UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Joint Statement of Chair Lina M. Khan,
Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya
In the Matter of Passport Auto Group
Commission File No. 2023199

October 18, 2022

Today, the Commission announces a complaint and settlement with Passport Auto and two of its executives, Everett A. Hellmuth, III and Jay Klein (collectively "Passport"), alleging violations of Section 5 of the FTC Act ("Section 5") and the Equal Credit Opportunity Act ("ECOA").

According to the complaint, Passport routinely charged bogus fees and imposed higher borrowing costs on Black and Latino buyers. Count I alleges defendants misrepresented vehicle prices in violation of Section 5; Count II alleges defendants misrepresented that consumers were required to pay certain fees in violation of Section 5; Count III alleges defendants imposed higher costs on Black and Latino consumers than on similarly situated non-Latino White consumers in violation of Section 5; and Count IV alleges defendants imposed higher costs on Black and Latino consumers than on similarly situated non-Latino White consumers in violation of ECOA.

Naming Hellmuth and Klein as individuals in this matter is justified by the allegations in the complaint and their history with the FTC. This is the second time in four years that Passport Auto, Hellmuth, and Klein have settled with the FTC for alleged violations of consumer protection laws.[1] In 2018, the FTC alleged that these defendants mailed more than 21,000 fake "urgent recall" notices to consumers to lure them to visit dealerships.[2] Today's complaint alleges they imposed bogus fees and discriminatory financing. The Commission alleges that Hellmuth and Klein have been at the helm of Passport throughout. We are committed to holding accountable executives with a sufficient level of knowledge and participation in law violations. This is such a case.

Count III—which involves Passport's imposition of higher borrowing costs on Black and non-White Latino consumers than on similarly situated non-Latino White consumers—is a straightforward application of Section 5. Section 5(n) of the FTC Act states that an act or practice is unfair if it "causes or is likely to cause substantial injury to consumers or competition which is not reasonably avoidable by consumers themselves and not outweighed by

[1] Press Release, Fed. Trade Comm'n, Washington, DC-Area Car Dealerships, Marketing Firm Settle Deceptive Advertising Charges (Oct. 10, 2018), https://www ftc.gov/legal-library/browse/cases-proceedings/162-3193-passport-imports-inc-passport-toyota.
[2] Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Passport Imports, Inc.*, No. 8:18-cv-03118-PX (D. Md. Oct. 10, 2018), https://www.ftc.gov/system/files/documents/cases/passport_toyota_complaint_10-10-18.pdf.

countervailing benefits to consumers or competition."[3] Here, Black and Latino consumers suffered substantial economic injury in the form of higher fees for the same products and services.[4] These consumers could not reasonably avoid this injury, because they typically had no way of knowing they were being charged more than their White counterparts. And Passport's pricing practices did not yield countervailing benefits.

Our colleague Commissioner Phillips argues in his dissent that sector-specific antidiscrimination laws dramatically limit our Section 5 unfairness authority. We disagree. Practices that meet the factors of Section 5(n) are not insulated from the Commission's oversight merely because they involve discriminatory conduct. Such an "implied repeal" argument is disfavored[5]—especially because Congress enacted the unfairness framework *after* the anti-discrimination statutes[6]—and a similar argument was squarely rejected by the Third Circuit in the *Wyndham* matter.[7]

The fact that harmful conduct may be subject to other legal or regulatory regimes does not in itself limit (or lessen) the FTC's responsibility to use all of our available authorities to target such conduct.[8] Where Congress passes laws prohibiting conduct that also violates the FTC Act, the FTC often charges violators with the full range of law violations, including Section 5.[9] Section 5 does not wilt when Congress legislates.

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[3] 15 U.S.C. § 45(n).

[4] Discriminatory conduct may also result in forms of non-monetary injury that also constitute "substantial injury." *See* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Napleton Automotive Group, at 3 (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf.

[5] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007) (holding that the courts will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.").

[6] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

[7] *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015) (holding that the FTC Act applied to data security and rejecting Wyndham's argument that "Congress knows how to target cybersecurity when it wishes to do so, and Congress did not do so in the 'unfair' practices provision of the FTC Act.").

[8] *See generally FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (permitting challenge under the antitrust laws to Hatch-Waxman related patent settlements); *Wyndham*, 799 F.3d 236.

[9] Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Age of Learning, Inc.*, No. 2:20-cv-07996 (C.D. Cal. Sept. 1, 2020), https://www ftc.gov/system/files/documents/cases/1723086abcmousecomplaint.pdf (charging that defendant's failure to disclose negative option violated Section 5 and the Restore Online Shopper's Confidence Act); *see also* Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. 8 Figure Dream Lifestyle LLC*, No. 8:19-cv-01165-AG-KES (C.D. Cal. June 12, 2019), https://www.ftc.gov/system/files/documents/cases/182_3117_8_figure_dream_lifestyle_complaint_6-25-19.pdf (charging that defendants' misrepresentations violated Section 5 and the Telemarketing Sales Rule); Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. National Landmark Logistics LLC*, No. 0:20-cv-02592-JMC (D.S.C. July 13, 2020), https://www.ftc.gov/system/files/documents/cases/202_3071_national_landmark_logistics_-_complaint.pdf (charging that defendants' false or misleading misrepresentations violated Section 5 and the Fair Debt Collections Practices Act).

Commissioner Phillips also implies that our analysis of Count III makes an impermissible appeal to public policy.[10] Again, we disagree. The facts of this case satisfy our statutory unfairness test, and we make no appeal to public policy. However, we note that Section 5(n) expressly allows the Commission to "consider established public policies as evidence to be considered with all other evidence" so long as such considerations do not "serve as a primary basis for such determination."[11] Count III resonates with a public policy of combatting racial discrimination, which is reflected in "formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts."[12] While this justification is not necessary to our determination today, it cannot be said to weaken it.

In sum, FTC staff has made a persuasive case that Passport's pricing practices caused substantial injury to Black and Latino consumers that were not reasonably avoidable by those consumers and not outweighed by countervailing benefits. We thus agree with their recommendation to include Count III in the complaint.

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[10] Dissenting Statement of Commissioner Noah Joshua Phillips, Federal Trade Commission vs. Passport Automotive Group, Inc. et al. (Oct. 14, 2022) ("In the name of 'public policy,' it adopts a policy different from the one policymakers specifically promulgated.").

[11] *See, e.g.*, Concurring Statement of Acting Chairman Maureen K. Ohlhausen In the Matter of Vizio, Inc. (Feb. 6, 2017) ("[H]ere, for the first time, the FTC has alleged in a complaint that individualized television viewing activity falls within the definition of sensitive information. There may be good policy reasons to consider such information sensitive. Indeed, Congress has protected the privacy of certain video viewing activity by passing specific laws, such as the Cable Privacy Act of 1984.") (concurring in unanimous vote to file complaint and settlement).

[12] FTC Policy Statement on Unfairness, appended to *In re International Harvester Co.*, 104 F.T.C. 949 (1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.