



Podcast Transcript

AD Nauseam: Living in America with Julia Ensor

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Corbett: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Connor Corbett, your new host of AD Nauseam, and you're listening to BakerHosts. We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives.

On today's episode of AD Nauseam, Amy and Daniel are joined by special guest Julia Ensor, a former FTC attorney who spearheaded Made in the U.S.A. guidelines and regulations that are being enforced today. Julia discusses how to stay Made in the U.S.A. compliant and some of her favorite cases on the topic. With that, welcome to AD Nauseam and let's turn it over to Amy, Daniel, and Julia for this week's episode on Made in the U.S.A.

Mudge: And welcome back to AD Nauseam to all of our beloved AD law listeners. We are always so delighted when we can get together twice a month and talk about advertising law, but it is even better when we get to talk about it with friends.

Kaufman: Couldn't agree more, Amy. I mean, we have a great time when it is just the two of us, but like any long-term thing, and this has been going on for a while here, sometimes you really do need another person to change things up a bit. And today, we could not be any happier to welcome my former colleague and former FTC-er, Julia Ensor.

Ensor: I am just so glad to be here today. I'm a huge fan of the podcast. As I've told you so many times, Daniel and Amy, that I tell everybody, if you want to learn about AD law, go back and listen to the AD Nauseam archives. It is the best way to be. So I'm super excited to be here and joining you today.

Mudge: We want to make sure that everybody, all of our dear listeners, do know about Julia is what she did during her lauded tenure at the FTC and what you focused on and the gifts that you gave to all of us.

Ensor: Yeah, thanks. So I spent the past 15 years at the FTC. I learned how to be a lawyer at the FTC. It was a great place to be. For most of the time I was there, I was in the Division of Enforcement where I coordinated the Made in U.S.A. compliance program. So that was a super fun role. I got to do pretty much everything in that role. I was the primary staff drafter of the Made in U.S.A. labelling rule. I got to serve as lead agency counsel on every Made in U.S.A. case back to 2012. It was awesome.

The other big, nerdy thing I got to work on when I was at the FTC was the Green Guides. I got to be the agency's expert on recyclable, organic, and a few other claims, and I worked on two rounds of reviews. So those were the big things I did in addition to the other enforcement responsibilities. Then I took a brief stop doing some business education at the FTC before I left and joined private practice this summer.

Mudge: Wait a minute, Julia, are the Green Guides coming out? Do you know about that?

Ensor: That is a great question. Chris Mufarrige made a statement at the NAD conference that you guys, some of your loyal listeners may have heard, that suggested that they may very well be coming out soon. So stay tuned. I'll be watching.

Mudge: But Commissioner Holyoak basically said she had no update. I was hoping you might have something, some nugget for us, but we will focus on Made in U.S.A.

Kaufman: It was worth a try. So, okay, Julia, let's be clear. You are really a leading expert on Made in the U.S.A. claims, among other things, and we are absolutely going to dig into that. But before we get into the important legal stuff, we want to get to know you a little bit better and let our audience get to know you a little better. So let's start, what are you streaming these days?

Ensor: Yeah, well, I was really excited to see another season of Landman just dropped. I really enjoyed that. It's got your Billy Bob Thornton and your Demi Moore. So it is good stuff, Texas oil rigs. But my true streaming passion for many years, and don't tell anybody, is 90 Day Fiancé. I can't get enough, especially 90 Day Fiancé: The Other Way. Oh, my goodness.

Mudge: Okay, alright. I have never watched that. I've never watched either of these and I'm actually looking for, alright, I'm feeling really good about this because I need shows. I did just finish Slow Horses and I was really sad. There is one more season coming, but it is absolutely brilliant. And I do love every time a new Abbott Elementary comes out, I kind of hoard them up like little gifts because it is just, I think, the happiest place to be. The one I want to give, this is a little bit older, it is about a year, but I got to throw out some smut too, Rivals. Alright? It is a British, it's got David Tennant, it is very soapy. Just go look for it. Daniel, what about you?

Kaufman: So my latest obsession, of course, has been Traitors on Peacock with Alan Cumming which I am completely obsessed with. But I also started watching the show Shameless, which I guess was on Showtime for many years, never watched it. It is really disturbing and sometimes difficult to watch, but I'm really enjoying that a lot.

