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

Office of Commissioner
Melissa Holyoak

Concurring Statement of Commissioner Melissa Holyoak

1661, Inc. d/b/a GOAT, FTC Matter No. 2223016

December 2, 2024

I support today's settlement with 1661, Inc. d/b/a GOAT, an online sneaker and apparel resale platform that allegedly engaged in deceptive and unfair practices related to shipping timeframes and product guarantees, in violation of Section 5 of the FTC Act and the FTC's Mail, Internet, or Telephone Order Merchandise Rule. I write separately to highlight the Commission's use of its unfairness authority in the Complaint and share my views on how the Commission should consider using such authority in the future.

The Complaint alleges that GOAT's customer service practices are unfair because the company failed to implement appropriate procedures to help customers seeking returns and refunds for defective products under its "Buyer Protection Policy".[1] GOAT stated that the purpose of the policy was to ensure that customers receive coverage, support, and protection for products that are "inauthentic," "incorrect," "missing a key feature," or "do[] not match the item description."[2] GOAT required customers who received defective products to work with customer service to initiate a return and obtain a refund.[3] Yet, despite this stated policy, the Complaint alleges that GOAT lacked appropriate customer service procedures. GOAT had no system in place to identify, let alone prioritize, requests made to customer service under the Buyer Protection Policy.[4] Customers could not reach customer service through a dedicated phone line or live chat function.[5] Instead, customers had to submit requests via a generic form on GOAT's website and wait for an email response.[6] And, even when GOAT responded to such requests by email, its standard operating procedures—*e.g.*, rejecting return requests for used or final sale items—allegedly created more obstacles for customers, preventing them from obtaining timely refunds under the policy.[7] In my view, GOAT's alleged customer service practices satisfy the requirements for unfairness under the FTC Act. The Complaint alleges a "substantial injury" to consumers (the inability to return defective products and obtain refunds); it's not reasonably avoidable (customers must rely on GOAT's customer service to initiate defective product returns and process refunds); and it is not outweighed by any countervailing benefits to consumers or competition.[8]

This case is a good example of the Commission's robust enforcement to protect consumers, and how we should consider and appropriately use every tool that Congress has given to us. This

[1] Compl. ¶¶ 60-62.
[2] *Id.* ¶¶ 37-38.
[3] *Id.* ¶ 39.
[4] *See id.* ¶¶ 39-52.
[5] *Id.* ¶ 49.
[6] *Id.* ¶¶ 49-50.
[7] *See id.* ¶¶ 44-52.
[8] *Id.* ¶¶ 60-62; *see also* 15 U.S.C. § 45(n).

includes using our existing consumer protection authorities—consistent with the Commission's constitutional and statutory authority—in new or emerging areas. For example, we must better understand how platforms enforce their terms of service to deny access or services to users or moderate speech about controversial topics.[9] And the settlement with GOAT underscores the existing legal authority the Commission has to prosecute how platforms enforce their terms of service. Platforms employ their own internal procedures when they decide to terminate or deny access to users—not unlike the failed internal procedures of GOAT. A platform's internal procedures can also be a black box, failing to provide users with adequate information about alleged violations of the terms of service, the platform's determination, and the user's purported "options" to challenge or appeal those decisions.[10] Such actions have serious consequences for consumers,[11] and in some cases, may be contrary to consumers' reasonable expectations and constitute an unfair practice.[12] It is critical to do more to understand the role that platforms play in controlling access to the digital commons.[13] And a comprehensive approach to *behavioral* remedies—using our consumer protection and antitrust authorities—can reduce big tech's ability to unlawfully remove Americans off their platforms.[14]

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[9] *See* Remarks of Commissioner Melissa Holyoak at the Competitive Enterprise Institute's Annual Summit, *Rediscovering Adam Smith: An Inquiry in the Rule of Law, Competition, and the Future of the Federal Trade Commission*, at 12-13 & n.67 (May 31, 2024) ("I am concerned about how technology or financial services companies using opaque terms and conditions to employ subjective evaluations of certain consumer conduct that are inconsistent with consumers' reasonable expectations . . . . The effect of . . . deplatforming can have the effect of reducing those consumers to second class citizens. I believe it is critical to do more to understand the role that platforms play in controlling access to the digital commons. In a time when cancel culture is rampant—including in corporate America—such concerns are real. To the extent we can wield existing enforcement authorities to combat some of these problems, we should do so aggressively."), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-cei.pdf; Concurring and Dissenting Statement of Comm'r Melissa Holyoak, *Social Media and Video Streaming Services Staff Report*, FTC Matter No. P205402, at 1 (Sept. 19, 2024) ("What these companies deem 'harmful,' 'bias[ed],' or 'erro[neous],' and their approach to such content, have significant consequences. When companies suppress dissenting views on controversial topics to avoid harm or otherwise protect users online, they effectively prevent the clash of competing information and diverse views. . . . As history has shown, limiting debate about contested topics to prevent harm and promote safety can backfire, reducing our freedom and undermining our agency as citizens."), https://www.ftc.gov/system/files/ftc_gov/pdf/commissionerholyoak -statement-social-media-6b.pdf.

