UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION AT SANTA ANA

HONORABLE MÓNICA RAMÍREZ ALMADANI, JUDGE PRESIDING

CERTIFIED TRANSCRIPT

FEDERAL TRADE COMMISSION, PLAINTIFF, vs. DAVE, INC., et al., DEFENDANTS.	SACV NO. 24-09566-MRA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SANTA ANA, CALIFORNIA

MONDAY, JUNE 30, 2025

2:32 P.M.

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SANTA ANA, CALIFORNIA; MONDAY, JUNE 30, 2025; 2:32 P.M.

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THE CLERK: Calling Calendar Item No. 1, CV 24-9566, Federal Trade Commission v. Dave, Inc.

Counsel, please state your appearances for the record, beginning with the plaintiff.

MS. WILLIAMS: Good afternoon, Your Honor.

Sarah Williams for the plaintiff, United States of America.

THE COURT: Good afternoon.

MS. BAKER: Good afternoon, Your Honor.

Allyson Baker for Dave.

MR. BROWN: Tom Brown, Your Honor, for Defendant Jason Wilk.

02:32:09 MS. ARISTEI: Joan Aristei. I'm the chief legal officer for Dave.

THE COURT: Good afternoon, everyone. You may be seated.

Before the Court is defendants' motion to dismiss

02:32:24 the first-amended complaint. Defendant raises numerous grounds for dismissal of the Government's claims. However, my tentative ruling is to deny the motion.

The Government's first-amended complaint contains detailed factual allegations explaining how Dave mislead

02:32:47 consumers by offering an instant cash advance of up to $500

without hidden fees but concealing the consumers almost never received the $500 amount; that cash would only be received instantly with a small fee and that additional fees, including a recurring monthly membership fee and tips apply.

I do want to hear argument today. As I said, this is my tentative ruling.

I will hear, first, from defendant.

MS. BAKER: Thank you, Your Honor.

If may approach?

THE COURT: Yes.

(Pause.)

MS. BAKER: Thank you.

Good afternoon, Your Honor. I'm Allyson Baker, on behalf of Dave. My colleague Tom Brown is going to be speaking on behalf of Mr. Wilk.

I wanted to, first of all, explain to Your Honor a number of reasons why we believe this complaint should be dismissed in its entirety. First of all, there's a procedural flaw with the complaint. The Department of Justice was substituted in as a plaintiff impermissibly, and I want to kind of go back and give Your Honor a little bit of that history.

So on November 5th of 2024, the complaint by the Federal Trade Commission was brought against Dave and only

Dave.

Between November 5th, 2024 and December 30th, 2024, when this first amended complaint that's in front of Your Honor today was filed, as I understand it, there's a process in place by which if the Federal Trade Commission seeks to impose civil money penalties, it gives the Department of Justice the first right of refusal to either take the case or not take the case.

Here, the Department of Justice took the case, and they filed what they call an amended complaint on December 30th, and they impermissibly filed that complaint procedurally. What they should have done is dismissed the November 5th complaint and re-filed. And I want to explain why.

There is no procedural rule that allows for the Department of Justice to have done what it did. Rule 15 does not allow for it. They reference Rule 17, actual party of interest in their papers, but Rule 17 doesn't provide for that. Rule 17, as Your Honor knows, does not have a procedure for substituting in a plaintiff in this situation.

THE COURT: But the rule is clear that the real party-in-interest, correct, is the party that is authorized to pursue the claim. So why is the United States here not authorized to pursue this claim?

MS. BAKER: It's not -- the question isn't whether

02:35:46 or not the United States is authorized to pursue this claim, respectfully. The question is whether or not they are pursuing this claim under any cognizable rule.

So Rule 17 says: Real party-in-interest

02:35:58 designation and general --

(Court Reporter requests clarification for the record.)

MS. BAKER: Absolutely.

-- the following may sue in their own names

02:36:04 without joining the person for whose benefit the action is brought, an executor, an administrator, a guardian, a bailee, a trustee, a party with whom or in whose name a contract has been made for another's benefit and a party authorized by statute.

02:36:19 But that's not the situation here. There isn't any real party-in-interest here that is contemplated by Rule 17. There's no mistake here. There's no situation where subsequent to November 5th the Government learned that it was indeed the real party-in-interest.

02:36:36 Now, I want to point something out, because I think this is really an important point that the Government makes in its brief about this procedural point. They say that there is no prejudice and thus because there's no prejudice, no harm, no foul. But that's not correct. There

02:36:51 is prejudice. Indeed, the amended complaint that was filed

02:36:54 on December 30th names a new party and that party, Mr. Wilk, from whose counsel you'll hear from in a few minutes, Your Honor, had no notice that this complaint was going to be filed previously. So it isn't the case that this is a 02:37:09 prejudice-free situation. And there's no procedural basis for doing it. So that is as a matter of course, Your Honor should dismiss this complaint. But there's a number of other reasons why Your Honor, also, should dismiss this complaint, and I want to get to those.

02:37:22 THE COURT: How was your client prejudiced?

MR. BROWN: Well, my client is prejudiced by a few things. First of all, on November 5th, 2024, my client believed that the Federal Trade Commission was pursuing this case. The Department of Justice and the Federal Trade 02:37:36 Commission could have brought civil money penalties at any point in time. This statute, the statutory provision that allows them to pursue that, is not new. They chose to not only pursue civil money penalties after the fact but to have a new party step in and be substituted.

02:37:53 And so sitting here and saying how is my client prejudiced, my client is prejudiced because there's --

(Court Reporter requests clarification for the record.)

MR. BROWN: -- there's a different party that's 02:38:00 prosecuting the case. There are civil money penalties that

are now imposed and its CEO is now a named party. So those are all the tangible ways that it's prejudiced, but the rules themselves -- the rules themselves do not contemplate this situation.

And I want to turn to the material claims in Count 3, Count 4 and Count 5 which concern the Restore Online Shoppers Confidence Act, ROSCA, and those claims also should be dismissed.

