

## Analysis of Proposed Consent Order to Aid Public Comment

*In the Matter of TBWA Worldwide, Inc., File No. 122 3010*

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing consent order from TBWA Worldwide, Inc. (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

This matter involves the advertising and marketing of the Nissan Frontier pickup truck by respondent. Respondent is an advertising agency of Nissan North America, Inc., and prepared and disseminated the “Hill Climb” advertisement, which promoted the Nissan Frontier pickup truck. According to the FTC complaint, the Hill Climb advertisement, which appeared on television and over the internet, deceptively demonstrated the capabilities of the Nissan Frontier.

Specifically, according to the FTC complaint, the Hill Climb advertisement depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The Nissan Frontier speeds up the sand dune and stops immediately behind the dune buggy. The Nissan Frontier then pushes the dune buggy up and over the top of the hill. Onlookers are portrayed observing the feat in amazement. A narrator subsequently states, “The mid-size Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all.” According to the complaint, the demonstration is portrayed in a realistic, “YouTube” style, as if shot with a mobile phone video camera.

According to the complaint, respondent represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The complaint further alleges that this claim is false, and thus violates the FTC Act, because the Nissan Frontier pickup truck is incapable of performing the feat depicted in the Hill Climb advertisement. The complaint further alleges that respondent knew or should have known that the claim is false. In truth, according to the complaint, both the Nissan Frontier pickup truck and the dune buggy were dragged to the top of the hill by cables, and the sand dune was made to appear to be significantly steeper than it actually was.

The Hill Climb advertisement was created by TBWA Chiat/Day Los Angeles, a division of TBWA Worldwide, Inc. Because TBWA Chiat/Day Los Angeles is not a formal corporate entity, the Commission’s order names TBWA Worldwide, Inc., as respondent. Via the order’s definition of “respondent,” however, the injunctive

provisions of the order apply only to TBWA Chiat/Day Los Angeles and to its sister agency, TBWA Chiat/Day New York.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from misrepresenting, in the context of the advertisement as a whole, any material quality or feature of any pickup truck through the depiction of a test, experiment, or demonstration. Part I specifies that nothing in the order shall be deemed to preclude the use of any production techniques that do not misrepresent a material quality or feature of the advertised truck. Consistent with prior FTC cases involving advertising agencies, Part I also declares that respondent can be held liable for violating Part I of the order only if it knew or should have known that the test, experiment, or demonstration misrepresented a material quality or feature of the advertised truck.

Part II of the proposed order requires respondent to maintain, and make available to the Commission upon written request, copies of relevant advertisements, as well as any and all unedited video and still images taken during the production of any advertisement depicting a demonstration, experiment, or test. Under Part II, respondent must also maintain any and all affidavits or certifications submitted by an employee, agent, or representative to any television network or other individual, where such affidavit or certification affirms the accuracy or integrity of a demonstration contained in an advertisement.

Part III of the proposed order requires respondent to provide copies of the order to certain of its personnel. Parts IV and V of the proposed order require TBWA Worldwide, Inc., to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part VI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.