2019/may/22/chemicals-in-cosmetics-us-restricted-eu>.

¹⁸ Sandra E. Garcia, *Sunday Riley Settles Complaint That It Faked Product Reviews*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/us/sunday-riley-fake-reviews.html>.

¹⁹ Nicole Lyn Pesce, *This is Exactly How Many Reviews it Takes to Get Someone to Buy Something*, MARKETWATCH (Oct. 22, 2019), <https://www.marketwatch.com/story/this-is-exactly-how-many-reviews-it-takes-to-get-someone-to-buy-something-2017-08-22-12883123>.

²⁰ Karen Weise, *A Lie Detector Test for Online Reviewers*, BLOOMBERG (Sept. 29, 2011), <https://www.bloomberg.com/news/articles/2011-09-29/a-lie-detector-test-for-online-reviewers>.

²¹ Eric Griffith, *39 Percent of Online Reviews Are Totally Unreliable*, PCMAG.COM (Nov. 7, 2019), <https://www.pcmag.com/news/371796/39-percent-of-online-reviews-are-totally-unreliable>.

reviews are, overall, untrustworthy through a variety of metrics, including convergence with Consumer Reports ratings and resale value.²²

Fake online reviews—including those made at the behest of employers—have been a problem for years, but the FTC has been slow to take action. The New York Attorney General brought the first regulatory action on astroturfing ten years ago against a plastic surgery franchise that asked employees to pose as satisfied customers and post favorable reviews of their services. In an email, employees were directed to “put your wig and skirt on and tell them about the great experience you had.”²³ Appropriately, Lifestyle Lift was required to pay penalties and costs to the state. Nevertheless, in the intervening years, absent other high-profile enforcement actions, astroturfing has flourished. A yearlong investigation by Attorney General Schneiderman in 2013, Operation Clean Turf, uncovered widespread bad practices, including paying “reputation shops,” which had staff to write fake reviews and paid existing customers to do so as well.²⁴ Sporadic enforcement by the FTC and other regulators against these behaviors hasn’t been enough to stop their proliferation.²⁵

The FTC especially needs to take stronger actions because platforms don’t have sufficient incentives to police fake reviews. To the contrary, fake reviews, views, and social engagement artificially amplify the metrics by which they are judged by users and investors.²⁶ And perhaps for this reason, sorting algorithms tend to promote content with the most associated activity (real or not) and thus reward this behavior. As Commissioners Chopra and Slaughter note in their statement on the proposed Sunday Riley settlement, policymakers in Canada, the UK, and Australia are already calling on platforms to take more responsibility for the problem, and the FTC should likewise put more pressure on them to act.²⁷

²² Bart de Langhe, Philip M. Fernbach, Donald R. Lichtenstein, *Navigating by the Stars: Investigating the Actual and Perceived Validity of Online User Ratings*, JOURNAL OF CONSUMER RESEARCH, Volume 42, Issue 6 at 818-19 (April 2016) https://www.colorado.edu/business/sites/default/files/attached-files/jcr_2016_de_langhe_fernbach_lichtenstein_0.pdf; Jake Swearingen, *Hijacked Reviews on Amazon Can Trick Shoppers*, CONSUMER REPORTS (Aug. 26, 2019), <https://www.consumerreports.org/customer-reviews-ratings/hijacked-reviews-on-amazon-can-trick-shoppers/>.

²³ *New York State Attorney’s Office Announces Settlement with Lifestyle Lift*, NBC NEW YORK (Jul. 14, 2009), <https://www.nbcnewyork.com/news/local/NY-State-Attorneys-Office-Announces-Settlement-with-LifeStyle-Lift.html>.

²⁴ David Streitfeld, *Give Yourself 5 Stars Online? It Might Cost You*, N.Y. TIMES (Sept. 22, 2013), <https://www.nytimes.com/2013/09/23/technology/give-yourself-4-stars-online-it-might-cost-you.html>; Danny Bradbury, *Keeping Social Media Clean: The War Against Astroturfing*, THE GUARDIAN (Oct. 13, 2013), (<https://www.theguardian.com/technology/2013/oct/14/keeping-social-media-clean-the-war-against-astroturfing>).