So Count 3 of the complaint talks about the fact that Dave and Mr. Wilk failed to provide clear and conspicuous disclosures. And then it enumerates -- and I'm reading from page 36, paragraph 106 of the complaint, Your Honor. And then it enumerates four specific material transaction terms that the complaint alleges were not disclosed and that ROSCA contemplates being disclosed. The problem is that there is no statutory basis to assert that any of these first three are material terms, and there is no precedent -- there is no precedent for this expanded reading of ROSCA.

So, first, let me -- let me go through each of what is alleged. The very first allegation claims that defendant offers cash advances at or near the amounts advertised to very few consumers and do not offer any cash advances to some customers. And the Government claims and contends that that's a material term of a transaction that's

02:39:50 covered by ROSCA. And Your Honor knows ROSCA seeks to address the way a negative option is offered to consumers.

Now, we're not conceding that there's a negative option in this instance. But for purposes of today's 02:40:05 hearing, I want to address, specifically, the allegations in Count 3, Count 4 and Count 5 which presume that there is a negative option under ROSCA.

So, first, ROSCA itself -- and I'm looking at 15 U.S.C. Section 8403, subpart 1 -- makes it very clear ROSCA 02:40:26 requires that text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information. Now, Your Honor may say, *Well, what is the transaction?*

The transaction itself is the negative option or 02:40:42 the fact of the subscription. So what ROSCA seeks to govern here 15 U.S.C. 8403, Section 1, is the material -- a disclosure of those terms that inform the subscription. That's very important, because Count 3 expands ROSCA beyond recognition. The terms that are alleged in Count 3 -- and, 02:41:07 specifically, I'm looking at Paragraph 106A, B and C -- and I'll come back to D in a moment. None of those terms in A, B and C concern the offering of a subscription. And Your Honor need look no further than precedent in this circuit from the last 18 months. So precedent from this 02:41:30 circuit in the last 18 months, three are three specific

cases that have all addressed ROSCA claims and all have addressed this question of what a material term is. And none of those cases, none of those cases when they've looked at this question of what material term is, have gone beyond the immediate subscription event itself. And I want to talk about each of those cases in due course, if I may.

So, first, there is an *Adobe* case that was decided this past May, and it was decided in the Northern District of California. And in that case, in that case, there were three different material terms that were at issue: An annual paid monthly plan, the fees that were associated with canceling that plan and the mechanics of how that plan was cancelled. Those were the three material terms. Those were the three material terms. Those are not the terms that are being alleged in Count 3. And in that case, the Court found that one of those terms was adequately disclosed and so dismissed a portion of that claim.

There is no --

THE COURT: You would agree that the operative phrase here is "all material terms of the transaction," correct?

MS. BAKER: So --

THE COURT: Not all material terms of the negative option feature, correct?

MS. BAKER: The negative option feature,

Your Honor, is the transaction.

So let me respond to your question. What the Federal Trade Commission and now the Department of Justice have essentially done is they have said that every material term associated with a product -- the product called "ExtraCash" -- is part and parcel of the subscription event. That's what --

THE COURT: But isn't that based on the specific facts here and the flow of this specific app? A consumer seeking ExtraCash must connect their bank account, correct, to be considered?

MS. BAKER: Your Honor, what your question presupposes is that ExtraCash and the subscription itself are one and the same. And that's not correct.

And let me explain why: First of all, there are consumers who subscribe who never get ExtraCash advances and never want them and never choose them. They're offered them and they decline them, but they subscribe.

Number two, ExtraCash is not the only product that Dave offers. You can subscribe to Dave and get a bank account product. You can subscribe to Dave and get what's called a "Side Hustle," which is basically the opportunity -- a product that allows you to see other job options, like surveys, for example. You can subscribe to Dave and participate in its Goal Account which allows

consumers to save. None of those things, none of those products are mentioned in this complaint. So ExtraCash and the subscription event are not one and the same in this case.

THE COURT: So are you saying that you don't need to subscribe in order to obtain ExtraCash?

MS. BAKER: Your Honor, the question of whether you need to subscribe to obtain ExtraCash, there are -- one of the problems with the complaint Your Honor gets to is that the complaint lacks specificity as to time.

THE COURT: But I'm asking you a factual question.

MS. BAKER: I understand.

So the complaint itself alleges that, but there are, as I understand it, Your Honor -- and I want to triple-check this -- but as I understand it, Your Honor, there are discreet moments -- there have been discreet moments in time when it's been possible to do that without -- without paying --

THE COURT: But in general that's how the Government alleges that the app works, correct?

MS. BAKER: Well, the Government's allegations about how the app works sort of say that, and I want to go to -- I want to go to paragraph 70 in the complaint.

(Pause.)

MS. BAKER: Is Your Honor there?

02:46:31 THE COURT: You can proceed.

MS. BAKER: Of course.

So it says that Dave charges consumers who connect their bank accounts to its app an automatically recurring 02:46:43 monthly fee. It does not allow users to get a cash advance without first enrolling in this automatically recurring charge. But what Dave -- what isn't alleged in this complaint is that a consumer has to pay a membership fee to get that charge.

02:46:57 But more importantly, more importantly, Count 3 misconstrues -- misconstrues the way that the product works. And I want to give Your Honor an analogy that I think is very important. So we talk about the *Adobe* case. I want to talk a bit about the *Prime* case and the *Doxo* case.

02:47:14 Each of those cases involved a ROSCA claim and material terms relating to that ROSCA claim that only concerned the mechanics of the subscription itself. So, for example, we talked about *Adobe*. Now, if you were to extend the *Adobe* complaint and have it be analogized to 02:47:41 Count 3 in this case, what would have been alleged in *Adobe* is not just the mechanics of the subscription itself, but the way that the product works, the way the PDF function works. That's not alleged in that complaint. That's not part of the material terms of ROSCA for a reason, because 02:47:58 that's not what ROSCA contemplates.

