Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

August 31, 2009

Alan Charles Raul
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005

Re: Sears Holdings Management Corporation
FTC Matter No. 0823099

Dear Mr. Raul:

Thank you for your comment regarding the above-referenced matter. Your comment was placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice, 16 C.F.R. § 2.34, and was given serious consideration by the Commission.

In your comment, you express concern that the proposed order, by requiring Sears to disclose certain information prior to, and on a separate screen from, any end user license agreement ("EULA") or similar document, is an attempt to set a new standard of disclosure for all online transactions. Specifically, your comment states that the proposed order casts doubt upon the validity of "clickwrap agreements," online agreements where consumers manifest acceptance by clicking on an "I accept" button at the end of the terms of service. Your comment argues that clickwrap agreements have routinely been enforced by the courts and that the facts detailed in the Commission's complaint show a valid clickwrap agreement between Sears and consumers.

The proposed consent order does not create a new standard of disclosure for Internet transactions in general. Indeed, its provisions regarding separate screen notice and express consent are very similar to provisions in recent consent orders approved by the Commission. *See Zango, Inc.*, FTC Docket No. C-4186 (2007); *see also Direct Revenue, LLC*, FTC Docket No. C-4194 (2007). In those cases and in this one, such provisions relate to the particular conduct and software at issue and are designed to ensure that these respondents do not engage in similarly deceptive or unfair practices.

The Commission acknowledges that the courts have frequently enforced clickwrap agreements as valid contracts. However, as the Commission pointed out in response to a comment in *Zango*, there are occasions when disclosure in a EULA alone may not be sufficient to correct a misleading impression created elsewhere. *See, e.g., FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (fine print contractual notices are insufficient to undo deceptive net impression); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd*, 265

F.3d 944, 956 (9th Cir. 2001) (disclaimers and truthful statements that are made outside the context of a deceptive representation (such as a contract) do not automatically undo the deception and exonerate deceptive activities); *cf.* FTC, *Dot Com Disclosures* (adequacy of disclosure required to prevent deception is based on the overall net impression) (available at www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html). Accordingly, the Commission will approach the validity of EULA-only disclosure on a case-by-case basis, weighing what information is material to consumers and the overall, net impression upon the consumer regarding the transaction.[1]

After considering your comment, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without modification. A copy of the final Decision and Order, and other relevant materials, are available on the Commission's website at http://www.ftc.gov.

Thank you again for your comments. It helps the Commission's analysis to hear from a variety of sources in its work, and we appreciate your interest in this matter.

By direction of the Commission.

Donald S. Clark
Secretary

[1] *Zango, Inc.*, FTC Docket No. C-4186, letter responding to comment from Mark Bohannon, Software & Information Industry Ass'n (Mar. 7, 2007) *available at* http://www.ftc.gov/os/caselist/0523130/0523130c4186lettercommenterSIIA.pdf.