Partial Dissent of Commissioner Maureen K. Ohlhausen
In the Matter of True Ultimate Standards Everywhere, Inc. ("TRUSTe")
November 17, 2014

I support Count I of the complaint in this matter because of TRUSTe's unique position of consumer trust as a third party certifier. However, I do not support the use of "means and instrumentalities" liability in Count II of the complaint and dissent as to that Count.

TRUSTe was initially organized in 1997 as a non-profit. Before July 2008, TRUSTe required every certified client website to include in its privacy policy a description of TRUSTe stating in part, "TRUSTe is [a] non-profit organization." On July 3, 2008, TRUSTe changed its corporate form from non-profit to for-profit. The company announced the change to its clients and requested that all clients update the relevant privacy policy language on their websites. Some clients did not update their websites. When TRUSTe recertified such websites, TRUSTe would typically request, but not require, that the client update their privacy policy to reflect the change to for-profit status.

Count II of our complaint alleges that by recertifying websites containing privacy policies that inaccurately describe TRUSTe as a non-profit, TRUSTe provided the means and instrumentalities to its clients to misrepresent that TRUSTe was a non-profit corporation. Specifically, the majority's statement argues that "TRUSTe's recertification of these inaccurate privacy policies … provided its clients with the means and instrumentalities to deceive others."[1]

I disagree with this use of means and instrumentalities. To be liable of deception under means and instrumentalities requires that the party *itself* must make a misrepresentation, as the Commission detailed in *Shell Oil Company*.[2] According to the majority in that case, "[T]he means and instrumentalities doctrine is intended to apply in cases … where the originator of the **unlawful material** is not in privity with consumers" and "it is well settled law that the originator is liable if it passes on **a false or misleading representation** with knowledge or reason to expect that consumers may possibly be deceived as a result."[3] For example, in *FTC v. Magui Publishers, Inc.*, the court found the defendant directly liable for providing the means and instrumentalities to violate Section 5 when it sold Salvador Dali prints with forged signatures to retail customers, who then sold the prints to consumers.[4]

Unlike *Shell* and *Magui Publishers*, the statement that TRUSTe provided to its clients was indisputably truthful at the time. During the period in which TRUSTe required client

[1] *In the Matter of True Ultimate Standards Everywhere, Inc.* ("TRUSTe"), FTC File No. 1323219, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny, at 2 (Nov. 17, 2014).
[2] *In the Matter of Shell Oil Co.*, 128 F.T.C. 749 (1999).
[3] *Id.* at *10 (Public Statement of Chairman Pitofsky, Commissioner Anthony and Commissioner Thompson) (emphasis added). Similarly, Commissioner Orson Swindle's dissent stated that under FTC precedent, "means and instrumentalities is a form of primary liability in which the respondent was using another party as the conduit for disseminating **the respondent's misrepresentations** to consumers." *Id.* at *14-15 (Dissenting Statement of Commissioner Orson Swindle) (emphasis added). Swindle's dissent likewise emphasized that a defendant "may not be held primarily liable unless it has actually made a misrepresentation." *Id.* (quoting *In re JWP Inc. Securities Lit.*, 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996)). *See also FTC v. Magui Publishers, Inc.*, Civ. No. 89–3818RSWL(GX), 1991 WL 90895, at *14, (C.D. Cal. 1991), *aff'd*, 9 F.3d 1551 (9th Cir. 1993) ("One who places in the hands of another a means or instrumentality to be used by another to deceive the public in violation of the FTC Act is directly liable for violating the Act.").
[4] *Magui Publishers, Inc.*, 1991 WL 90895, at *17.

privacy policies to state that TRUSTe was a non-profit, TRUSTe was, in fact, a non-profit. Once TRUSTe changed to for-profit status, it no longer required clients to state its non-profit status and actively encouraged clients to correct their privacy policies. TRUSTe did not pass to clients any false or misleading representations regarding its for-profit status. Nor was TRUSTe's recertification of websites a misrepresentation of TRUSTe's non-profit status to its clients; during recertification TRUSTe again clearly communicated its for-profit status to clients by requesting that its clients update their privacy policies. Because TRUSTe accurately represented its non-profit status to its clients, TRUSTe cannot be primarily liable for deceiving consumers under a means and instrumentalities theory.

TRUSTe's alleged recertifications of untrue statements are more properly analyzed as secondary liability for aiding and abetting.[5] In *Magui Publishers* the court found that the defendant forgers were not only directly liable for their own misstatements, but also secondarily liable for the retailers' fraudulent misrepresentations to consumers because defendants "supplied their deceptive art work, certificates and promotional materials to their retail customers with full knowledge these customers would use the materials to deceive consumers."[6] The court explained that aiding and abetting has three components: "(1) the existence of an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of the wrong and of his or her role in furthering it; and (3) substantial assistance in the commission of the wrong."[7]

It is not clear that TRUSTe's clients committed an independent primary wrong. However, TRUSTe certainly had knowledge of the misstatements in the privacy policies and of TRUSTe's role in facilitating those misstatements. And, arguably, its certifications may have provided substantial assistance in deceiving consumers. Regardless, because TRUSTe never misrepresented its corporate status, TRUSTe's actions regarding its corporate status at most comprise aiding and abetting its clients' actions.

Perhaps all this seems like legal hairsplitting, but it is not. Under the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*,[8] the FTC "may well be precluded from bringing Section 5 cases under an aiding and abetting theory."[9] By prosecuting activities more properly analyzed as aiding and abetting under the guise of means and instrumentalities liability, I am concerned that we are stepping beyond the limits the Supreme Court has established. I therefore dissent from Count II.

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[5] "[A] respondent who has provided assistance to another party that has made misrepresentations is at most secondarily liable -- in particular, for aiding and abetting another's misrepresentations." *Shell Oil Co.*, 128 F.T.C. 749, *15 (1999) (Swindle Dissent) (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 870 (1999); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) ("the critical element separating primary from aiding and abetting violations is the existence of a representation, made by the defendant.")).

[6] *Magui Publishers, Inc.*, 1991 WL 90895, at *15.

[7] *Id.* at *14.

[8] *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994).

[9] *Shell Oil Co.*, 128 F.T.C. 749, *19 (Swindle Dissent).