02:48:00 And the transaction language that Your Honor is referencing in the statute, the transaction language that Your Honor is referencing in the statute does not, does not contemplate every single product or feature associated with
02:48:14 a company that offers a subscription. And, you know, you need look no further than the *Prime* case, the *Amazon* case out of the Western District of Washington.

So the three material terms in that case were the free trial and whether -- the fact that it automatically
02:48:31 converted into a paid subscription, the monthly costs of that subscription and the fact that consumers were enrolling in it at all. That Court did not examine what happens if you get a Prime subscription and, you know, how are your products delivered to your house? What's the timeline
02:48:50 around that. Those components of Prime and all of the features and all of the products and services that you can get from the Amazon Prime platform are not addressed in that ROSCA analysis.

So when the Court found that those three material
02:49:04 terms were not adequately disclosed, those terms were very carefully hewed -- hewed very carefully and very closely to the specific enrollment function. That's markedly different, that's markedly different than what is in Count 3.

02:49:19 The *Doxo* case is another example. The *Doxo* case,

which was decided in the Western District of Washington in March of this year, there, too, the material terms that were at issue were material terms that were specific to the subscription itself. And in that case, it had to do with whether or not a consumer even knew that there was a subscription or that they were paying for the subscription. That's not -- that's very, very different than a situation where a product, a single product that a company offers in connection with other products and other features, that that one product becomes the singular focus of a ROSCA claim. That's not what ROSCA does. ROSCA is not the same thing as Section 5 of the Federal Trade Commission Act.

And what the Government is doing here is they are mixing and matching -- they're mixing and matching deception in ROSCA and that's not how the law works. And you need look no further, of course, than the actual click-to-cancel rule which has been in place, as Your Honor knows, since January of this year. And that makes it very clear. When it talks about the reasons for that rule having been written, one of the things that that rule says in the advance notice of rulemaking that ROSCA does not prescribe specific steps for how marketers have to follow or comply with its provisions. So it acknowledges that ROSCA doesn't go as far as Count 3 in this complaint.

The equivalent of Count 3 in this complaint is,

essentially, a situation where if you were, for example, looking at something like AAA and you subscribe to AAA to fix your car every year and the subscription component around AAA wasn't the only point of focus for ROSCA. It was whether or not somebody came and they fixed your tire if you needed it, how soon you could get someone on the phone, all of the different components that AAA offers, the nature of their insurance.

Similarly, for Costco. If you walked into Costco, you have to have a subscription. The components of that subscription do not subsequently also address a concern whether or not the product that you're buying is really organic or the nature of the warranty associated with the furniture you buy there. That's what Count 3 does here. Count 3 goes well beyond the statute. It goes well beyond any precedent in this circuit or anywhere else.

And again, Your Honor, *Adobe*, *Amazon* and *Doxo* are all examples of material terms that are very specific to the point of enrollment in a subscription, and they do not talk about any of the features or products associated with the larger non-subscription related aspects of the company. And that's the case here, too. So Count 3 should be dismissed.

Now --

THE COURT: Let me ask you a question with respect to this count, so this is clear and conspicuous disclosures

of all material terms.

MS. BAKER: Yes.

THE COURT: You argue that a customer's decision to leave a tip has no bearing on their eligibility for cash advance; is that correct?

MS. BAKER: Absolutely, correct.

THE COURT: But you -- would you agree that it affects the ultimate amount that they receive?

MS. BAKER: No, it does not.

THE COURT: It does not affect it?

MS. BAKER: It does not affect the amount. No, Your Honor.

THE COURT: And how is that?

MS. BAKER: Your Honor, if I may direct your attention to paragraph 46 of the complaint, please, which is page 19. And it's the App Screenshot 4.

So this screenshot is a screenshot that the Government includes in its complaint. And it's a screenshot that shows -- or the Government contends shows -- that this is the tipping dynamic that a customer sees. And at the very top of the screen it says "Your advance is on its way!," which means that by the time the consumer encounters this tip screen, he or she has already received the amount of their advance. They already know what their advance is.

So the mechanism of tipping is not connected to

how much a consumer receives, or is eligible to receive, or can receive in an advance. And, indeed, it makes it very clear right, because right under where it says "Your advance is on its way!," it says:

"Your optional tip helps us stay in business. We also provide a meal for every percentage you tip."

And then there's an option there to tip, but it's totally optional and it's not tethered to the amount.

THE COURT: Do they have to agree to the membership before they get to this screenshot?

MS. BAKER: So are you -- is Your Honor asking if they have to -- if they have to become a member and allow for access to their bank account to understand the amount of the advance --

THE COURT: To be considered for the advance cash.

MS. BAKER: -- in the flow?

That's much earlier in the flow before you get to the section where you have an advance. Yes, Your Honor, but it's not -- it's not connected. The amount of the advance has nothing to do with whether you tip, how much you tip. It's totally optional to tip or not tip. And by the way, that's a historic fact as well, because the company doesn't have a tipping model anymore.

THE COURT: Counsel, you have 10 more minutes, if

you'd like to address the other --

MS. BAKER: I would, Your Honor.

So I want to go to Count 4. Count 4 talks about -- and before I ask, 10 minutes and then my colleague can speak about Mr. Wilk?

THE COURT: Briefly, yes.

MS. BAKER: Okay. Okay.

Count 4 talks about the need to have billing must obtain express informed consent before charging consumers. And for all the reasons that we've explained, Count 3 which doesn't -- which enumerates a number of material terms which, by the way, are disclosed adequately but they're also not ROSCA specific. Hereto, Count 4 should be dismissed because clearly consumers are aware of the fact of the subscription and the fact that the subscription is -- I want to direct your attention, specifically, to paragraph 27 -- the App Screenshot 3.

So the fact that the subscription starts and how you subscribe and what it says is that "Dave charges a membership fee of $1 per month to connect your bank." So consumers understand that they are paying a dollar a month before they subscribe. And to the extent there's any term in Count 3 that is arguably material to the subscription event, it's only that subpart D. And, indeed, that's what concerns Count 4 as well.