Mudge: Because we don't have The Bear right now, so yeah.

Kaufman: Exactly.

Mudge: Alright, but we're doing Made in U.S.A, I feel like we need to get some Americana trivia out of all of us, but particularly Miss Julia. So, let's go, what is your favorite American band? No Brits can sneak in here, American band.

Ensor: Right. Well, lately, my kids and I have been working on our Fate of Ophelia dance. We've been getting our Swiftie best on. I'm embarrassing them in every way that I can. So that is definitely where we are this week. Ask me again next week for another and different answer.

Mudge: Alright, I'm Lady Gaga. Just here all the time for it. Just her recent tour is fabulous. Everybody should go.

Kaufman: I guess I have to start with Stevie Nicks. It's been decades of listening to Stevie.

Mudge: I love that we've all female artists in our list. Alright, what is just best Americana, best quintessentially American thing that you can't live without?

Ensor: Well, I got to go with two. I mean, I'm never going to say no to a piece of apple pie. So, you got that. And then you got to enjoy your fireworks, a little bit of fireworks and crashing around 4th of July. Let's go.

Kaufman: So I like the apple pie, but the thing I like even better than an apple pie is a sheet cake that looks like an American flag that is made with strawberries and blueberries. I'm all there.

Mudge: And Cool Whip frosting. I love all of those things too. I think I'm going to go McDonald's. Alright, now that we have set the Americana table, it is time for Made in U.S.A. And Julia, help remind our audience, give them the 101. What do you need as an advertiser before you're going to make an unqualified, pure, made in the good old U.S. of A. claim?

Ensor: Yeah. So step one, you have to make sure that your product is last substantially transformed in the United States under customs regulations. Now, that is not really interesting or fun or exciting, but you must comply with customs law before you even think about making a Made in U.S.A. advertising claim for your product. So step one, step back and think about is your product substantially transformed in the United States? Because...

Mudge: Can I ask a question there?

Ensor: Yeah.

Mudge: That specific language from, is final assembly or processing of the product. And so, in that language, we should read that language to mean substantial transformation in the U.S.A.?

Ensor: Absolutely. Because if your product is not substantially transformed in the U.S.A., your product is legally an imported product. And you can't make a Made in U.S.A. claim for an imported product. You just can't. So step one, start with substantial transformation. Then after you cross that hurdle, then we can talk about Made in U.S.A. advertising claims.

So the next step after that is you think about, is your product all or virtually all made in U.S.A., all the way back to raw materials? Now, people ask all the time, what does that mean? That is really vague. What does the FTC consider when you're trying to figure out if a product is all or virtually all made in the U.S.A.? Well, wouldn't be an annoying lawyer if I didn't say it depends, but a range of flexible factors are going to come into consideration here. So you'll be thinking about the percentage of costs in your product that go to foreign versus U.S. costs. You're going to think about how far back in the manufacturing chain the foreign content is.

And let me pause there for a second to give you an example of what I mean by that. So in the FTC's guidance, there is an example about a clock radio. It is probably a little bit of a dated example, a plastic clock radio. And what the guidance says is that in order to make the plastic housing for your clock radio, you need petroleum. If the petroleum in the housing of the clock radio is imported, that is not something consumers are probably going to be thinking about when they're looking at a Made in U.S.A. claim for a clock radio. So in that case, if you're talking about imported petroleum that is used to make the plastic, that is used to make the housing, that is used to make the clock, that foreign input is going to be far enough back in the manufacturing chain that you probably don't need to take it into account when you're making a Made in U.S.A. claim.

Now, beyond those two, the last thing that everybody should be thinking about is how important your foreign content is to the form or function of your product. So here, I had a really interesting matter when I was at the FTC, it was a very random product. It was a product that was a device for people to rinse out cloth diapers. And it consisted of basically a piece with a clip. And you clipped the cloth diaper on it, and then you rinsed the cloth diaper out. So in that case, the clip that held the cloth diaper on the product was imported. Everything else in the product was made in the U.S.A. The clip accounted for a very, very small percentage of the cost to make this particular product. But because the product didn't work, the product was basically nothing without the clip, in that case, it likely would deceive consumers to make an unqualified Made in U.S.A. claim. So we said in that case, even though the percentage of costs are really low, you still need to qualify your Made in U.S.A. claim because the content here is so important to the function of this cloth diaper cleaner.

