

Analysis of Proposed Consent Order to Aid Public Comment

In the Matter of Deutsch LA, Inc., File No. 122-3252

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

Respondent is an advertising agency hired by Sony Computer Entertainment America LLC (“SCEA”) to develop an advertising campaign for the PlayStation Vita (“PS Vita”). The PS Vita is a game console that SCEA first offered for sale in the United States on February 22, 2012. The PS Vita is part of SCEA’s line of game consoles, including the PlayStation 3 video game console (“PS3”), which allows consumers to play video games on their television sets. Unlike the PS3, the PS Vita is a handheld, portable game console that allows consumers to play games away from their television sets. In addition to selling game consoles, SCEA is one of many game developers writing game titles for use on its PS3 and PS Vita game consoles. At the time the PS Vita was launched, “MLB 12: The Show” was a popular SCEA title for the PS3.

According to the complaint, advertisements developed by respondent promoted two notable features of the PS Vita. First, respondent’s advertisements represented that, with the “cross platform gaming” or “cross save” feature of the PS Vita, consumers could begin playing a game on a PS3 console, save their progress at a specific point in the game, and then continue that game where they left off on the PS Vita. Second, respondent’s advertisements represented that with the “3G version” the PS Vita, available for an extra \$50 and monthly fees, consumers could access a 3G network to play games live with others (“multiplayer gaming”). The complaint alleges that advertisements respondent developed to promote these features were false or misleading and thus violate the FTC Act.

The FTC’s complaint alleges that respondent made false or misleading claims about the cross save feature in advertisements it developed to promote the PS Vita. For example, the complaint alleges that respondent’s advertisements represent that PS Vita users are able to pause any PS3 game they are playing on their PS3 consoles at a specific point in the game, and continue to play that game where they left off on the PS Vita. Contrary to this representation, this feature is available only for a limited number of PS3 game titles. Further, the pause and save feature described in the advertisements varies significantly by game. For example, with respect to the game depicted in the advertisement for this feature, “MLB 12: The Show,” consumers are able to pause and save the game to the PS Vita only after they have finished the entire baseball game (all nine innings) on the PS3. The complaint also alleges that with respect to this feature,

respondent failed to disclose the material fact that, with games such as MLB 12: The Show, consumers would have to own two versions of the same game, one for the PS3 and one for the PS Vita, in order to use this feature.

The complaint also addresses advertising claims made for features relating to the 3G version of the PS Vita. Specifically, the complaint alleges as false or misleading the representation that PS Vita users who own the 3G version are able to engage in live, multiplayer gaming through a 3G network. In fact, PS Vita users are restricted to asynchronous or “turn-based” multiplayer gaming with the 3G version of the PS Vita.

Additionally, the FTC’s complaint includes allegations that the respondent misled consumers through deceptive product endorsements. Specifically, respondent included the term “#gamechanger” in its advertisements for the PS Vita to direct consumers to online conversations about the PS Vita on Twitter. According to the complaint, approximately one month before SCEA offered the PS Vita for sale to the public, one of respondent’s assistant account executives sent an email message to all of respondent’s employees asking them to help with the advertising campaign by posting comments about the PlayStation Vita on Twitter, using the #gamechanger hashtag. According to the complaint, as a result of this email message, various Deutsch employees used their personal Twitter accounts to post positive comments about the PS Vita. According to the complaint, these tweets about the PS Vita were false and misleading because they were not independent comments reflecting the views of ordinary consumers who had used the PS Vita. The complaint also alleges that these comments were deceptive because respondent failed to disclose the material fact that employees of an advertising agency hired to promote the PS Vita wrote them.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Part I of the proposed order prohibits respondent from misrepresenting any material gaming feature or capability of any Handheld Game Console Product when used as a standalone device to play video games. Because respondent is an advertising agency, however, the proposed order states that it shall be a defense that respondent neither knew nor had reason to know that such feature or capability was misrepresented.

Part II of the proposed order prohibits respondent from making any representation about the material capability of any Handheld or Home Game Console Product to interact with, or connect to, any other Handheld Game Console Product during gaming, unless at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation. Again, because respondent is an advertising agency, the proposed order states that it shall be a defense that respondent neither knew nor had reason to know that such capability was not substantiated by competent and reliable evidence.

Part III of the proposed order prohibits respondent from making any representation about the material capability of any Handheld or Home Game Console Product to interact with, or connect to, any other Handheld or Home Game Console Product during gaming, unless it discloses, clearly and prominently, and in close

proximity to the representation, that consumers must purchase two versions of the same video game, one for each console, if such is the case. Due to respondent's status as an advertising agency, the proposed order states that it shall be a defense that respondent neither knew nor had reason to know that consumers must purchase two versions of the same video game to use such capacity.

Parts IV through VI of the proposed order address respondent's use of deceptive product endorsements. Part IV prohibits respondent from misrepresenting that an endorser of any Handheld Game Console Product, Home Game Console Product or Video Game Product, is an independent user or ordinary consumer of the product.

Part V of the proposed order prohibits the respondent, in connection with the advertising of any Handheld Game Console Product, Home Game Console Product or Video Game Product, from making any representation about any endorser of such product, unless it discloses, clearly and prominently, a material connection, when one exists between such endorser and respondent or any other individual or entity manufacturing, advertising, labeling, promoting, offering for sale, selling or distributing such product. The proposed order defines "material connection" as any relationship that materially affects the weight or credibility of any endorsement that would not be reasonably expected by consumers.

Part VI of the proposed order requires respondent to take all reasonable steps to remove, within seven days of the service of the order, any previously posted product review or endorsement under its control that does not comply with Parts IV and V of the order.

Part VII of the proposed order contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through VI of the order.

Parts VIII through X of the proposed order require the company to: deliver a copy of the order to certain personnel having managerial responsibilities with respect to the subject matter of the order; 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 XI of the proposed order 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, and it is not intended to constitute an official interpretation of the complaint or proposed order or to modify the proposed order's terms in any way.