So consumers are very well aware of the mechanics of what's involved; that there's a one-dollar fee associated with connecting your bank account before you click "Connect." And, indeed, you can see here --

(Court Reporter requests clarification for the record.)

MS. BAKER: Sure. And, indeed, you can see that where it says "Dave charges a membership fee of $1 per month to connect your bank," that is not only, you know, a fact that a consumer sees before they click "Connect," but it's a fact that is rendered conspicuous. And it's conspicuous because, one, it's above that green bar and, two -- and I have a color copy of this complaint -- you see that the "See our FAQs" is right next to that frame, so it pulls it out. So it's not something that just blends into the background.

So Count 4 should also be dismissed.

Now, Count 5, which talks about simple cancellation and the need to have simple cancellation and, specifically, what it's referencing is, again, ROSCA itself, 15 U.S.C. Section 8403, subpart 3, which says that you have to provide a simple mechanism for a consumer to stop recurring charges from being placed on the consumer's credit card.

THE COURT: I'm just going to slow you down for a second.

Going back to Count 4 --

MS. BAKER: Sure.

THE COURT: -- these disclosures that you describe, is there any language -- and the way I understand the Government's complaint is that there isn't any language informing a consumer that clicking these green buttons constitutes assenting to the terms and conditions of the agreement?

MS. BAKER: Your Honor, I don't believe that that's correct. I can't -- what you've just described is not --

THE COURT: Why is that a plausible --

MS. BAKER: Well, I'm just looking at the App Screenshot 3 in their complaint.

THE COURT: I'm looking at it, too.

MS. BAKER: Yes. And it says here: "Dave charges a membership fee of $1 per month."

So, first of all, at the very top, it says: "Connect your primary bank." And then it explains: "Connect the bank account you get paid to and get approved for the higher amount." And then it has different bars here: "Take interest-free advances. Get money instantly."

And then it says: "Dave charges a membership fee of $1 per month to connect your bank."

And then it says: "Questions? See our FAQs" in

blue and then, it says "Connect account."

So, presumably, where it says "Connect your primary bank" and then it says it charges $1 to connect to your primary bank and then it says "Connect an account," that if you were to connect your account, you would be charged a dollar. I don't know how -- I mean, that seems pretty apparent from the way that this works.

Top of the screenshot, middle part, bottom part.

THE COURT: Do you agree that ROSCA requires a consumer's express informed consent and you believe this is sufficient at the motion to dismiss stage?

MS. BAKER: Absolutely, Your Honor. It is sufficient. And all of Count 3, including subpart D and Count 4 should be dismissed, based on this screenshot alone.

And I want to just talk about Count 5, which is simple cancellation. So the Department of Justice, the Government, alleges that Dave failed to provide simple mechanisms to stop recurring charges.

Now, its own complaint undermines that fact, because you need look no further than paragraph 41 which talks about the fact that thousands -- it alleges, at least -- that thousands of consumers contact Dave each month to cancel their account. So the mechanism must be simple enough to enable that.

THE COURT: But isn't the allegation that they're

03:00:13 contacting Dave because they can't cancel their accounts? Is that -- let me take a closer look at -- you said paragraph 41?

MS. BAKER: Yes, Your Honor.

03:00:39 THE COURT: So this paragraph alleges that thousands of consumers contact Dave to cancel their accounts because the offered advance amounts are smaller than promised or because Dave offers them nothing, not to stop recurring charges.

03:01:01 MS. BAKER: Well, if they're canceling their accounts, then that's what that means. It stops recurring charges.

THE COURT: But I -- the way I understand their claim is that it's not simple to cancel the recurring

03:01:13 charges.

MS. BAKER: That's what they claim, but they don't actually explain -- they do have to do something. They can't just make a conclusory statement in their complaint. Even under *Iqbal Twombly*, they cannot do that. They don't

03:01:27 actually explain what is so not simple about it. Let me give you an example. So they cite paragraph 77 and they say that between August of 2021 and November of 2022, Dave did, quote: "Not allow any consumers to stop the recurring charge through an in-app process, if they had also opened a

03:01:46 Dave bank account."

So that's one of the paragraphs they cite. But here's the problem with that paragraph. What they don't cite and what they don't put in the complaint is the fact of whether or not a consumer was ever in this category paying a recurring charge in the first instance. So they don't allege in paragraph 77 that a consumer was paying a recurring charge and they weren't able to stop paying that recurring charge between August of 2021 and November of '22. So that's a problem with their -- with their Count 5.

So you look at paragraph 41. You look at the flawed paragraph 77.

They talk about in paragraph 84, nine steps that they claim involve cancellation, but they don't explain what those nine steps are or why any of those steps renders this not simple. And you can look at a couple of different cases to get an example of what a non --

THE COURT: You have three minutes, Counsel.

MS. BAKER: Thank you, Your Honor.

You can look at a couple of different cases to get an example of what non-simple or what would offend ROSCA --

THE COURT: I'm telling you I'm having a hard time understanding how four, five paragraphs of allegations here are insufficient to plausibly allege this claim.

MS. BAKER: Well, you can have many paragraphs, but just because the paragraphs are on the paper doesn't

mean that they allege --

THE COURT: I understand that, Counsel.

MS. BAKER: I know, Your Honor.

THE COURT: They are pretty specific.

MS. BAKER: Your Honor, respectfully, I don't think that they adequately show that this isn't -- that is a not simple -- I'm using double negatives -- that this is a not simple process.

And Your Honor can look at the *Amazon* case. And, for example, in the *Amazon* case, the motion to dismiss, the complaint alleged that the cancellation flow required consumers to click six times and go through four screens seeking to entice consumers not to cancel the subscription or merely pause the subscription. That's nowhere here.

