OFFICE OF
THE COMMISSIONER

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

March 21, 2012

VIA FAX AND U.S. MAIL
(856) 757-5370

Honorable Renee Marie Bumb
United States District Court
Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets Room 1050
Camden, NJ 08101

RE: ***Federal Trade Commission v. Circa Direct LLC***
Case No. 11-CV-2172 RMB-AMD

Your Honor:

On February 22, 2012, this Court ordered the Commission to respond to a series of questions regarding the appropriate standard to apply in approving the settlement of this matter. (Docket No. 36.) I understood that the burden of the Court's order was to determine how it could properly perform its statutory obligations under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), when the Commission submitted a consent decree to the Court in which defendants Circa Direct LLC and Andrew Davidson ("Defendants"), *inter alia*, did not admit to any wrongdoing. I do not believe that the brief the Commission staff filed on March 14, 2012 ("Staff Brief") answered that fundamental question. (Docket No. 42.) Accordingly, I write separately to offer an independent view.[1]

The Staff Brief suffers from two failings. The first is that it makes a "one size fits all" argument. It does not mention the text of Section 13(b), which specifically requires a district court, acting under the statute, to consider proper proof before issuing a permanent injunction in settlement of a matter, including whether the Commission is likely to succeed in litigation and whether a settlement is in the public interest. Although I would not presume to advise the Court how it should rule, both of these statutory requirements are obviously affected if the Commission permits a defendant to settle without admission of liability (*e.g.*, "without admitting the allegations set forth in the Commission's Complaint" or "without any admission or finding of liability" (Proposed Order at 2-3)), which, in my view, is tantamount to a denial of liability.

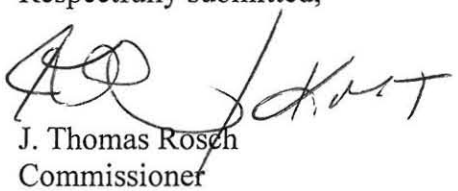
---

[1] The views expressed here are my own and do not reflect the views of the Federal Trade Commission or other Commissioners. Because the Staff Brief has already been filed and Defendants have not taken an inconsistent position (Docket No. 43), the posture of this statement is somewhat unusual. I am sending this informal letter to share my views on this matter expeditiously. If the Court would prefer, I can file a motion to submit this short separate statement as an amicus.

Cf. 17 C.F.R. § 202.5(e) (noting the SEC policy that "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations"). Nor does the Staff Brief rely on any case law addressing how Section 13(b) applies in these particular circumstances. That is not surprising. As far as I am able to determine, there is no case law specifically on that point.

Second, the Staff Brief implies that the Commission's decision to file the settlement should itself control how the district court will apply Section 13(b) under these circumstances. It implies, in other words, that once a Commission majority votes in favor of a settlement, the district court should substantially defer to the Commission regarding whether the district court will adhere to the strictures of Section 13(b) or not. There is indeed authority in other contexts for courts deferring to the conclusions of an administrative agency. But those are generally cases where the administrative agency is bound to apply the same statute as the court. That is not the case here, where the Court, and the Court alone, applies 13(b). It strikes me as rather bold to suggest that this Court should simply "rubber-stamp" an agency decision that the agency is likely to succeed in litigation or that a settlement is in the public interest where the Commission has accepted what is in essence an implied denial of liability from a defendant.

Respectfully submitted,



J. Thomas Rosch
Commissioner

cc: Kristine Ann Sova, Esq. (via mail and email)
Venable LLP
1270 Avenue of the Americas
25th Floor
New York, NY 10020
kasova@venable.com

Edwin M. Larkin, Esq. (via email)
Venable LLP
emlarkin@venable.com

Lameke E. Cannon, Esq. (via email)
Venable LLP
lecannon@venable.com

Laura M. Sullivan, Esq. (via email)
Federal Trade Commission
lsullivan@ftc.gov

Elizabeth Olivia Tucci, Esq. (via email)
Federal Trade Commission
etucci@ftc.gov

James A. Prunty, Esq. (via email)
Federal Trade Commission
jprunty@ftc.gov