²⁵ See, e.g. *FTC v. Reverb Communications*, Docket No. C-4310 (2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/11/101126reverbcmpt.pdf>; *FTC v. Legacy Learning Systems*, Docket No. C-4323 (2011), <https://www.ftc.gov/news-events/press-releases/2011/06/ftc-approves-final-order-settling-charges-firm-used-misleading>.

²⁶ Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.

²⁷ Statement of Commissioner Rohit Chopra, joined by Commissioner Rebecca Kelly Slaughter, In the Matter of Sunday Riley, Commission File No. 1923008 at 3 (Oct. 21, 2019),

The FTC Should Demand More Before Settling to Send a Stronger Message to Potential Lawbreakers

Consumers rely on the FTC to police the marketplace and ensure that companies don't engage in deceptive behavior. Allowing 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.

For this reason, it is disappointing that the FTC has defended the sufficiency of its no-payment settlements—implying they might do the same even if they had penalty authority.²⁸ For example, in response to dissenting opinions from Commissioners Chopra and Slaughter on recent settlements regarding false "Made in America" advertising, Chairman Joe Simons stated that "Historically, the Commission has made the strategic choice to expend its limited resources to pursue administrative consent orders securing at least twenty years of conduct relief buttressed by the threat of significant penalties because they have been largely successful in keeping companies under order from making deceptive "Made in U.S.A." claims."²⁹ While we agree that these settlements may rein in those who are facing penalties for violating an Order, the Chairman implicitly concedes that they do little to prevent companies *not* under Order from breaking the law—further implying that it's only the threat of real penalties that will incentivize companies to follow the law. Commissioner Wilson has also defended the sufficiency of no-payment settlements, again focusing on the deterrent effect on the company under Order.³⁰ However, given how few companies the FTC puts under Order, the agency's primary concern needs to be an order's effect on *general deterrence*: unfortunately, settlements for a promise not to repeat the illegal behavior send precisely the wrong message to other companies.

That defendants should not be allowed to retain the monies they made from that fraud should not be controversial. The FTC has the legal authority to request redress for the

https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf.

²⁸ Annie Karni, *On 'Made in America,' Trump's F.T.C. Appointees May Be Out of Step With Him*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/us/politics/made-in-america-ftc-trump.html>.

²⁹ Concurring Statement of Chairman Joe Simons, Regarding the Matters of Sandpiper/PiperGear and Patriot Puck (Apr. 17, 2019),

https://www.ftc.gov/system/files/documents/public_statements/1514773/sandpiper_patriot_puck_simons_concurring_statement_4-17-19.pdf.

³⁰ <https://twitter.com/CSWilsonFTC/status/1191366212086910983>. Commission Wilson does refer to a "ripple effect" from a settlement, though the only evidence cited is a second-hand anecdote from a company was an interest in promoting the popularity of its compliance products.

defendants' behavior under Section 13(b) of the FTC Act.³¹ Despite some recent cases to the contrary, the courts have ruled repeatedly that the FTC can request disgorgement in cases involving routine fraud.³² Further, a number of district courts have affirmed that the FTC has the authority to order redress under 13(b) for *any* Section 5 violation.³³ The Commission has routinely demanded disgorgement in other settlements, including in the recent case against Devumi for similar online platform abuses.³⁴ Disgorgement should be the appropriate minimum response to the actions at issue in this proceeding.

Courts have determined that disgorgement should be tied to the defendants' "unjust gains," as long as the FTC can reasonably approximate that sum (and the defendant is unable to show that it is inaccurate).³⁵ Given that the false online reviews were central to products' appeal, the FTC should arguably seek all revenues made during the period in which the illegal activity occurred.³⁶ At the very least, however, they should obtain the defendants' *profits* derived from misleading consumers.³⁷

Astroturfing is unambiguously deceptive and poisonous to the marketplace of ideas. Under the FTC's guidance, Sunday Riley employees posting reviews online are required to identify themselves as such.³⁸ However, given how prolific astroturfing is in the modern marketplace, it would not appear that the FTC's statements and current enforcement practices have been sufficient to convince the marketplace that this behavior is illegal, or at least that it

³¹ See 15 U.S.C. § 53(b); Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (Revised July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

³² See, e.g., *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988), <https://law.justia.com/cases/federal/appellate-courts/F2/861/1020/138861/>; *FTC v. Bronson Partners et al.*, 654 F.3d 359 364 (2d. Cir. 2011), https://scholar.google.com/scholar_case?case=11704521390303959096&hl=en&as_sdt=6&as_vis=1&oi=scholar; for more on Section 13(b) authority, see David Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* at 20, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

³³ See, e.g., *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558 562 (D. Md. 2005), https://scholar.google.com/scholar_case?case=11163478180994723502&hl=en&as_sdt=6&as_vis=1&oi=scholar; *FTC v. 1st Guar. Mortg. Corp.*, at 44 fn 158 (S.D. Fla. 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330guarantyorder.pdf>.

