



Office of Commissioner
Melissa Holyoak

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

Concurring and Dissenting Statement of Commissioner Melissa Holyoak

In re Evolv Technologies, Inc., Matter No. 2323013

November 26, 2024

I support today’s settlement with Evolv Technologies, Inc., which allegedly made false or unsubstantiated claims about its “AI-powered” security screening system’s ability to detect all weapons, ignore harmless personal items, and perform these tasks better than traditional metal detectors. The Commission’s action today is important to stop deception in the security screening market for schools, and protects not only Evolv’s school customers, but also the children and teens whose safety depends in part on the efficacy of security screening systems. I am grateful to the talented staff who have brought this important matter.

While I support the complaint, I do not support Part II of the proposed order, which requires Evolv to notify its school customers of their right to unilaterally cancel multi-year subscription contracts with Evolv. The notice, in effect, creates a cancellation right in Evolv’s contracts where one does not otherwise exist.¹ And, by declaring that school customers can “exercise the right to cancel their contracts” and that such school “[c]ustomers shall owe no more money to Defendant after the effective cancellation date[,]”² the notice provides school customers with a *de facto* refund by allowing them to avoid obligations for future contractual payments. The Majority includes this provision in the proposed order even though the Commission has no authority under Section 13(b) of the FTC Act to change contractual terms—whether through rescission or reformation of contract remedies³—or seek a refund of monies,⁴ as this notice provision contemplates. Indeed, whereas the language of Section 19(b) of the FTC Act expressly gives the Commission authority to obtain rescission or reformation of contracts,⁵ Section 13(b) does not.⁶ The Supreme Court’s decision in *AMG Capital Mgmt., LLC v. FTC*, unanimously holding that the Commission lacks authority under Section 13(b) to obtain redress or disgorgement for garden-variety Section 5 deception and unfairness counts,⁷ reinforces this conclusion. The absence of this language in Section 13(b), in contrast to its presence in Section 19(b), further underscores that Section 13(b) relief cannot be expanded to unilaterally change contractual terms or suspend future contractual payments.

¹ Proposed Order at 4.

² *Id.*

³ See generally *Cigna Corp. v. Amara*, 563 U.S. 421, 435-36 (2011) (noting that “the power to change the terms” is “akin to the reform[ation] of a contract” remedy, and thus, is not available where the statutory language fails to identify equitable remedies).

⁴ See *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 76 (2021) (holding that the FTC does not have authority under Section 13(b) to seek redress or disgorgement).

⁵ 15 U.S.C. § 57b(b).

⁶ *Id.* § 53(b).

⁷ See 593 U.S. at 75-77.

The fact that this proposed order requires Evolv to *notify* school customers of their right to cancel (rather than directly ordering Evolv to rescind or revise its contracts) does not change the analysis. Nor does it matter that the Complaint alleges Evolv is “continuing to exercise contracts won through” misrepresentations.⁸ These multi-year subscription contracts with school customers contain no right of cancellation.⁹ The notice requirement creates this new right for customers, which, in effect, forces Evolv to rewrite (or ignore) existing contractual terms to honor it. For example, if a school customer terminated a contract in the absence of this notice requirement, Evolv could recover all unpaid fees for the entire contractual term from that customer. But with this notice requirement, Evolv is prohibited from collecting future unpaid fees for the contractual term once the school customer exercises its cancellation right.¹⁰ Part II of the proposed order therefore constitutes an impermissible reformation of contract remedy and is akin to monetary relief under Section 13(b).¹¹ No amount of creative pleading in the Complaint changes this outcome.

When last the Commission overstepped its authority under Section 13(b), the result was *AMG Capital Mgmt., LLC v. FTC*. We should learn from that decision, rather than once again pushing the bounds of our authority to obtain a remedy that Congress has not authorized.

⁸ Compl. ¶ 32.

⁹ *Id.* ¶ 15.

¹⁰ Proposed Order at 4 (“Customers shall owe no more money to Defendant after the effective cancellation date[.]”).

¹¹ I do not share Commissioner Ferguson’s view about this difficult question about remedies. We both agree that Section 13(b) relief is limited to “injunctions” that address future or ongoing violations of the FTC Act. But we disagree about what constitutes an injunction. In my view, Part II of the proposed order hardly qualifies as an injunction; it rewrites existing contracts, creates unilateral cancellation rights, and suspends future contractual payments. Under Commissioner Ferguson’s view, Part II is an injunction because it stops Evolv from “continuing to exercise contracts won through [its] misrepresentations without giving customers an opportunity to withdraw from the contracts.” See Concurring Statement of Comm’r Andrew Ferguson, *In re Evolv Technologies, Inc.*, FTC Matter No. 2323013, at 2 (Nov. 26, 2024) (internal quotation marks omitted). But this view is difficult to square with the Supreme Court’s decision in *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67 (2021). Consider the following scenario: a consumer purchases a new car from a dealership and is allegedly deceived into purchasing an extended warranty and ongoing service contract. Under Commissioner Ferguson’s view, Section 13(b) permits the Commission to undo the consumer’s purchase of the products—via an injunction—due to the dealership’s misrepresentations. I doubt the Supreme Court shares such an expansive view given its clear directive that our Section 13(b) authorizes the Commission to obtain injunctive relief (e.g., a prohibition on *future* misrepresentations by the dealership), not monetary redress for that consumer’s injury stemming from the product purchased.