Kaufman: And that is fascinating. So look, obviously high standard to make an unqualified Made in the U.S.A. claim, but when it comes to qualified claims, would it be safe to say the sky is the limit or what is your take on qualified claims?

Ensor: Well, as you guys well know, when it comes to advertising claims, the sky is never really the limit. So marketers can only make claims that they can substantiate. So true claims that you can back up with a reasonable basis. Beyond that, there is a lot of room to be creative when it comes to qualified claims. So you have your quintessential assembled in the U.S.A. claim, this is the safe harbor claim in the guidance. And what the guidance says is that anybody that substantially transforms a product in the United States without further processing overseas can label that product as assembled in the United States. So that is always available to marketers, as well as some variations of that claim.

Beyond that, something that marketers should always be thinking about, is there a particular process that I can call out as happening in the United States? Like, maybe I can promote my product as having U.S. customer service. Maybe my product is designed in the United States. These are all variations that are okay to use as long as they're true, substantiated, and there is nothing else about the context of the ad that would mislead consumers.

Mudge: So Julia, a claim that most marketers absolutely hate, they're like, assembled in the U.S.A., that is a terrible claim. But one thing that we have seen, I think it is kind of the one that people pick, is made in U.S.A. of foreign and domestic ingredients, or imported and domestic components or ingredients. How does one support this?

Ensor: Yeah. So that is a great question. Before we talk about that one, I'm going to let you in on my little trade secret here. Which is, yeah, you have your made in the U.S.A. of U.S. and imported ingredients. But think about whether you can get the same marketing benefit from just saying made in the U.S.A. of imported ingredients without the reference to U.S. ingredients. Because if you say made in the U.S.A. with imported parts, made in the U.S.A. with imported ingredients, the substantiation standard for that is the same as assembled in the United States.

So for those types of claims, if you're not referencing U.S. parts, again, all you need to demonstrate is that your product is last substantially transformed in the U.S. without further processing overseas. So pause on that one if you think it'll get you the same marketing benefit.

Now, if you want to introduce discussion of U.S. parts, that is okay too, but you should be ready to demonstrate that your product does have significant U.S. parts, like not just a thread or a nail or something like that. And then know that for those U.S. parts, you need to be able to substantiate that those parts themselves are all or virtually all made in the United States. So you've got a turtles all the way down situation there.

Mudge: Little nested dolls kind of situation.

Ensor: Exactly.

Mudge: Just a word for, I hate the idea of paying for two lawyers when you need one, but I do want the substantial transformation analysis, I think is not one that advertising, mere mortal advertising lawyers should necessarily try to get to. The what is substantial transformation is not necessarily obvious. It is customs driven, it is import driven. So if you need help in looking at to understand what is substantial transformation, I really always say you should go out and find your trade lawyer to make sure that is the right analysis. Julia, am I overthinking this?

Ensor: Not at all. I absolutely agree with you, Amy. So substantial transformation is incredibly product specific, and it doesn't always go the way that you think. I had a case at the FTC that involved batteries, and in that case, substantial transformation wasn't what I expected it to be at all. In that case, when we're looking at lithium ion batteries, origin traveled with the cells. It was very complicated. So my best guess, even as someone that dabbles in this area quite a bit, might not have been exactly right. So you are correct that talking to somebody who knows customs law in and out is always a good idea. And if you can get the particular center of excellence at customs that has responsibility for your product on the line, all the better.

Kaufman: So obviously, Made in the U.S.A., four words makes a point. Are there sort of equivalent statements that you think are the equivalent of making a Made in the U.S.A. claim?

Ensor: Yes, definitely. So first of all, the thing that I always tell marketers is if you're trying to figure out if you're making an unqualified Made in U.S.A. claim or not, a good idea is to step back and be like, am I just being creative with my words and trying to get around the rules for making a Made in U.S.A. claim? What am I trying to tell consumers? If it is made in U.S.A., then you should use the analysis for unqualified claims. But beyond that, in general, claims like built in the United States are interpreted the same as made in the United States. That is one that throws people for a loop sometimes because some people assume that built in the United States is more similar to assembled in the United States. That is not correct.

