Dissenting Statement of Commissioner Noah Joshua Phillips

In the Matter of MoviePass, Inc.
Commission File No. 1923000
June 7, 2021

The Commission's decision in this case to plead a novel theory of liability under the Restore Online Shoppers' Confidence Act of 2010 ("ROSCA") accomplishes nothing for consumers and reduces clarity for businesses seeking to follow the law. I respectfully dissent.

Congress enacted ROSCA to protect consumers from aggressive sales tactics on the Internet. In so doing, it expressed particular concern about the practice of reputable online retailers sharing their customers' information with third party sellers ("post-transaction third party sellers"), who in turn "used aggressive, misleading sales tactics" to charge millions of unwitting American consumers for goods and services.[1] Consumers didn't know what they were being charged for, and had no way to stop recurring charges. Congress found that these sales tactics undermined consumer confidence in the Internet and

material terms of the transaction" before obtaining the consumer's billing information; (ii) obtain express informed consent from the consumer before charging the consumer's financial account; and (iii) provide a simple mechanism for the consumer to stop the recurring charges.[6] Section 8403 does not define which terms must be disclosed, or make clear whether the disclosure obligation applies to the negative option feature or that feature as well as the underlying product.

In selling its services to consumers, MoviePass used a negative option feature. Consumers interacted directly with MoviePass and were aware that they were purchasing a service from MoviePass and were agreeing to recurring charges. The complaint does not allege that MoviePass failed to provide a simple mechanism to cancel the recurring charge or that any ROSCA violation took place for the majority of its consumers.

Liability here is instead predicated on the fact that, when it became apparent its business model was not working because some customers were going to too many movies, MoviePass began throttling high-volume users of its service and potentially reducing their ability to screen movies on a truly "unlimited" basis and failed to disclose this to new consumers. This is deception, and it violates Section 5 of the FTC Act. But the complaint also fashions MoviePass's failure to disclose affirmatively that it would throttle certain high-volume users of its service as a failure to clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information under ROSCA.[7]

The novelty here is that, for the first time, the Commission is treating a deception about the characteristics of the underlying product—not the negative option feature—as a violation of ROSCA. To date, all the complaints filed by the Commission that allege ROSCA violations in the negative option context with a first party seller have involved defendants hiding a negative option feature, not obtaining express informed consent before charging the consumer, or failing to provide vn (t)-2 (pa) (ga)4ad c

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First, pleading this new theory accomplishes nothing here. One benefit of establishing liability for rule violations is to obtain a penalty. But the corporate respondents are in bankruptcy and the individual respondents are settling these allegations in a no-money order. The relief we obtain today is no different than if we proceeded without a ROSCA count. Including a ROSCA count does nothing for consumers in terms of monetary or injunctive relief. That makes our announcement of sweeping new liability and introduction of a lack of clarity to the market about required disclosures, discussed below, ill-advised.

Second, while not facially-implausible, the statutory interpretation pushed by the Commission in this case is far from obvious. Section 8403 concerns "negative option marketing" and speaks specifically to, *inter alia*, "goods or services sold in a transaction effected on the Internet through a negative option feature". The negative option is the aggressive tactic that Congress was concerned about, and the statutory requirements of disclosure of terms, consent to collection of financial information, and simple cancellation protect specifically against its abuse. But there is nothing in the statute—and little, for that matter, in the legislative history—to suggest congressional intent to regulate disclosures about the products or services being sold, as opposed to disclosures about the negative option.

Section 8402, concerning third-party post-transaction sellers, provides an important contrast. There, Congress specifically delineated the terms that sellers were obligated to disclose, including defining "material terms" to include "a description of the goods or services". Section 8403, addressing negative options, does not include that language. (So the Commission reads the words into the statute.) A heightened requirement for post-transaction third party sellers makes sense. Where the consumer is not aware of the transaction at all, disclosures about the product are essential. But where the consumer is aware they are buying the product—but not the negative option that will continue charging them over time—the justification for compelling disclosure about the product is less clear.[9] What is more, because Congress specifies certain material terms in Section 8402 but not Section 8403, the scope of the obligati6a th9(te)-4 /4 (m)-6 (ate)4 (2 ((u2 (s)1 (u)2 (r)5 (

penalties. At the very least, before putting this new theory into action, the Commission should issue guidance to companies as to their disclosure obligations.

The Commission's decision dramatically to re-interpret ROSCA and expand liability comes just weeks after the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, which held that