

Dissenting Statement of Commissioner J. Thomas Rosch

In the Matter of Facebook, Inc., File No. 092 3184, Docket No. C-4365

August 10, 2012

I dissent from acceptance of this final consent order for two reasons. First, in the Agreement Containing Consent Order, respondent Facebook “expressly denies the allegations set forth in the complaint, except for the jurisdictional facts.”¹ Our Federal Trade Commission Rules of Practice do not provide for such a denial.² Beyond that, as I read Section 5, Commissioners are authorized to accept a consent agreement only if there is reason to believe that a respondent is engaging in an unfair or deceptive act or practice and that acceptance of the consent agreement is in the interest of the public.³ I respectfully suggest that the whole reason for requiring the Commission to conclude that there is “reason to believe” is to force the Commission to come to grips with the probability that the respondent did engage in conduct creating liability. I would further argue that in the real world, if the Commission allows the respondent to expressly deny that it did engage in that conduct (or to use language that is tantamount to an express denial), there is a questionable basis for us to conclude that that probability exists (or that the consent is in the public interest either).⁴ Accordingly, I cannot find that either the “reason to believe” or the “in the interest of the public” requirement is satisfied when, as here, there is an express denial of the allegations set forth in the complaint.

I should add that I am also in favor of reconsidering Rule 2.32’s authorization of the inclusion of language in a consent agreement that it “is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.” In comparison, the Securities and Exchange Commission’s informal procedures provide that, “it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur.”⁵ Accordingly,

¹ Agreement Containing Consent Order, ¶ 5.

² See 16 C.F.R. § 2.32 (“The agreement may state that the signing thereof is for settlement purposes only and *does not constitute an admission* by any party that the law has been violated as alleged in the complaint.”) (emphasis added).

³ 15 U.S.C. § 45(b). See *Johnson Prods. Co. v. FTC*, 549 F.2d 35, 38 (7th Cir. 1977) (“The Commission, unlike a private litigant, must act in furtherance of the public interest.”) (explaining that the public interest mandate entitles the Commission to reserve to itself the option of withdrawing its acceptance of a consent decree after the public comment period).

⁴ See *FTC v. Circa Direct LLC*, 2012 U.S. Dist. LEXIS 81878, *3-*6 (D.N.J. June 13, 2012) (expressing the concern that when being faced with a settlement without an admission of liability, it is difficult to determine whether or not the public interest is being served).

⁵ 17 C.F.R. § 202.5(e).

the SEC has adopted a policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.⁶ Importantly, the SEC also has concluded 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.”⁷ I would encourage consideration of whether our authorization of language that a consent agreement “is for settlement purposes only and does not constitute an admission that the law has been violated” is tantamount to a denial and if so, whether the Commission should similarly embrace the “neither admits nor denies” model language.

Second, while I hope that the majority is correct in their assertion that the consent order covers the deceptive practices of Facebook as well as the applications (“apps”) that run on the Facebook platform, it is not clear to me that it does. In particular, I am concerned that the order may not unequivocally cover all representations made in the Facebook environment (while a user is “on Facebook”) relating to the deceptive information sharing practices of apps about which Facebook knows or should know. For example, a reporter from *Forbes* recently disclosed that while downloading an app on Facebook, a pop up screen informed users that “This app shares articles you read and more on Facebook with:” and then allowed users to choose between “public,” “friends,” or “only me.”⁸ The reporter assumed – as most users would – that choosing “only me” meant that no one else would be able to see what one was reading when using that app. However, to the contrary, according to this report, choosing “only me” merely meant that your reading habits didn’t show up in your friends’ news feed or tickers on Facebook.⁹ Users reading articles within the app would still see articles read by other users, even those users that had chosen the “only me” option. Apparently there is no way to turn off sharing within the app, except on an article-by-article basis.¹⁰ I consider such inadequate disclosure to be deceptive

⁶ *Id.*

⁷ *Id.*

⁸ Jeff Bercovici, *Despite FTC Settlement, Facebook Still Playing Coy on Privacy*, *Forbes*, Dec. 1, 2011, available at <http://www.forbes.com/sites/jeffbercovici/2011/12/01/despite-ftc-settlement-facebook-still-playing-coy-on-privacy/>.

⁹ Subsequently, some changes have been made to the Washington Post Social Reader application download page. There is now a small question mark icon located next to the “who can see activity from this app on Facebook” language. When a user scrolls over the question mark icon, it says “This does not control who can see your activity within the app itself.”

¹⁰ Users can learn about the app on the Washington Post website or on the Facebook website. The app is downloaded from the Facebook website itself and users access the application while on Facebook.

when it occurs in the Facebook environment, irrespective of whether that failure to fully disclose stems from the conduct of the app or Facebook itself. I would include language in the order to make that clear, lest Facebook argue subsequently that the Commission order only covers deceptive conduct engaged in by Facebook itself.