The FTC has seen consumer perception testing demonstrating that when consumers see a built in the U.S.A. claim, they interpret it the same as made in U.S.A. So if you're saying built in U.S.A., make sure you're meeting that all or virtually all standard. But any synonyms for Made in U.S.A., made in America, born in the U.S.A., can be just look at the context of the claim and think about what you're trying to convey to consumers and how reasonable consumers are likely to understand the claim.

Mudge: Yeah, a word from our sponsor. I will say, if you have questions, hmm, is crafted in the U.S.A. the same thing as made in U.S.A.? You can think through it the way, Julie, you suggested. But honestly, I'd go to your warning letters. The FTC's website has all of these unofficial, really, opinions on there. And for example, I had an NAD case once where one of the issues was, is born in the U.S.A. a Made in U.S.A. claim? And the other side said, of course it is not. This just means we have a headquarters in the United States. And I was like, I know Julia said something about this. I figured, I found jeans case. And I was like, you see? The authority, Julia Ensor, said the born in the U.S.A. is a Made in U.S.A. claim, NAD adopted that. So it is a very rich body of, I'm using law in air quotes, but really, really helpful to suss these things out.

But Julia, let's talk about the Made in U.S.A. rule. And look, we've had Made in U.S.A. for decades under good old Section 5. Why we needed a rule, especially when the rule, I think, is pretty much the same language as the enforcement statement, tell us how this unfolded.

Ensor: Right. So as you note, Section 5 is the fallback statute that the FTC has been using to target deceptive Made in U.S.A. claims for more than 80 years. It is a really broad statute. It applies to almost every sector of the economy. It applies to almost every form of advertising, and it is a great tool for the FTC to use to target deceptive claims. That said, there are some things that Section 5 doesn't do for the FTC. Chief among them is give the agency an easy path to monetary relief for consumers in the first instance.

The other thing that Section 5 doesn't do when it comes to Made in U.S.A. claims is it doesn't solidify the all or virtually all standard into law. So the all or virtually all standard for many years was present in guidance and in decisions and orders of the commission. But every time the FTC wanted to bring a case alleging that a product was deceptively advertised as Made in U.S.A., the FTC would also have to separately allege that consumers understood the claim to mean that the product was all or virtually all made in the U.S.A. So every time the agency brought a case, the all or virtually all standard was on the table for negotiation, for people to run consumer perception testing and demonstrate that it is the wrong standard. It just was an extra step that has to be proven every time the agency brings a case.

So for a variety of reasons, a few years ago, the agency decided to make a rule pursuant to authority that it was given in 1994 in the Violent Crime Control and Law Enforcement Act, which I know is kind of a weird place to give the agency Made in U.S.A. rulemaking authority. But there was a grant of authority in that

statute that said the FTC could make a rule consistent with its decisions and orders relating to unqualified Made in U.S.A. claims on labels on products. So really narrow grant of authority, any rule that the agency promulgated pursuant to that authority would be treated as a trade regulation rule for enforcement purposes. And what that means is if people violate the rule, the agency can seek a civil penalty or the agency can seek redress for consumers. And that is really valuable now, particularly since the agency has some challenges in seeking monetary relief.

Mudge: Yeah, yeah, yeah, we know it is just all about money, okay? Money, money, money, dirty money. Let's get back to counseling question. Can you talk a little bit about, is the Made in U.S.A., is that cost calculation focused on just the product or when does the product packaging count as well? And I think this is one that, again, you provided some really good clarity after there was an NAD case that got kicked to you involving glue that was a referral. But I still see it is something that companies really struggle with. So lay it out for us, Julia.

Ensor: Yeah. So this is a question that comes up all the time. And that is, if I make a Made in U.S.A. claim for my product, does that have to mean that the packaging is made in the U.S.A. as well? So the answer to that is not necessarily. There was some guidance out there in the world for a long time relating to product packaging that said that there is this army of older ladies that is collecting perfume bottles and it is imperative that we protect them. Because when old ladies are shopping for perfume and they see a Made in U.S.A. claim, they're interpreting that claim to mean that their collectible perfume bottle is made in the U.S.A. as well. So in that circumstance, we need to make sure that the advertised product and its packaging are both made in the U.S.A.

