

Complaint

IN THE MATTER OF

DEUTSCH LA, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4515; File No. 122 3252
Complaint, March 24, 2015 – Decision, March 24, 2015

This consent order resolves concerns that respondent Deutsch LA, Inc. (“Respondent”) falsely advertised certain capabilities of Sony’s PlayStation “PS Vita.” The PS Vita is part of Sony’s line of game consoles, including the PlayStation 3 video console (PS3), which allows consumers the flexibility to play video games on, or away from, their television sets. The complaint alleges that Respondent, as Sony’s advertising agency, falsely advertised that PS3 users could save their progress in a game and pick up where they left off on the PS Vita. Respondent also falsely represented that consumers could access a 3G network to play games live with others, for a monthly fee. The consent order bars Respondent from engaging in similar acts or practices in the future.

Participants

For the *Commission*: *Linda K. Badger and Matthew D. Gold.*

For the *Respondent*: *Stuart Friederl, C. Andrew Keisner, and Ronald Urbach, Davis & Gilbert, LLP; and Jeffrey A. Greenbaum, Frankfurt Kurnit Klein & Selz, PC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Deutsch LA, 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 Deutsch LA, Inc., is a California corporation with its principal office or place of business at 5454 Beethoven Street, Los Angeles, CA 90066.
2. Respondent, at all times relevant to this complaint, was an advertising agency of Sony Computer Entertainment America LLC (“SCEA”), and prepared and disseminated advertisements to promote the sale of the PlayStation Vita (“PS Vita”). The PS Vita

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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") that 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 the 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" and "Unit 13" were popular SCEA titles for the PS3.

3. Advertisements prepared by Respondent promoted, among other things, two notable features of the PS Vita. First, advertisements represented that, with the "cross platform gaming" or "cross save" feature, consumers could begin playing a game on a PS3, save their progress at a specific point in the game, and then continue that game where they left off on the PS Vita. Second, with the "3G version" of the PS Vita, available for an extra \$50 and monthly fees, advertisements represented that consumers could access a 3G network to play games live with others ("multiplayer gaming").

4. 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.

5. Respondent has disseminated or has caused to be disseminated advertisements for the PS Vita, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

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- a. Television Commercial (Exhibit A, transcript, and Exhibit B, DVD containing ad)

[Depiction of a young man sitting on a couch, playing the PS3 game, “MLB 12: The Show”]

[Voice Over]: “It’s a problem as old as gaming itself. Stay home and just keep playing, or get to work on time so your coffee breath boss doesn’t ride you like a rented scooter.”

[Depiction of the inside of a subway car]

[On-screen Super]: “Simulated screen visual”

[Voice Over]: “Who says you have to choose?”

[On-screen Super]: “**CROSS PLATFORM PLAY**”

[Depiction of the man pausing the PS3 game, picking up the PS Vita, viewing a download screen, and walking out the door, continuing to play the same game on his PS Vita while walking down the street]

[Voice Over]: “Your PS3 stays home, but the game goes with you.”

[On-screen Super]: “**#GAMECHANGER**”

[Voice Over]: “Never stop playing.”

[On-screen Super]: “**NEVER STOP PLAYING**”

[Voice Over]: “PlayStation Vita”

[On-screen Super]: “**PS VITA**”

- b. Television and Internet Commercial (Exhibit C, transcript, and Exhibit D, DVD containing ad)

[Depiction of a young man walking down the street, playing the shooting game, “Unit 13” on his PS Vita]

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[Voice Over]: “Suddenly it doesn’t feel so safe out there.”

[On-screen Super]: “Simulated screen visual”

[Voice Over]: “People are lookin’ at ’cha with bad intentions. Because with Vita, your spot on the leader board is always up for grabs.”

[Depiction of the young man passing strangers on the street who also appear to be playing on a PS Vita. They look furtively at each other. A man passing by on a bus, who also appears to be playing a PS Vita, nods to the young man.]

[Voice Over]: Find a friend, find an enemy, find a game anywhere, anytime.”

[On-screen Super]: “**3G GAMING**”

[On-screen Super]: “**#GAMECHANGER**”

[Voice Over]: “Never Stop Playing”

[On-screen Super]: “**NEVER STOP PLAYING**”

[Voice Over]: “PlayStation Vita”

[On-screen Super]: “**PS VITA**”

6. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

- a. 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.
- b. PS Vita users who own the 3G version are able to engage in live, multiplayer gaming through a 3G network.

7. In truth and in fact:

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- a. PS Vita users are not 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. This cross platform gaming feature is only available for a limited number of PS3 game titles, and the pause and save feature varies significantly by game. For example, with respect to “MLB 12: The Show,” consumers are only able to pause and save the game to the PS Vita after having finished the entire baseball game (all nine innings) on the PS3.
- b. PS Vita users who own the 3G version are not able to engage in live, multiplayer gaming through a 3G network. PS Vita users are restricted to asynchronous or “turn-based” multiplayer gaming with the 3G version of the PS Vita.

Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

8. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that consumers can play PS3 games, such as “MLB 12: The Show,” on the PS3, pause the game, and continue that game on the PS Vita. Respondent has failed to disclose that, to use this feature, consumers must own two versions of the same game for each console (*e.g.*, two versions of “MLB 12: The Show”), one for the PS3 and one for the PS Vita. This fact would be material to consumers in their purchase and use of the PS Vita. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

9. Respondent knew or should have known that the representations set forth in paragraphs 6 and 8 were, and are, false or misleading.

10. Through the means described in Paragraph 5, Respondent included the term “#gamechanger” in advertisements for the PS Vita. This term directed consumers to online conversations about the PS Vita on Twitter.

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11. Approximately one month before SCEA offered the PS Vita for sale to the public, one of Respondent's assistant account executives sent the following email message to all of Respondent's employees:

"Fellow Deutschers –

The PlayStation Team has been working hard on a campaign to launch Sony's all-new handheld gaming device, the PS Vita, and we want **YOU** to help us kick things off!

The PS Vita's innovative features like 3G gaming, cross platform play and augmented reality will revolutionize the way people game. To generate buzz around the launch of the device, the PS Vita ad campaign will incorporate a #GAMECHANGER hashtag into nearly all creative executions. #GAMECHANGER will drive gamers to Twitter where they can learn more about the PS Vita and join in the conversation. **The campaign starts on February 13th, and to get the conversation started, we're asking YOU to Tweet about the PlayStation Vita using the #GAMECHANGER hashtag.** Easy, right? <https://twitter.com/#!/search/%23gamechanger>

Want to know more about what makes the PS Vita a #GAMECHANGER? Check out the links below:

<http://us.playstation.com/psvita/>

http://www.youtube.com/watch?v=Q8C5quD0a_0

Thanks for your help, and make sure to go get a PlayStation Vita on February 22nd!"

12. As a result of this email message, various Deutsch employees used their personal Twitter accounts to post positive comments about the PS Vita, including the following examples:

"One thing can be said about PlayStation **Vita**...it's a **#gamechanger**"

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“PS **Vita** [ruling] the world. Learn about it!
us.playstation.com/psvita/#GAMECHANGER”

“Thumbs UP **#GAMECHANGER** - check out the new
PlayStation **Vita**”

“This is sick. . . .See the new PS **Vita** in action. The
gaming **#GameChanger**”

“Got the chance to get my hands on a PS **Vita** and I'm
amazed how great the graphics are. It's definitely a
#gamechanger!”

13. Through the means described in Paragraphs 10 through 12, Respondent has represented, directly or indirectly, expressly or by implication, that these comments about the PS Vita were independent comments reflecting the views of ordinary consumers who had used the PS Vita.

14. In truth and in fact, these comments about the PS Vita were not independent comments reflecting the views of ordinary consumers who had used the PS Vita. These comments were created by employees of Respondent, an advertising agency hired to promote the PS Vita. Therefore, the representation set forth in Paragraph 13 was, and is, false and misleading.

15. Through the means described in Paragraphs 10 through 12, Respondent has represented, directly or indirectly, expressly or by implication, that certain comments about the PS Vita reflected endorsements from persons who had used the PS Vita. Respondent failed to disclose that those comments were written by employees of Respondent, an advertising agency hired to promote the PS Vita. This fact would have been material to consumers in their purchasing decision regarding the PS Vita. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

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

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THEREFORE, the Federal Trade Commission this twenty-fourth day of March, 2015, has issued this complaint against Respondent.

By the Commission.

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EXHIBIT A



Commercial Script - Dilemma



(Audio Effects and Music Throughout; Announcer:) It's a problem as old as gaming itself. Stay home and just keep playing, or get to work on time so your coffee breath boss doesn't ride you like a rented scooter. Who says you have to choose? Your PS3 stays home, but the game goes with you.

(Visual:) CROSS PLATFORM PLAY (Announcer:) Never Stop Playing. PlayStation Vita. **(Visual:) #Gamechanger Never Stop Playing PS Vita Sony Make Believe**

PlayStation Vita, February 29, 2012

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EXHIBIT B

**[Redacted from Public Record, but Incorporated by
Reference]**

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EXHIBIT C



Commercial Script – Bad Intentions



(Audio Effects and Music Throughout; Announcer:) Suddenly it doesn't feel so safe out there. People are lookin at'cha with bad intentions. Because with Vita, your spot on the leader board is always up for grabs. Find a friend, find an enemy, find a game anywhere, anytime. **(Visual:)** 3G gaming **(Announcer:)** Never Stop Playing. PlayStation Vita. **(Visual:)** #Gamechanger Never Stop Playing PS Vita Sony Make Believe

PlayStation Vita, February 29, 2012

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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 Deutsch LA, Inc., is a California corporation with its principal office or place of business at 5454 Beethoven Street, Los Angeles, CA 90066.
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.

