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Comments of Robert Gellman regarding the proposed consent order in the Matter of PDB Sports, Ltd., d/b/a Denver Broncos Football Club – Consent Agreement; File No. 142–3025

Federal Trade Commission
Office of the Secretary
Room H-135
600 Pennsylvania Avenue, NW
Washington DC 20580

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In the January 29, 2014, Federal Register, the Federal Trade Commission filed proposed consent decrees on 12 Safe Harbor enforcement cases. I randomly selected one of these consent decrees for comment. The same comments apply to all of these cases, but since the Commission does not appear to consider seriously public comments in any of its privacy cases, I do not see a good reason to go through the exercise of filing duplicate comments in the other cases.

I object to the consent decree, and I ask that the Commission take additional steps to: a) explain its actions by providing additional facts about the privacy practices of the company; b) consider whether the company in question actually complied with Safe Harbor requirements (beyond the misrepresentation of compliance); c) require the company to notify affected consumers and provide them with a remedy; and d) require the company to remain in the Safe Harbor and comply fully with its requirements in the future with respect to (at a minimum) any information collected during the period when the company claimed to be in the Safe Harbor.

1. As is typical of Commission privacy and security consent decrees, there are virtually no facts in the complaint or the consent decree that would enable the public to evaluate the extent of the misrepresentation. Nowhere is there information about the number or location of customers affected by the misrepresentation. The Commission's documents do not say how information about customer data was used or misused in violation of the rules of Safe Harbor. The Commission only bothered to find one fact and made no other findings. It appears that the Commission did the bare minimum necessary to support its complaint. Meanwhile, the complaint does not propose to remedy the harm in a way that would protect the consumers who are supposed to be the beneficiaries of Safe Harbor or address consumer interests in any meaningful way.

2. The Commission did not conduct or require a privacy audit of the company that violated Safe Harbor. The complaint only alleges a misrepresentation of the company's Safe Harbor status. We do not know if the company's actual practices ever met Safe Harbor standards. The lesson here

seems to be that the Safe Harbor enforcement is only skin deep. A company need only keep its representations up-to-date. There is no likelihood that any Safe Harbor company will ever be held accountable for actual compliance with the substantive requirements of the Safe Harbor Framework. If the Commission even bothered to ask about substantive obligations, it did not share the attempt or the findings with the public.

3. The consequences for any company that violates the Safe Harbor rule by misrepresenting its status appear to be inconsequential. The Commission seeks no penalty of any type. The message the Commission sends with this and the other Safe Harbor consent decrees is that a company can misrepresent its status in the Safe Harbor for as long as it likes. If the Commission selects a company from among the hundreds that are violating Safe Harbor, all that will happen is that the selected company will be told to clean up its misrepresentation. There are no apparent financial or other meaningful consequences. Why would any Safe Harbor violator bother to address a misrepresentation unless and until the Commission knocks on its door?

4. It has been known for years that hundreds of US companies misrepresent their Safe Harbor status.[1] There have been several in-depth studies of Safe Harbor, with the most recent done in 2008 by Chris Connolly, director of Galexia, an Australian management consulting company with expertise in privacy, authentication, electronic commerce, and new technology.[2] Given the small number of complaints brought by the Commission in the decade since shortcomings with Safe Harbor were first identified, the odds currently favor those who violate the rules. The chances of being caught are small, and the consequences are nil. What we have here, in the end, is just the appearance of oversight and enforcement by the Commission.[3]

5. Perhaps the worst feature of the consent decree is its extraordinarily narrow scope. The company is enjoined from misrepresenting its Safe Harbor status, but it is not required to notify affected customers about its misrepresentation. Nor is the company required to provide any remedy to affected customers. The company is not even required to remain in Safe Harbor in the future or to fulfill its Safe Harbor obligations for data collected during the period when it claimed to be in the Safe Harbor. The message that the Commission seems to be sending is that it is perfectly acceptable for a company that voluntarily agrees to comply with privacy rules to terminate its compliance at any time. For those who did business with the company during the period when it represented its Safe Harbor status, the limits Safe Harbor imposed on data

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[1] *The Functioning of the US-EU Safe Harbor Privacy Principles* (2001). This study was reportedly published by the European Commission, but a copy has not been located on the EU's data protection webpage or elsewhere on the Internet. Another study was completed in 2004. *Safe Harbour Decision Implementation Study* (2004), http://ec.europa.eu/justice/policies/privacy/docs/studies/safe-harbour-2004_en.pdf.

[2] *The US Safe Harbor - Fact or Fiction?* (2008), http://www.galexia.com/public/research/assets/safe_harbor_fact_or_fiction_2008/safe_harbor_fact_or_fiction.pdf. Connolly briefly updated the study in 2010. *The Future of the EU/US Safe Harbor Privacy Framework: Can it be improved or does it require a complete overhaul?*, Galexia (presentation to Privacy Laws and Business Conference, Cambridge, July 2010), http://www.privacylaws.com/About_Us/Media-Centre/Annual-Conference-2010-Videos/ .

[3] By happenstance, I read last week of an enforcement action taken by the Securities and Exchange Commission in the Matter of GW & WADE, LLC, https://www.sec.gov/litigation/admin/2013/ia-3706.pdf. The SEC order is filled with facts and details. It imposes numerous obligations on the target company, including requirements to hire independent auditors, pay fines, and reimburse clients. I am fully aware that the SEC deals with different laws and has different authorities and powers, but the contrast between the SEC actions and the FTC actions is striking.

processing can disappear without comment from the Commission so long as the notice on the company website is correct.

The Commission has spoken repeatedly about the importance of privacy self-regulation[4] (of which the Safe Harbor Framework is a limited example), but companies have joined and dropped out of Safe Harbor and other privacy self-regulatory schemes for years without any response from the Commission. The Commission's lack of action gives the appearance that privacy protections promised by a company that committed to a privacy self-regulatory program can last only as long as the company wants them to last. Companies can drop out of privacy self-regulatory programs without consequence, and entire privacy self-regulatory programs can disappear without comment from the Commission. The Commission has rarely, if ever, tried to hold a company accountable after the company drops its participation in a privacy self-regulatory scheme or when the self-regulatory scheme itself ends. In the end, while the Commission pays lip service to privacy self-enforcement, its actions undermine meaningful privacy self-enforcement rather than support it.

6. I question the Commission's use of resources. The Safe Harbor cases applied scarce Commission resources that could have been used to bring actions that would protect American consumers. Some commissioners have reportedly said that Safe Harbor enforcement would be a priority. Does this mean that American consumers are now second class citizens at the Federal Trade Commission? Are there no complaints from American consumers and consumer groups that remain uninvestigated? Has the Commission run out of fraudulent businesses bilking consumers to investigate? If the Commission allowed the public to view its enforcement activities by maintaining a public docket of complaints and investigations, the public might actually know the answers to some of these questions.

The Safe Harbor framework only benefits business. It does nothing for American consumers, and, given the known widespread violations, it has done little or nothing for European consumers. The Commission's enforcement actions have not changed the appearance that Safe Harbor is not a reliable, robust, or meaningful program.

This case will only provide another meaningless number in the Commission's enforcement statistics. The Commission's actions on Safe Harbor do not help consumers anywhere. I suggest that the Commission reassess its enforcement priorities.

For the above reasons, I ask that the Commission rescind the consent decree and conduct a real enforcement action.

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[4] See generally Robert Gellman and Pam Dixon, *Many Failures: A Brief History of Privacy Self-Regulation in the United States* (2011), (World Privacy Forum) http://www.worldprivacyforum.org/pdf/WPFselfregulationhistory.pdf.