



July 15, 2021

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Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex D)  
Washington, DC 20580

Re: *In the Matter of MoviePass, Inc.* – Consent Agreement (Commission File No. 192 3000)

Dear Commissioners:

Deceptive marketing and similar forms of commercial dishonesty wreak havoc on the U.S. economy, cheating consumers out of billions of dollars and distorting the efficient allocation of resources as those who hone fraudulent schemes are rewarded and honest competitors punished. Consumer fraud and deceptive marketing are classic market failures.<sup>1</sup> And as consumers continue to gravitate to the internet for their purchases, savvy scammers are able to further exploit consumers while making it nearly impossible for online shoppers to protect themselves against such deception.

Exemplifying this troubling problem is deceptive online negative-option offers, which have become a multibillion-dollar disaster for consumers. Indeed, losses relating to such offers in just 14 cases the FTC pursued over the past decade totaled more than \$1 billion.<sup>2</sup> And despite the efforts of the Commission and state attorneys general, the incidence of deceptive negative-option offers continues to rise.<sup>3</sup> Between 2015 and 2017, consumer complaints about free trials more

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<sup>1</sup> See Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 (4) HARV. L. REV. 661 (1977).

<sup>2</sup> See Better Business Bureau, *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*, at 2 (Dec. 2018), available at [https://www.bbb.org/globalassets/local-bbbs/st-louis-mo-142/st\\_louis\\_mo\\_142/studies/bbb-study-free-trial-offers-and-subscription-traps.pdf](https://www.bbb.org/globalassets/local-bbbs/st-louis-mo-142/st_louis_mo_142/studies/bbb-study-free-trial-offers-and-subscription-traps.pdf).

<sup>3</sup> See Sophia Wang, *One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation*, 26 CORNELL J. L. & PUB. POL. 197, at 200 (Fall 2016).

than doubled.<sup>4</sup> Over that same span, the Better Business Bureau identified nearly 37,000 complaints – the average loss being \$186 per consumer.<sup>5</sup>

Unsurprisingly, in 2016, one consumer survey found that unwanted fees associated with trial offers and automatically renewing subscriptions were the biggest financial complaint of consumers.<sup>6</sup> Corresponding with this consumer dissatisfaction, more than 100 federal class actions have been filed on behalf of consumers complaining about various negative-option terms and conditions since 2014.<sup>7</sup> Further, consumers complaints (very often from senior citizens) concerning negative-option offers are one of the most common types of complaint that TINA.org receives.

Recognizing these realities, and understanding that the central determinant of whether dishonest practices can succeed is the efficacy of law enforcement, in 2010 Congress enacted the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. § 8403, which reads, in pertinent part:

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<sup>8</sup>), 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.

By its terms, there can be no doubt that the MoviePass defendants violated ROSCA based on the allegations in the FTC's complaint.<sup>9</sup> This is so because ROSCA should not be narrowly construed as applying only to material disclosures associated with the mechanics of negative-option transactions. The plain language of the statute makes clear that the rule applies to "all material terms of the transaction," and not some amorphous and undefined subcategory of

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<sup>4</sup> *Id.*

<sup>5</sup> And these numbers are likely low because, *inter alia*, as FTC studies have found, less than 10 percent of fraud victims report their losses. *Id.*

<sup>6</sup> See Rebecca Lake, *Report: Hidden Fees Are #1 Consumer Complaint*, updated June 10, 2021, available at <https://www.mybanktracker.com/money-tips/money/hidden-fees-consumer-complaint-253387>.

<sup>7</sup> See TINA.org's Class-Action Tracker, available at <https://www.truthinadvertising.org/category/class-action-tracker/>.

<sup>8</sup> The Telemarketing Sales Rule 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).

<sup>9</sup> See *In the Matter of MoviePass, Inc., et al.*, No. 192 3000, Complaint, available at [https://www.ftc.gov/system/files/documents/cases/192\\_3000\\_-\\_moviepass\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/192_3000_-_moviepass_complaint.pdf).

material terms. A broad interpretation is consistent with public policy and common sense, while a narrower and unjustified reading of the statute would most certainly mean that a subset of deceptive ROSCA cases will not be covered by the rule.

Indeed, a restrictive interpretation of ROSCA reads an entire clause out of the law, contrary to the canon against superfluity.<sup>10</sup> And such a narrow interpretation results in precisely the kind of strained analysis that the Supreme Court has cautioned against. As the Supreme Court noted, “[t]he problem is a practical one of consumer protection, not dialectics.”<sup>11</sup> Adopting a construction of “all material terms of the transaction” that would categorically exclude any and all material terms that do not precisely pertain to mechanical negative-option features would create an unnecessary loophole in ROSCA.

Moreover, it will further no public policy and instead serve as an unjust shield against potential liability for merchants who deceive consumers about the characteristics of a good or service in order to lure them into a negative option offer if the FTC chooses to adopt a definition of “all material terms of the transaction” that is so narrow that any savvy wrongdoer can bypass the rule simply by ensuring that the deception used to entice consumers into negative-option offers is front loaded in the transaction process.

In this case, the FTC alleges that defendants went to great lengths to ensure that a substantial minority of its customers were precluded from receiving the primary benefit of the bargain that was, no doubt, the motivation for entering into the negative subscription offer with MoviePass in the first place – “unlimited movies.” Indeed, what reasonable consumer would enter into a recurring fee agreement to view unlimited movies knowing that their usage would be severely and arbitrarily throttled? Clearly, unlimited movie viewing was the *sine qua non* for consumers entering into a recurring monthly payment agreement with MoviePass. And because MoviePass deceptively altered the material terms of the transaction, defendants violated ROSCA by failing to disclose “all material terms of the transaction,”<sup>12</sup> and failing to secure consumers’ express informed consent before charging their financial accounts.<sup>13</sup>

While it is true that the FTC has heretofore not pursued ROSCA violations focused on the benefits of the bargain that motivate consumers to enter into negative-option subscriptions, the lack of such enforcement actions does not impact the plain language of the statute or the authority granted by Congress. It is the FTC’s responsibility and duty to hold wrongdoers accountable using the available arrows in its quiver. As such, TINA.org supports the proposed

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<sup>10</sup> See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (“a statute should be interpreted so as not to render one part inoperative.”).

<sup>11</sup> *United States v. Urbuteit*, 335 U.S. 355, 358 (1948). See also *Kordel v. United States*, 335 U.S. 345, 349 (1948) (“[T]here is no canon against using common sense in a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it.”); *United States v. Baker*, 932 F.2d 813, 814-15 (9th Cir. 1991) (following “the Supreme Court’s admonitions . . . that courts generally beware the creation of ‘loopholes’ that have no basis in statutory language.”).

<sup>12</sup> See 15 U.S.C. § 8403(1).

<sup>13</sup> See 15 U.S.C. § 8403(2).

consent agreement in this case, and urges the Commission to utilize ROSCA to the fullest extent authorized by Congress.

Respectfully submitted,



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