

Dissenting Statement of Commissioner J. Thomas Rosch

United States of America v. Google Inc.

(United States District Court for the First, the Stipulated Order for Permanent Injunction

that "Defendant denies any violation of the FTC Act, and all liability for the claims set forth in the Complaint, and all allegations of the Complaint save those regarding jurisdiction and venue. Yet, at the very same time, the Commission supports a civil penalty of \$2.5 million against Google for that very same conduct. Ordering a denial of liability in circumstances such as these is unprecedented.

Second, in the *Circa Direct*

¹ See, e.g., Dissenting Statement of J. Thomas Rosch, *In the Matter of Pool Corporation*, FTC File No. 101-0115 (Nov. 21, 2011) available at <http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementofrosch>

² Order, Stipulated Ex. 2.

³ *FTC v. Circa Direct LLC*, 2012 U.S. Dist. LEXIS 81878, *14 (D.N.J. June 13, 2012). Our sister agency the Securities and Exchange Commission, has interpreted this language used in *Circa Direct* to be tantamount to a denial of liability 17 C.F.R. § 202.5(e)

This scenario – violation of a court order – has the Commission's place of Google's denial of liability all the more applicable.

Fourth, it may be asserted that denial of liability is justified by the prospect of a \$22.5 million civil penalty. But \$22.5 million represents a *de minimis* amount of Google's profit or revenues. Beyond that, the Commission now has allowed liability to be denied not only in this matter but also in the Facebook settlement where Facebook simply promised to "and sin no more" (unlike Google, Facebook was not previously under order). There is nothing to prevent future respondents with fewer resources than Google and with lower profiles than Google and Facebook from denying liability in the future too.

Fifth, it may also be asserted that denial of liability is warranted here because Google is being sued for the same conduct in other forums. But, I see no reason why the more common "neither admits nor denies liability" language would not adequately protect Google from collateral estoppel in these lawsuits.

For the foregoing reasons I dissent from the Commission's decision to accept this consent decree.