³⁴ See, e.g., *FTC v. Uber Technologies*, Case No. 3:17-cv-00261 at ¶ 12 (2017), <https://www.ftc.gov/system/files/documents/cases/1523082ubercmpl.pdf>; *FTC v. Herbalife*, Case No. 2:16-cv-05217 at ¶1 (2016), <https://www.ftc.gov/system/files/documents/cases/160715herbalifecmpt.pdf>; *FTC v. Devumi, LLC*, Case No. 9:19cv81419, https://www.ftc.gov/system/files/documents/cases/devumi_complaint.pdf.

³⁵ *FTC v. Bronson Partners et al.*, *supra* note 32.

³⁶ *FTC v. Robert J. Febre et al.*, 128 F.3d 530 at ¶ 28 (7th Cir. 1997), <https://www.courtlistener.com/opinion/747643/federal-trade-commission-v-robert-j-febre-individually-and-as-an-officer/>.

³⁷ *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202 3 (D. Mass. 2009), <https://www.courtlistener.com/opinion/2443970/ftc-v-direct-marketing-concepts-inc/>.

³⁸ 16 CFR § 255.5, <https://www.law.cornell.edu/cfr/text/16/255.5>.

will be aggressively punished. Additionally, given industry's failure to recognize that this behavior is illegal, litigating a case leading to a court of law pronouncing astroturfing to be illegal could be considerably more impactful than a mere negotiated settlement.

The FTC obviously needs more authority, including first-time penalty authority to sufficiently disincentivize corporate misbehavior, and more staff to bring more cases.³⁹ The FTC also needs rulemaking to clarify the scope of deceptive marketing, and to empower the FTC to obtain civil penalties for violations.⁴⁰ However, in the meantime, the FTC must wield its limited authority more aggressively to demand more consequences of companies that violate the law. If, on the other hand, the FTC thinks that a more aggressive enforcement posture would also be insufficient to address the widespread problem of review fraud, it should admit its limitations and petition Congress for specific legislation to address the issue.

Additionally, the FTC could do more to clearly proscribe this behavior: for example, it should update the Endorsement Guidelines, which outline in detail the rules of the road for advertisers, more frequently. While the FTC updated the Endorsement Guidelines in 2009 to encompass online advertising activities,⁴¹ the guidelines don't explicitly deal with the issue of social media promotion, such as likes, retweets, and other engagement.⁴² The Endorsement Guidelines need to be updated to clarify that buying likes, shares, and followers online—such as the behavior described in the recent complaint against Devumi—is illegal.⁴³

Because of the FTC's limited resources, the agency can only go after a small sliver of bad actors. Thus, FTC cases are impact litigation, designed to influence behavior in the market—not to punish everyone engaging in that behavior. It would be better for the FTC bring fewer cases with more impact rather than send bad message with no-consequence settlement for clearly egregious behavior. The Commission should reconsider the settlements at issue in this proceeding, and moving forward, commit to using the full range of its enforcement authority to hold companies accountable for their misbehavior.

³⁹ See, Comments of Consumers Union, Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P1812201 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0052-d-0018-154961.pdf.

⁴⁰ Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 Wm. & Mary L. Rev. at 1144 (2018), <https://scholarship.law.wm.edu/wmlr/vol59/iss3/8>.

⁴¹ Kaitlin Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews* at 376 (Sept. 29, 2013), <https://ssrn.com/abstract=2333170>.

⁴² *FTC Releases Advertising Disclosures Guidance for Online Influencers*, FED. TRADE COMM'N (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers>.

⁴³ *FTC v. Devumi, LLC*, Case No. 9:19cv81419 (Oct. 18, 2019) (complaint), https://www.ftc.gov/system/files/documents/cases/devumi_complaint.pdf.

Respectfully submitted,

Justin Brookman
Director, Privacy and Technology Policy
Washington, DC

Maureen Mahoney
Policy Analyst
San Francisco, CA