You can look at the *U.S. versus MyLife* case where it talked about the fact that consumers could only cancel using the phone; that they had no other way to do that -- that is not in this complaint -- and that when they called, they got a six-part retention sales script thrown at them. That's not in this complaint. The only allegation in this complaint is that people have to cancel. They want to cancel and they can cancel. And, indeed, the complaint itself acknowledges that. It says thousands cancel every month.

THE COURT: But not through the app. That's the

allegation, the in-app process for users --

MS. BAKER: Well, you're talking about paragraph --

(Overtalking: Unable to report.)

THE COURT: -- it's not simple, but let's move on. You have one minute.

MS. BAKER: Yeah. Paragraph 77 is -- it does not allege that consumers are paying recurring fees. That's very important, Your Honor. That's what I think Your Honor is referencing.

Your Honor, I understand that you've read our papers. We, obviously, have a number of other arguments.

I'm here if Your Honor has any other questions, but I think at least as of now, unless I have the ability to rebut the Government, I will let my colleague speak about Mr. Wilk.

THE COURT: Yes. Let me hear from your colleague.

MS. BAKER: Thank you.

MR. BROWN: Thank you, Your Honor.

I join in Ms. Baker's arguments regarding Section 5 and ROSCA. To the extent that the Court has additional questions, I'm available to answer.

And I think, in particular, it's important to note that paragraph 77 does not allege -- and nowhere in fact does the complaint allege -- that there wasn't a simple

mechanism available to consumers to cancel or pause the $1 subscription. The language in paragraph 77 has been carefully chosen in that regard.

But I'm, obviously, here talking about Mr. Wilk. Again, I think the procedural issues here are important. He was not named as a defendant when the complaint was originally filed. An answer was provided. At that point, it's not proper for him to be -- to simply be added without the Government seeking leave. And so we believe that the entire complaint should be dismissed but at the very least that he should be dismissed.

THE COURT: Why is that? Why can't the Government amend its complaint and add your client as a defendant?

MR. BROWN: Well, we had answered.

THE COURT: Another defendant had answered.

MR. BROWN: Apologies, Your Honor.

Let's get to Mr. Wilk's connection --

THE COURT: Your main claim is that the claims against your client are time-barred; is that correct?

MR. BROWN: Well, it's difficult -- I mean, so this is part of the challenge associated with the filing of the amended complaint, right? So the complaint doesn't specify the time period that is allegedly covered, particularly with respect to Mr. Wilk. And there was no tolling agreement entered as between Mr. Wilk and the

Government, dating back to the time that the investigation began. And so, yes, that is one dimension of the prejudice and confusion.

And then with regard to his connection to the allegations in the complaint, as we pointed out, it's not sufficient as a matter of law to simply rely on general corporate governance in his position as a shareholder.

The Government points, in response to that, to four paragraphs, essentially, paragraph 40, an internal survey related to complaints that the company had received related to the amount of money that the company had received.

Paragraph 43 alleges that Mr. Wilk received a presentation related to screens that present the express fee and then recounts a recommendation that the company had not adopted paragraph 69 which relates to an allegation related to Mr. Wilk's views about the experiments related to the screen showing tips and then paragraph 73 which recount various consumer complaints related to the one-dollar fee.

None of those paragraphs lay out the level of involvement or control in the specifics associated with either of those paragraphs or anything having to do with the app that would tie Mr. Wilk to the particular decisions. And I think that the contrast is sort of best laid out by looking at the cases on which the Government -- to which the

Government points but doesn't discuss in its opposition brief.

So *FTC versus American Standard Credit*, 874 F.Supp. 1080, beyond having an economic interest and control in the corporate governance sense, quote:

The individual defendants formulated, reviewed, approved, implemented and disseminated the company's marketing policies and procedures. One of the individual defendants is marketing director of ASCS, implemented the company's marketing policies and procedures and monitored the marketing activities of the third-party marketers for at least nine months. That person also entered into the contract that was the basis of the claim.

FTC versus Publishing Clearing House, not to be confused with Publisher's Clearing House. The individual defendant filed the corporate defendant's business license at the direction of someone she knew was facing criminal charges concerning his telemarketing activities. She had worked as a solicitor for the prior company which had closed down due to a criminal fraud investigation, and she signed the contract that was the basis for the marketing.

FTC versus Network Services Depot, 617 F.3d 1127, that particular case arose out of an investment scam. Network Services sold the opportunity to invest in Internet kiosks, and it contacted with somebody to install them. The

FTC sued among others the owner and senior executive of Network Services. And the District Court concluded, and the Ninth Circuit agreed, that those two people knew of the scheme; that they knew that their business partner had made unreasonable projections; that their business partner had overestimated the number of kiosks that it made and that they knew from joint customers that kiosks that their business partner had claimed to install had not been installed. And indeed, the District Court concluded and the Ninth Circuit agreed that at least one of the individuals had actively been complicit in concealing the non-installation of kiosks.

And then, *U.S. versus MyLife*, again, beyond ownership and control, the complaint alleged the company's creator and principal director had been responsible for overall direction and business strategies, had directed billing, marketing, advertising and subscription practices and personally marketed the product.

THE COURT: Is it your position that the first-amended complaint does not allege any active involvement by your client?

MR. BROWN: I think it does not contain the level of allegations that would permit a jury to rule that he had the requisite knowledge and participation --

THE COURT: The jury.

03:11:27 MR. BROWN: Well, that's the standard.

THE COURT: At this point, it's a motion to dismiss the allegations --

(Overtalking: Unable to report.)

03:11:31 MR. BROWN: Well, 12(b)(6), of course, points to is it sufficient for a -- are the facts sufficient to support a legal judgment? And no, I don't believe that the complaint sets forth facts that --

(Overtalking: Unable to report.)

03:11:40 THE COURT: -- or plausible claim.

MR. BROWN: And I don't -- there is no case on which the Government relies which supports that conclusion. And, again -- I mean, I can --

Fifth, *U.S. versus Stratics Networks*, since I've

03:11:55 talked about four of them, I might as well finish.

THE COURT: I'm hearing your disagreement and that there are clearly factual disputes.