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ORDER**DEFINITIONS**

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

1. Unless otherwise specified, “respondent” shall mean Deutsch LA, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Clearly and prominently” shall mean as follows:
 - a. In textual communications (e.g., printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;
 - b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
 - c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication. *Provided, however,* that, for communications disseminated through programming over which respondent does not have editorial control (e.g., an endorser’s appearance on

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a news program or talk show), the required disclosures may be made in a form consistent with subparagraph (b) of this definition;

- d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and
 - e. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.
- 4. “Handheld Game Console Product” means any handheld portable electronic device designed for and primarily used for playing video games that has its own screen, speakers and controls in one unit, including the PlayStation Vita (“PS Vita”) and the PlayStation Portable (“PSP”).
 - 5. “Home Game Console Product” means any electronic device designed for and primarily used for playing video games on a separate television screen, including the PlayStation 3 (“PS3”) and the PlayStation 4 (“PS4”).
 - 6. “Endorsement” means as defined in the Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §255.0.
 - 7. “Endorser” means an individual or organization that provides an Endorsement.
 - 8. “Material connection” means any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

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9. “Video Game Product” means any electronic game that is designed for and primarily used for playing on a Handheld Game Console Product or a Home Game Console Product.
10. The term “including” in this order means “without limitation.”

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any material gaming feature or capability of such product when used as a standalone device to play video games.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that such feature or capability was misrepresented.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product or Home Game Console Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the material capability of the Handheld Game Console Product 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.

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Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that such capability was not substantiated by competent and reliable evidence.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product or Home Game Console Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the material capability of any Handheld Game Console Product to interact with, or connect with, any 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 the Handheld Game Console Product and one for the Home Game Console Product, if such is the case.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that consumers must purchase two versions of the same video game to use such capability.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, Home Game Console Product, or Video Game Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that an endorser of such product is an independent user or ordinary consumer of the product.

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V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, Home Game Console Product, or Video Game Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any endorser of such product unless it discloses, clearly and prominently, a material connection, when one exists, between such endorser and the respondent or any other individual or entity manufacturing, advertising, labeling, promoting, offering for sale, selling, or distributing such product.

VI.

IT IS FURTHER ORDERED that respondent shall, within seven (7) days of the date of service of this order, take all reasonable steps to remove any product review or endorsement, which is under the control of respondent Deutsch LA, Inc., currently viewable by the public that does not comply with Parts IV and V of this order.

VII.

IT IS FURTHER ORDERED that respondent Deutsch LA, 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, upon reasonable notice and request, make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the

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representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

IT IS FURTHER ORDERED that respondent Deutsch LA, 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 account directors and creative directors having direct and supervisory or managerial responsibilities with respect to the subject matter of this order (“Personnel”), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

IX.

IT IS FURTHER ORDERED that respondent Deutsch LA, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, 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, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line: In the Matter of Deutsch LA, Inc., FTC File Number 122-3252. *Provided, however,* that, in lieu

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of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

X.

IT IS FURTHER ORDERED that respondent Deutsch LA, Inc., and its successors and assigns shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its 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.

XI.

This order will terminate on March 24, 2035, 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;
- 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

Analysis to Aid Public Comment

such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

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 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.

Analysis to Aid Public Comment

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.

Analysis to Aid Public Comment

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.

Analysis to Aid Public Comment

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.

Analysis to Aid Public Comment

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.

Complaint

IN THE MATTER OF

HEALTH DISCOVERY CORPORATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECS. 5(A) AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4516; File No. 132 3211
Complaint, March 30, 2015 – Decision, March 30, 2015

This consent order addresses allegations that respondents Health Discovery Corporation, along with Kristi Kimball and her company, New Consumer Solutions LLC (collectively “Respondents”), deceived consumers concerning its mobile device software application. The complaint alleges that Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act by representing that its MelApp mobile device application accurately analyses moles and other skin lesions for melanoma and increases consumers’ chances of detecting melanoma in early stages. According to the complaint, the MelApp application instructed users to photograph a mole with a smartphone camera and input other information. The application would then supposedly calculate the mole’s melanoma risk as low, medium, or high. However, the Respondents lacked substantiation for these representations. The order bars the Respondents from making false representations regarding its products without scientific testing and substantiation. The order further requires the company to follow appropriate recordkeeping and compliance reporting requirements, as well as to preserve documents for human clinical studies that it conducts or sponsors.

Participants

For the *Commission*: *Mary Johnson and Karen Mandel.*

For the *Respondent*: *Timothy J. Fitzgibbon, Nelson Mullins Riley & Scarborough, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Health Discovery Corporation, a corporation, 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 Health Discovery Corporation (“Respondent”) is a Georgia corporation with its principal office or place of business at 4243 Dunwoody Club Drive, Atlanta, Georgia 30350.