

Complaint

IN THE MATTER OF

NISSAN NORTH AMERICA, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4454; File No. 122 3010
Complaint, May 1, 2014 – Decision, May 1, 2014

This consent order addresses Nissan North America, Inc.'s advertising, marketing, and sale of the Nissan Frontier pickup truck. The complaint alleges that respondent has marketed the Nissan Frontier to consumers through the "Hill Climb" advertisement, which depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The complaint further alleges that respondent falsely represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The consent order prohibits respondent from misrepresenting, in the context of the advertisement as a whole, any material quality or feature of any Nissan-branded pickup truck through the depiction of a test, experiment, or demonstration.

Participants

For the *Commission*: *Matthew D. Gold* and *Evan Rose*.

For the *Respondent*: *Dominick Cromartie*, *Stuart Friedel*, *Joseph Lewczak*, and *Ronald Urbach*, *Davis & Gilbert LLP*, and *Amanda Reeves*, *Latham & Watkins LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nissan North America, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nissan North America, Inc., is a California corporation with its principal office or place of business at One Nissan Way, Franklin, Tennessee 37067.

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2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the Nissan Frontier pickup truck.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for the Nissan Frontier pickup truck, including “Hill Climb,” a commercial that was disseminated on television and over the internet. (Exhibit A, transcript, and Exhibit B, DVD containing ad)

5. 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.” The demonstration is portrayed in a realistic, “YouTube” style, as if shot with a mobile phone video camera. A statement appears onscreen in small type for the first three seconds of the thirty-second advertisement and disappears before the Nissan Frontier enters the frame. The statement reads, “Fictionalization. Do not attempt.”

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that the Hill Climb advertisement accurately represented the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions.

7. In truth and in fact, the Hill Climb advertisement did not accurately represent the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. In truth, 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

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was. The Nissan Frontier pickup truck is incapable of performing the feat depicted in the Hill Climb advertisement. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practice in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this first day of May, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeney not participating.

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Exhibit A

TBWA/CHIAT/DAY

BROADCAST COPY

NATIONAL
NISSAN FRONTIER
"Hill Climb":30 TV
CLIENT: NISSAN
JOB NO: FNTR-11-T5343
DATE: September 19, 2011

TBWA/CHIAT/DAY APPROVALS

PR	DATE	CW	DATE	AE	DATE	TH	DATE
TECH	DATE						

VIDEOAUDIO

©2011 Nissan North America Inc.

OPEN TO A DUNE BUGGY STRUGGLING TO
MAKE IT UP UP A SAND DUNE.
**LEGAL DISCLAIMER: Dramatization - Do
Not Attempt.**

Spectator: Gun it bro!

CUT TO SPECTATOR WITH A PUZZLED LOOK
ON HIS FACE.
CUT TO A SHOT OF A FRONTIER DRIVING UP
THE SAND DUNE.

Spectator: What's this guy
doing?

FRONTIER CONTINUES UP THE SAND DUNE
AND HELPS THE DUNE BUGGY OVER THE TOP
OF THE HILL.

FRONTIER COMES BACK AROUND AND PERCHES
ON THE TOP OF THE SAND DUNE,
TRIUMPHANT.

VO: The midsize Nissan Frontier
with full size horsepower and
torque.
Innovation for Doers. Innovation
for all.

CUT TO NISSAN BADGE

SUPER: NISSAN BADGE
SHIFT_the way you move.

Exhibit A

5353 GROSVENOR BLVD, LOS ANGELES, CA 90066-6913 TEL: (310) 305-5000 FAX: (310) 305-6000

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Exhibit B

Exhibit B:

DVD of NISSAN FRONTIER
“HILL CLIMB” TV Commercial
(See attached)

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“consent agreement”), which includes: a statement by respondent that it neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nissan North America, Inc., is a California corporation with its principal office or place of business at One Nissan Way, Franklin, Tennessee 37067.

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2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean Nissan North America, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, promotion, offering for sale, sale, or distribution of any Nissan-branded pick-up truck in or affecting commerce, shall not misrepresent, in the context of the advertisement as a whole, any material quality or feature of the advertised pick-up truck through the depiction of a test, experiment, or demonstration.

Provided, however, that nothing in this 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.

II.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, within thirty (30) days of any

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written request, make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. Any and all video, in complete and unedited form, and any and all still images taken during the production of any advertisement depicting a demonstration, experiment, or test; and
- C. Any and all affidavits or certifications submitted by an employee, agent, or representative of respondent to a television network or to any other individual or entity, which affidavit or certification affirms the accuracy or integrity of a demonstration or demonstration techniques contained in an advertisement.

III.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns shall deliver a copy of this order to all current and, for the next five (5) years, all future Nissan North America Vice Presidents of Marketing and Nissan North America Directors of Marketing (“Personnel”) having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent Nissan North America, Inc., and its successors and assigns shall deliver this order to current Personnel within thirty (30) days after the date of service of this order, and to future Personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution,

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assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In the Matter of Nissan North America, Inc., FTC File Number 122 3010.

V.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VI.

This order will terminate on May 1, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;

Analysis to Aid Public Comment

- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner McSweeney not participating.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from Nissan North America, 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, marketing, and sale of the Nissan Frontier pickup truck by respondent. Respondent has marketed the Nissan Frontier to consumers through the "Hill

Analysis to Aid Public Comment

Climb” advertisement, which respondent disseminated on television and over the internet. According to the FTC complaint, the Hill Climb advertisement 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. 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 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 Nissan-branded 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.

Analysis to Aid Public Comment

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.

Parts III, IV, and V of the proposed order require respondent to provide copies of the order to its personnel; 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.

Complaint

IN THE MATTER OF

TBWA WORLDWIDE, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4455; File No. 122 3010
Complaint, May 1, 2014 – Decision, May 1, 2014

This consent order addresses TBWA Worldwide, Inc.'s advertising and marketing of the Nissan Frontier pickup truck. The complaint alleges that respondent created the "Hill Climb" advertisement, which depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill in a realistic, "YouTube" style, as if shot with a mobile phone video camera, to promote the Nissan Frontier pickup truck. The complaint further alleges that respondent falsely represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The consent order 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.

Participants

For the *Commission*: Matthew D. Gold and Evan Rose.

For the *Respondent*: Dominick Cromartie, Stuart Friedel, Joseph Lewczak, and Ronald Urbach, Davis & Gilbert LLP, and Corey Roush, Hogan Lovells.

COMPLAINT

The Federal Trade Commission, having reason to believe that TBWA Worldwide, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent TBWA Worldwide, Inc., is a Delaware corporation with its principal office or place of business at 488 Madison Avenue, New York, New York 10022.