(Overtalking: Unable to report.)

MR. BROWN: No, no. My point is not a factual

03:12:02 dispute, Your Honor. And I apologize for interrupting.

My point is that the complaint does not contain factual allegations that support a legal conclusion that he controlled --

THE COURT: But you're not saying it doesn't

03:12:17 contain any allegations of active involvement?

MR. BROWN: I'm saying that it does not contain sufficient allegations to support a legal conclusion that he controlled or directed sufficient to have individual responsibility -- that is correct -- juxtapose against the kind of allegations that exists in other complaints where beyond both ownership and control in the governance sense that were necessary for the courts in those cases to reach a conclusion that the individuals were appropriately defendants in those cases. And I would be curious, if the Court -- if the Department wants to identify what they think is their single best case, well, let's parse it and see if it supports the conclusion, but they don't -- other than selectively usurping them in the complaint, they don't discuss any -- I mean, in their opposition, they don't discuss any of them.

THE COURT: Thank you, Counsel.

Is there anything further?

MR. BROWN: That's it.

THE COURT: I'll hear from the Government.

(Pause.)

THE COURT: Counsel, why don't we start with the allegations or claims against Mr. Wilk and your argument as to why the first amended complaint plausibly alleges claims against Mr. Wilk.

MS. WILLIAMS: Yes, Your Honor.

03:13:46 One of the most important paragraphs in the first-amended complaint with respect to Mr. Wilk is paragraph 10. That's the paragraph that describes his role. It talks about the fact that he served as CEO since 2016. 03:14:00 He's a cofounder of the company, so there's really not a lot of mystery as to the time that he's been with the company. That is clearly alleged. It also alleges that he directs decisions for Dave's operations, including the admittable acts, digital content and design.

03:14:16 So the complaint is alleging that Mr. Wilk has made the determinations in the mobile app design decisions that are going throughout the allegations. Going through the complaint, you can find Mr. Wilk specifically called out in some places, such as his decision regarding tipping, but 03:14:35 you also found allegations -- find allegations against both defendants, the "defendants" plural and that's a perfectly acceptable way to plead a complaint to have plural defendants.

Ms. Baker asked for the most helpful case on point 03:14:52 here, the case I would first point to, although there are many as *Amazon*. *Amazon* has a good discussion of individual liability applying Ninth Circuit law.

And under that standard, it's clear that at the motion-to-dismiss stage, Mr. Wilk is an appropriate 03:15:13 defendant.

THE COURT: Both defendants have argued that the first-amended complaint here is improper, because United States improperly substituted itself in the case and then there was -- Mr. Wilk was added to the case.

What is your position on that?

MS. WILLIAMS: Rule 15(a)(1) allows the amendment. The --

(Court Reporter requests clarification for the record.)

MS. WILLIAMS: I apologize. Rule 15(a)(1) allows the amendment. This is still an amendment as a matter of course. Neither defendant has ever answered the complaint. That's why we're here today on a motion to dismiss. So this is at an early stage in the case where the Government can do it as a matter of right.

THE COURT: I thought I heard from Dave's counsel that they had answered the complaint.

MR. BROWN: That was my error, Your Honor.

THE COURT: So that is not correct?

MR. BROWN: Correct.

MS. WILLIAMS: That is incorrect.

There's also no rule that would provide for dismissal on these grounds and Ninth Circuit case law strongly favors decisions on the merits. It would be reversible error to dismiss the complaint because the

plaintiff employed Rule 15(a)(1).

Additionally, there is no prejudice for not notifying Mr. Wilk before the complaint was filed. There is no requirement that a defendant be notified in advance. The requirement is that he be summoned to court, and he was here.

THE COURT: Let's turn to the ROSCA claims. How is the Government defining transaction?

MS. WILLIAMS: A transaction is simple, Your Honor. It's a trade. It's an exchange. You give something and you get something. Here in the mind of the reasonable consumer, which the Ninth Circuit in *Cyberspace* and other cases tells us it's the standard to use. It's an exchange for a cash advance of up to $500 instantly. That's what the consumer thinks they're getting. You see that throughout the ads that are shown to the consumer in paragraphs 17, 18 and 19, and then you see it in the enrollment flow: "Get $500." So to the consumer, they're exchanging information and giving access to their bank account in exchange for this cash advance.

It is not limited to the negative option feature itself. That completely betrays the standard that is supposed to be employed here which is looking at it from the perspective of the consumer.

THE COURT: How do you respond to their argument

that if the statutory text was so clear the FTC would have no reason to propose this new Click to Cancel Rule?

MS. WILLIAMS: Well, they've misrepresented the Click to Cancel Rule in significant part, Your Honor. One small detail is the date of efficacy. Just for the record, it will not be effective until July 14th of this year. It's been kicked out as far as effective date.

But if you read the actual text of the Click to Cancel Rule, it's very consistent with FTC's position in this case. Click to Cancel is bigger than ROSCA, because it covers negative option features that are not covered in ROSCA, and it also covers misrepresentations. Misrepresentations are not the three ROSCA prongs, and you see that in our complaint. The two misrepresentation counts are one and two. Those are coming from Section 5 of the FTC Act. That's not ROSCA. ROSCA is not about misrepresentations. ROSCA is about disclosure. That's what Count 3 is getting to.

So what defendants have done is cite the sections that are about misrepresentation in the Click to Cancel Rule and ignored the sections that are about ROSCA. Reading the sections on ROSCA, ROSCA clearly prohibits charging or attempting to charge consumers for goods or services sold on the Internet through any negative option feature, unless the marketer clearly and conspicuously discloses all material

terms of the transaction before obtaining the consumer's billing information, regardless of whether a material term directly relates to the terms of the negative option offer. That language appears when they describe ROSCA on the page ending in 717, going into page 718.

When they talk about the 2021 enforcement policy for ROSCA, again the FTC says that earlier enforcement policy emphasized ROSCA's requirement that sellers disclose all material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term relates directly to the terms of the negative option.