[10] *See, e.g.*, U.S. Senate Committee on Commerce, Science, and Transportation, *Weaponizing Terms of Service: How Online Service Providers Use Broad Policies to Silence Conservatives*, at viii (Apr. 24, 2024) ("Online Service Providers employ unfair procedures when they terminate or deny services based on a violation of the terms of service: a. Although Online Service Providers sometimes specify which terms of service provision a user violated, they do not explain how the user violated that provision. Therefore, even when there may technically be an avenue for users to challenge terminations or denials, there is no effective way to do so. b. The Online Service Providers usually do not provide advance notice of service and interrupting the users' operations."), https://www.commerce.senate.gov/services/files/253BF7A3-EA7E-41B2-85AA-6404BF484870.

[11] *Supra* note 9.

[12] *See, e.g.*, *Orkin Exterminating Co. v. FTC.*, 849 F.2d 1354, 1365-66 (11th Cir. 1988) (evaluation turns on whether consumers had a free and informed choice that enabled them to anticipate and avoid the injury); *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1066 (1984) (whether an injury is reasonably avoidable depends, in part, on whether "people know the physical steps to take in order to prevent" injury).

[13] Remarks of Commissioner Melissa Holyoak, *supra* note 9, at 13.

[14] There is no question that the Commission should use all its available enforcement tools to address deplatforming and censorship. Commissioner Ferguson appropriately highlights the myriad calls for comprehensive use of the antitrust laws to address these issues. But given the systematic problems facing Big Tech, we must exhaust all tools in our approach to solving the problems our country faces. Antitrust and consumer protection are complements, not

substitutes. Indeed, we should leverage the Commission's consumer protection authorities—an approach that aligns with the prior Trump administration's suggestions. *See, e.g.*, *Remarks by President Trump Announcing an Executive Order on Preventing Online Censorship* (May 28, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-announcing-executive-order-preventing-online-censorship/ ("My executive order further instructs the [FTC] to prohibit social media companies from engaging in any deceptive acts or practices affecting commerce. This authority resides in Section 5 of the Federal Trade Commission Act. I think you know it pretty well."); *see also* Exec. Order No. 13,925, 85 Fed. Reg. 34079, 34082, § 4 (Federal Review of Unfair or Deceptive Acts or Practices) ("The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code."). Unfortunately, the Commission had not fully effectuated President-elect Trump's intent before the January 2021 change in administrations—and the Khan FTC has run in the opposite direction when it comes to using consumer protection authorities relative to free speech. *See, e.g.*, Eireann Van Natta, *Biden-Harris FTC Chair Lina Khan 'Weaponized' Agency Against Elon Musk, House Report Says*, The Daily Caller (Oct. 28, 2024), https://dailycaller.com/2024/10/28/lina-khan-elon-musk-ftc-house-judiciary-committee/. And while I agree with the many calls to explore *structural* remedies, the antitrust agencies have spent substantial resources for years and are investigating and litigating against the market power large technology companies wield. *See, e.g.*, Press Release, *Justice Department Sues Monopolist Google For Violating Antitrust Laws*, Dep't of Justice (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws; Press Release, *FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization. Such efforts are bearing fruit now, and this deployment of resources should not change in the next administration. But because structural remedies for antitrust violations may not comprehensively address *behavioral* conduct relative to censorship, we should not reflexively assume that structural remedies will solve the problem. For example, one may hope that splitting Facebook into four new platforms would result in at least one of those platforms competing for consumers on a pro free-speech basis. But absent some legal reason to change their behavior when it comes to content moderation and deplatforming, it is likely that redistributing the employees of Meta into these four new Facebooks in Menlo Park will not lessen the animus toward conservatives or change their treatment of consumers' disparate views. *See, e.g.*, Arriana McLymore, *Workers at several large US tech companies overwhelmingly back Kamala Harris, data shows*, Reuters (Sept. 9, 2024) (explaining: "Meta employees have donated $25,000 to Trump compared with $835,000 to Harris," and that "[e]mployees at Alphabet and its subsidiaries, which includes Google, and their family members have donated $2.16 million so far to Harris' campaign, nearly 40 times as much as Trump has received"), https://www.reuters.com/world/us/workers-several-large-us-tech-companies-overwhelmingly-back-kamala-harris-data-2024-09-09/. At bottom, limiting our range of options to structural remedies may foreclose other potentially salutary solutions to Big Tech's treatment of consumers' disparate views.