But outside of that narrow context where there is something collectible or of independent value of the packaging, then in general, if the packaging is just going to be discarded, it is just trash, then consumers aren't thinking about the product packaging when they see a Made in U.S.A. claim on the product. Now, the caveat to that is if you make a specific claim about the product packaging. So let's say you said, this product is Made in U.S.A. and so is the packaging. In that case, of course, you need to be able to substantiate that the packaging itself is made in the U.S.A. But if you're silent on the issue and there is nothing about the context that implies you're talking about the packaging, and it is just something you're going to throw away, it doesn't help people use a product or anything like that, then you don't need to consider the origin of the packaging when you're making your claim.

Kaufman: I love the notion of the FTC focused on protecting the little old ladies collecting perfume bottles. That is just delightful. But let's go back in time a little bit. Let's talk a little bit about how the Made in U.S.A. program ran under your watch. Although certainly there were cases where the FTC got money, and I remember some bitter disputes among some commissioners on some of these points, I never viewed getting money as ultimately the biggest goal there. There was so much that you accomplished through warning letters and things like that led to

really robust compliance and changes in the market. So tell us a little bit about the program and how you ran it.

Ensor: Yeah. So as you know, Daniel, as you know firsthand, enforcing in the space is a really delicate dance. On the one hand, all of us took our duty to protect consumers from deceptive claims really seriously. But on the other hand, my experience was that most of the businesses I saw were trying to follow the law and do the right thing. And over-enforcement when it comes to Made in U.S.A. claims has the potential to chill legitimate claims and even disincentivize job creation in the United States. So every time I was thinking about whether it is appropriate to recommend enforcement action or something else, I was keeping that in mind. Am I going crazy here? Am I going to have this unintended outcome of setting up a situation where people don't want to invest in the U.S. economy? Because that is the last thing that I want to happen.

So together with the rest of the team, we worked out a really careful program that focused on business counseling to businesses that tried to get it right. So as you mentioned earlier, Amy, that often resulted in the issuance of a closing letter that included guidance to the business community, basically about, here were the issues that we saw, and here were the steps that the company took to remediate them. There would always be a statement that there was no particular finding of violations or anything like that. We tried to really reserve formal enforcement actions for cases where the claim was just beyond boundaries wrong. Like for example, you have a company where the principal purportedly ripped out tags that said Made in China and replaced them with Made in U.S.A.

Or on the other hand, companies that refuse to work with the staff. So occasionally, we would see a company that would come in, report all their competitors for doing something, and then as we got down the line and remediated the competitor's claims, let's say we found out that the person that made the report actually was doing the same thing as their competitors. In that case, we would turn around, try to remediate the reporter's claims as well. I definitely had at least one circumstance where the company refused to work with us at that point and said, oh, you've just paved the way for me. You cleared the space, you fixed competition, and now I have a free reign. In that case, of course, I was going to recommend formal enforcement action.

Mudge: Ooh, don't mess with Julia. Wow. Alright, so do you think that Made in U.S.A. is a priority of this commission? I mean, we definitely saw at the recent ANA conference where Commissioner Holyoak said, oh, absolutely, we're looking at this. We all saw that Chairman Ferguson announced July 2025 is Made in U.S.A. month. I'm not sure if that was just 2025 or if that is an in perpetuity thing, but they've certainly been talking about it. Are we going to see cases?

Ensor: It is absolutely clear that Made in U.S.A. is going to continue to be an FTC priority. You're right, we haven't seen any cases yet, but I think that is going to change. What we did see in Made in America month this summer was not cases, but there were a series of warning letters that went out, including a few really interesting warning letters that went out to platforms that have third-party sellers.

And those warning letters basically told the platforms to do a better job of policing third parties on their sites. That is a pretty big deal. It is really interesting, and it was surprising from my perspective. So we'll see.

Kaufman: Yeah. Of course, platforms generally want to make sure that their sellers are being truthful. But it is certainly unclear to what extent the FTC Act would require that from platforms and whether the FTC would have a valid legal theory there.

Mudge: Yeah. I mean, there is certainly Section 230 of the Communications Decency Act issues of immunity, but I think that is something to watch unfold. But alright, so let's start talking about some of the cases that you worked on when you were at the FTC. Is there anything particularly interesting, a particular war story you want to share with us?