On the page that ends in 727, they're talking about the new rule in contrast to the existing regime of ROSCA and they say, specifically, the proposed rule, like ROSCA, would require sellers to disclose any material conditions related to the underlying product or service that is necessary to prevent deception, regardless of whether the term directly relates to the term of the negative option offer.

So it's clear in all of FTC's earlier interpretations that "all material terms" means all material terms to the transaction. It's also clear that if you were to look at the material terms of the negative option itself, which is not the correct reading but the one that Dave has

advanced, these terms are material to the negative option. Nobody would get a subscription with Dave if they didn't think they were also getting a cash advance. The reason to enter the subscription to the extent people are voluntarily doing so is to obtain a cash advance.

So the defendants have put forth a truly implausible reading of "all material terms" that isn't consistent both with the text of the statute, with the agency's interpretation in the Click to Cancel Rule when you read the sections that actually relate to disclosure in ROSCA instead of sections about misrepresentation about something else.

THE COURT: Let me ask you with respect to Claim 3 on the "Connect Your Account" screen that we discussed earlier, Dave appears to disclose the express fee for instant cash in the one dollar membership fee. What is the Government's position on those disclosures?

MS. WILLIAMS: We would look to Ninth Circuit law case, particularly *Cyberspace* and *Amazon* that talks about fine print and the importance of recognizing context. So this screen, it is true that that text appears at paragraph 27 of the complaint and that there's a light-colored text. The fact that it's light colored and small makes it easier for consumers to miss it. This is something that *Amazon* very directly speaks to, as do other

cases, as do *Adobe* and *Doxo* as well. It's also --

You cannot look at this in isolation. When Ms. Baker was here, she said -- and I believe this is pretty close to an exact quote -- that you can decide the case based on this screenshot alone.

That is what you cannot do under Ninth Circuit law. Ninth Circuit law urges the Court to look to all of the information that's presented to consumers and put yourself in the shoes of a reasonable consumer who's going -- who's seen these advertisements, which say nothing about a subscription, has started enrollment flow on the promise of instant $500 and, finally, gets to this third screen where the highlighted feature is "Connect Your Account to Get Your Advance." It's very clear that you're looking for an advance here, as well you're looking to get approved for the highest amount, take out interest-fee advances.

If Dave has other products outside of the complaint that are not an issue today, they're not the ones being advertised on this screen here in paragraph 27.

So this is something that is put in a place where it's easy for consumers to miss. And that's something, again, that *Amazon* specifically talks about. It's not enough to just have fine print somewhere where you know consumers are going to miss it. And we also know that

consumers do miss it. This also goes to the case law when consumers regularly miss something that speaks to the fact that it is deceptive that consumers are not seeing this. *Cyberspace*, at page 1101, talks about how consumers actually being misled is strong evidence. And that's discussed in 72 and 73 of the complaint.

I would also like to note, Your Honor, *Adobe* was discussed with reference to Count 3. It is not true that *Adobe* partially dismissed. *Adobe* dismissed -- I'm sorry, partially granted -- granted partial dismissal. *Adobe* denied total dismissal. The motion to dismiss was denied in its entirety. If you look at page 23 of that opinion, you can see that there was part of claim -- the disclosure claim there was Claim 1. Part of it was, is this an annual plan?

And the Court found *Adobe* had said, *It's an annual plan. It was clear to consumers, it was an annual plan.* Other at aspects of Count 1 were not clear to consumers. And so the Court maintained the complaint and denied the motion to dismiss as to Count 1 and all of the other counts.

It's also not true that none of these cases have included a separate fee from the subscription fee. *Doxo* is the case I would look to. Although every product is unique and you have to consider the statute in connection with Dave's product and the allegations, *Doxo* did involve a separate payment delivery fee that was in addition to the

subscription fees.

THE COURT: In the interest of time, can you, please, address Claim 5, the simple cancellation mechanism and the arguments you heard from defense counsel?

MS. WILLIAMS: Yes, I can, Your Honor, although defense counsel seemed to be very carefully trying to read only paragraph 41 as if it spoke for the whole complaint. When the bulk of the allegations, as Your Honor pointed out, appear between paragraphs 75 and 85, they are highly specific. The idea that we failed to allege there was a recurring charge makes no sense in the context even of the language of 77 where it says that "Users are contacting Dave to stop the recurring charge."

I believe Your Honor has already pointed out also with respect to paragraph 41, consumers contacting Dave to cancel is very different than getting Dave to cancel. Getting Dave to cancel is almost impossible and for some consumers impossible.

You also see in paragraph 79, for example, these consumer complaints. They're saying, *Hey, keeps charging me one dollar every single month.* So there's no question that these people are trapped and continuing to pay the monthly fee that they don't want which is exactly what ROSCA is intended to protect consumers from.

THE COURT: Thank you, Counsel. I don't have any

03:27:15 further questions.

I'll allow defendants five minutes to respond.

MS. BAKER: Thank you, Your Honor.

Your Honor, I want to talk about a couple of items
03:27:39 that the Government mentioned just now. So, first of all, this question about whether or not Count 5, as to the simple mechanism to cancel has been adequately pled, again, we believe it has not been adequately pled. And Your Honor can look, also, at the *Adobe* complaint itself. So the *Adobe*
03:28:02 complaint also alleges unlawful cancellation practices. And it, specifically, gives -- 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 -- 26 paragraphs describing in great detail why it believes there isn't a simple mechanism to cancel, in
03:28:30 contrast to the paragraphs that were just mentioned, almost all of which contain conclusory allegations. So Count 5 has not been adequately pled.

So I want to talk briefly about *Doxo* -- *Doxo* or *Doxso* [phonetic] -- which was decided in March of this year
03:28:47 is actually a very important case to look at. Because the material terms in that case were very important because of a couple of things. First of all, what was at issue in that case as it relates to the ROSCA claim was, one, whether a consumer knew that they were being charged anything. So
03:29:03 what I understand they had is they had a box. And it said,

If you clicked here to learn about the terms and conditions, when you clicked on that "Terms and Conditions" link, the box in *Doxo* was automatically clicked as well and you were automatically subscribed. That's very different, Your Honor, than paragraph 27's screenshot. Very different. So that's not the same situation.

