

Concurring Statement of Commissioner Christine S. Wilson
In re MoviePass, Inc.
FTC File No. 1923000

June 7, 2021

I support the complaint and consent in this matter challenging the respondents' marketing of its movie subscription product. Specifically, the respondents offered subscribers "unlimited movies" but deployed a variety of tactics to prevent consumers from enjoying unlimited benefits, as recounted in the complaint, rendering the representations deceptive. I also concur with the inclusion of a count challenging violations of the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8403 (ROSCA). The conduct alleged in this case, in my view, violates the plain language of the statute.

Section 8403 of ROSCA states that:

It shall be unlawful for any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the Internet through a negative option feature (as defined in the Federal Trade Commission's Telemarketing Sales Rule in part 310 of title 16, Code of Federal Regulations), unless the person—

- (1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information;
- (2) obtains a consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for products or services through such transaction; and
- (3) provides simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's credit card, debit card, bank account, or other financial account.

The TSR defines "negative option feature" as "an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or service or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. §310.2(w).

MoviePass Unlimited was a month-to-month arrangement that consumers could cancel at any time. The FTC for decades has interpreted these types of recurring agreements as negative option plans. Each month, the consumer's failure to cancel implies consent to be charged for an additional month. In other words, the seller obtains consent for the recurring charge using a negative option.

The "unlimited" aspect of the MoviePass subscription constituted a material term of the pass that the company marketed and sold. Notably, as alleged in the complaint, MoviePass highlighted this term as a primary selling point – touting "MoviePass Unlimited" and stating "Enjoy a new movie every day." MoviePass did not disclose that it would prevent consumers from actually viewing one movie per day or that it would implement ticket verification procedures to frustrate consumers' attempts to use their passes, as described in the Commission's complaint. In essence, MoviePass throttled subscribers' movie consumption. The terms or limits to the purportedly

unlimited subscription that were employed to achieve this throttling effect almost certainly would be considered material to consumers' decisions to purchase the subscription.

ROSCA Section 8403 plainly states that for goods or services sold through a negative option feature, the seller must "clearly and conspicuously disclose all material terms of the transaction." The respondents here did not disclose all material terms. Therefore, these facts, as alleged, in my view support a violation of ROSCA.

I am mindful that this settlement marks the first time the Commission has alleged a violation of ROSCA where the undisclosed material terms do not relate specifically to the negative option feature but instead to the underlying good or service marketed through that feature. But I believe that the facts of this case fall well within the bounds of the conduct that Congress contemplated challenging when promulgating the statute. In fact, the conduct described in the complaint fits neatly within the plain language of the statute.

Given the inaugural use of ROSCA for this purpose, it is appropriate that the Commission is foregoing civil penalties. Businesses need predictability about the manner in which laws will be enforced and should be afforded the ability to contest new uses of authority. This case will serve as notice to the market, and future violations of this type may well warrant civil penalties.

The Supreme Court's recent decision in *AMG*¹ has eliminated the FTC's ability to seek equitable monetary relief under Section 13(b) of the FTC Act to compensate consumers. The temptation to test the limits of our remaining sources of authority is likely to be strong. On numerous occasions, I have expressed concern about novel interpretations of our authority that exceed the boundaries of underlying statutes and corresponding Congressional intent.² And I will scrutinize carefully any future attempts to expand ROSCA, or any other authority entrusted to the Commission, beyond the plain language. Here, however, I am satisfied that the challenged conduct falls well within the four corners of the statute and therefore conclude that, under the facts alleged, including a ROSCA count is not an overreach.

¹ *AMG v. FTC*, slip op No. 19-508 (Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

² Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, Notice of Proposed Rulemaking related to Made in USA Claims (June 22, 2020) (expressing concern that the proposed rule exceeds the scope of authority Congress granted the FTC), https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf; Separate Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, *FTC v. Avant, LLC* (Apr. 15, 2019) (dissenting with respect to the maiden use of the Telemarketing Sales Rule (TSR) provision related to novel payments (specifically remotely created checks) in a non-fraud case), https://www.ftc.gov/system/files/documents/public_statements/1514073/avant_inc_1623090_separate_statement_of_christine_s_wilson_4-15-19.pdf. In the *Avant* matter, the Commission sought to impose liability under the TSR against a legitimate company, selling legitimate products, in circumstances not contemplated when the Rule was promulgated to address fraudulent businesses abusing these types of payments. *Id.*