Ensor: Sure. The best thing about the program was definitely the wide variety of products and industries that crossed my desk. Including...

Mudge: No, I don't want to hear anything more about diapers, okay?

Kaufman: They come up in a lot of episodes for some reason, Amy.

Mudge: Perfume is awesome. Talk about that all day. No more diapers. What do you got for us?

Ensor: Yeah, no. I'll tell you some of the products that came up that where I really wanted to move forward were either too weird or too controversial for us to get involved with. And it was highly disappointing for me. I wanted to be the weird product person and, unfortunately, government managers, Daniel, wouldn't let that happen. What are you going to do?

On the case fronts, I would say that, well, I have a couple of favorites. And most of them involve companies where the conduct was so flagrant that it was just outrageous. And so for example, I had one where a target was making Made in U.S.A. claims for a product. A thing that happens pretty frequently in Made in U.S.A. investigations is people want to take you on a tour of their factory. They say, my product is clearly made in the United States let me show you what I do. And that is great, I love seeing what people do. It is really interesting, and it does inform the investigation to understand a little bit better what the process was.

Well, in this case, there was a product that was marketed as Made in U.S.A. And the owner of the company said, and this was in the height of the pandemic, let me take you on a Zoom tour of my company and I'll show you around, I'll show you what we do. And I said, great. So he takes the phone and he is walking me around the factory and he picks up one of his products and he shows it to me and says, we make this right here in the United States. And I'm looking at the product and I'm saying, sir, that has a Made in China claim right there on the product. And he looks right at me and said, no, it doesn't. And it was incredible, it was absolutely incredible. So cases like that, where just the conduct is just so flagrant and the claim is so clearly false, where I think the most rewarding case is

to do, because in those cases, I knew that I was doing something good, that I was protecting consumers and competition by preventing clearly false claims.

Mudge: Okay. I think the lesson here, for our dear listeners, is call your lawyer before you invite the FTC into your place of business.

Kaufman: That is awesome. So because Made in the U.S.A. has been, continues to be such a hot topic, I thought we could wrap up here by maybe talking about some key pieces of advice that listeners should think about. And let's start with you, Amy.

Mudge: Alright. I'm going to go think long and hard before making a pure unqualified Made in U.S.A. claim. It is a very difficult standard to achieve. You heard that today from Julia. There is also the California Standard that comes into play. And these are closely scrutinized claims by regulators, by competitors, by class action lawyers. And so I would say that qualified Made in U.S.A. claims are your friends. Julia?

Ensor: I absolutely agree. Beyond that, companies should remember that Made in U.S.A. claims are not set it and forget it. If you're making a Made in U.S.A. claim, you need to go back and regularly reevaluate and reconsider. If you have a change in your manufacturing chain, if you have a change in your process, even a temporary one, that can have a dramatic effect on what type of Made in U.S.A. claim you can make. And certainly, some FTC cases have been brought based on changes in manufacturing practices that invalidated Made in U.S.A. claims.

Kaufman: Yeah, and I would say it is really important to do some training for your marketing people. Earlier, we mentioned the sometimes confusion that can happen between made in the U.S.A. claims and country of origin claims. And they really need to understand that M.U.S.A. claims are in a special class by themselves and have to be really carefully attended to.

Mudge: Absolutely. And finally, don't overdo it with the flags, the eagles, the government signals, the American pie, the fireworks, the McDonald's, maybe even. Any kind of Americana visual symbols, those can imply a Made in U.S.A. claim. And so with that, Julia, Daniel and I want to thank you so much for joining us. You are such a delight. You were an amazing credit to the government. And we're thrilled to have you enter the private bar and support America's fine businesses on their compliance efforts. And we hope you will come back and join us again, maybe to talk about the Green Guides if we ever get them.

Ensor: Thank you all for so much for having me today. It's truly been an absolute honor to get a chance to hang out with two of my very favorite people.

Kaufman: Thank you so much, Julia. Thanks again for joining us for the latest episode of AD Nauseam.

Corbett: Thanks, Amy, Daniel, and Julia. If you have any questions for Amy, Daniel, or Julia, their contact information is in the show notes. For more information on the

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