And the issue there with the additional fees was that the way it was advertised was *If you subscribe to us, you don't pay additional fees.* That's not what's at issue in Count 3. What Count 3 is claiming is that there are additional fees that a company in advance, that you may or may not chose to get, if you are a consumer who has also decided to become a member of Dave. They are apples and oranges, respectfully.

Now, the Government said something interesting. They said nobody could get a subscription, if they didn't think they were going to get a cash advance. That's just not correct. And nowhere in the complaint does it say that, nor could it say that. Because, indeed, as the Government knows, there are consumers who are members of Dave and who have never taken -- or who have chosen not to take advances. They use the company's other products, the ones I enumerated which is why -- which is why commingling Section 5 deception with ROSCA in Count 3 and Count 4 doesn't work, because it's not correct. ExtraCash is not one in the same with the

actual mechanism of subscription which is what ROSCA governs.

Now --

THE COURT: I have a question about that.

Government counsel pointed to that third screenshot that is in paragraph, I believe, 27 of the first amended complaint. And that screenshot, as we discussed before, states that "Dave charges a membership fee of $1 per month to connect your bank. Questions?"

The Government stated that this screenshot does not appear or does not include, I should say, other products, other Dave products. You're discussing other Dave products.

MS. WILLIAMS: It doesn't include other Dave products, because this connecting your bank account doesn't mean you're getting an advance. Like, the connecting of the bank account, the $1 is not the only -- like, you connect your bank account for other reasons. So, for example, there's a gold product and the gold product allows you to use some of your savings or to delineate some of your money and put it towards savings.

THE COURT: But those are other products. With respect to the product at issue here, the ExtraCash advance, the language -- the subscription language is in this screenshot, correct?

MS. BAKER: No, Your Honor.

This subscription screenshot doesn't say anything about ExtraCash. That's my point. ExtraCash is not the same thing as the membership. They're different things. So you can subscribe to Dave. You pay a dollar to have your account connected as this notes. And once you've connected your account, your bank account, you could use it to understand better your savings goals and never get an advance which is what ExtraCash is. They're not the same thing. They are not one and the same.

THE COURT: I understand your argument, but if you look at this screenshot, the language here about the membership, this relates to the ExtraCash advance.

MS. WILLIAMS: I'm sorry, Your Honor. I'm looking at App Screenshot 3. I don't see that. I'm sorry, I'm not sure --

THE COURT: "Connect your primary bank. Connect the bank account you get paid to and get approved for the highest amount. Take interest-free advances. Get money instantly for a small fee."

MS. BAKER: That does relate to ExtraCash, but you could become a member and never get ExtraCash.

THE COURT: Okay. Thank you, Counsel. Your time has expired.

The Court --

MR. BROWN: Can I reply on the individual defendants' issues?

THE COURT: You have 30 seconds to reply.

MR. BROWN: Okay. So I want to cite with respect to the conflating of the defendants and *FTC versus Lights of America*. This is a case decided in the Central District, 760 F.Supp --

THE COURT: What do you mean "conflating of the defendants"?

MR. BROWN: The --

THE COURT: When the complaint references "defendants" plural?

MR. BROWN: Both defendants.

As the Court pointed out, in this case, the individual defendants were dismissed precisely for the same mistake that the FTC originally -- where the Department of Justice has made here. It has not -- it has failed to allege the who, what and where and how of the individual defendant's connection to the acts and practices at issue.

So this is at page 854, just ahead of the jump to 855. And I can bring the complaint to the Court, if that would be helpful or the [sic] case to the complaint.

And then, counsel for the plaintiff also referenced the *Amazon* matter and the individual defendants there. And the relevant pages are 50 to 52. And in that

03:34:44 particular context, the FTC alleged connection of each of the three defendants to the particular product and services at issue. So one defendant was the senior vice president of Amazon who oversaw Amazon Prime, including the sign-up
03:35:04 process and the cancellation process. Defendant Lindsay was the Amazon executive with the most responsibility for the Prime subscription, which he managed as the Amazon vice president and senior vice president and then Defendant Ghani oversaw the Prime subscription program as a vice president.
03:35:23 He had authority over the Prime enrollment and cancellation process and, again, individual connection to the particular decisions that are being made.

Because as we all know now having spent -- I don't know -- 20 minutes talking about the font layout on the
03:35:40 screenshot on page 27 of the complaint, like the entire -- the entire ROSCA claim hinges on whether that language is sufficiently visible to somebody who is going through a subscription flow, again not necessarily to get an advance but simply to connect their account to the Dave service.
03:36:05 And so the relevant people, right, for individual responsibility to the extent that there would be those who are directly responsible for those screen layouts. That's what the FTC alleged in the *Amazon* case and what is absent from this complaint. And that's -- that is precisely why my
03:36:23 defendant deserves to be dismissed, even if this case is

procedurally proper.

I just want to close, if I may, with one point, and I appreciate Your Honor's patience. Earlier on my colleague, Ms. Baker, referenced Costco and the fact that in order to go to Costco, you need to have a membership and then there's a whole bunch of stuff that you can get at Costco, right? That's the same -- the service that Dave sells on a subscription basis, on a negative option basis is the connection of the account to the Dave service. Everything else is optional. That's one.

And then the second, not everybody who obtains an advance pays for the subscription, so this -- this fails on both of the dimensions.

THE COURT: Thank you, Counsel.

I appreciate everyone's arguments today.

The Court will take the motion under submission and issue a written ruling.

Thank you.

MR. BROWN: Thank you, Your Honor.

(At 3:37 p.m., proceedings were adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: July 5, 2025

/s/DEBORAH D. PARKER
DEBORAH D. PARKER, OFFICIAL REPORTER

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