SUPPLEMENT TO ASSIGNMENT

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Supplement to Assignment Date: 09/08/2021
Original Assignment Date: 08/16/2021

Document Number: 602303

Matter Name: Traffic Jam Events, LLC et al

Matter Number: D09395 Issue Number: 7

Staff Contact: TANKERSLEY, MICHAEL

Document Title: ASSIGNMENT OF REPLY IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION - PUBLIC

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **TRAFFIC JAM EVENTS, LLC, a limited liability company, and** **DAVID J. JEANSONNE II, individually and as an officer of TRAFFIC JAM EVENTS, LLC.**	**DOCKET NO. C-9395**

REPLY IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

Respondents David J. Jeansonne II and Traffic Jam Events, LLC ("Traffic Jam") do not—and cannot—dispute with any specific facts the significant record of material facts showing they violated the FTC Act and the Truth in Lending Act ("TILA"). First, there is no genuine issue of material fact that Respondents' mailers, viewed as a whole, misrepresented COVID-19 stimulus information and payments as well as association with, or approval by, the government. Second, Respondents do not offer a factual basis for disputing that a facial analysis of Respondents' prize advertisements shows they had a tendency to mislead consumers into believing they had won specific, valuable prizes. And, Respondents concede that their advertisements failed to disclose legally required information pursuant to TILA in connection with auto financing offers. Respondents also acknowledge that Respondent Jeansonne has and

had authority to control Traffic Jam and do not controvert the evidence that he also directly participated in its illegal practices, warranting individual liability.

Unable to point to any specific facts to contest liability or relief, Respondents' opposition relies on two unfounded legal arguments that do not survive any serious scrutiny. *See* Resps. Memo. in Opp. to Compl. Counsel's Mot. for Summary Decision, at 4-8 and 12-13 (hereinafter "Resps. Mem.").[1] First, Respondents' repeated references to legal principles applicable to unfairness matters are inapt because the unfairness standard embodied in Section 5(n) does not apply to FTC Act deception claims. *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1199 n.2 (9th Cir. 2006); *FTC v. Cantkier*, 767 F. Supp. 2d 147, 153 (D.D.C. 2011). Second, Respondents misstate the law under TILA because TILA's general advertising requirements broadly apply to all persons and not just creditors.

Respondents' failure to genuinely dispute facts and their faulty legal arguments confirm that there are no genuine issues in dispute and that summary decision is warranted on all three counts, meriting entry of a cease and desist order against both Respondents.

[1] Respondents have ignored their obligation to provide a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial. 16 C.F.R. § 3.24(a)(2). Respondents' failure to provide such a statement is not merely a technical defect, but warrants the Commission ruling that there is no substantial controversy regarding the facts set forth in Complaint Counsel's statement of facts. *See Coseme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) (failure to present a statement of disputed facts, supported with specific citations to the record, justifies deeming the facts presented in the statement of undisputed facts supporting motion for summary judgment to be admitted); *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988) ("We are satisfied that in the absence of the statement required to be furnished by [the defendant], the district court did not abuse its discretion in accepting as 'admitted' the facts identified by the government in the government's statement of material facts.").

I. THE UNFAIRNESS STANDARD DOES NOT APPLY TO THE TWO DECEPTION COUNTS

Respondents' inability to challenge the material facts in this case is compounded by their repeated reliance on the unfairness doctrine, which is wholly irrelevant to the deception claims at issue here.

As a starting point, Section 5 of the FTC Act provides the Commission with the authority to proceed under either a deception or unfairness theory. 15 U.S.C. §45(a)-(b) (declaring "unfair or deceptive acts or practices in or affecting commerce" to be unlawful and empowering the Commission to prevent such acts or practices). Contrary to Respondents' argument, Section 5(n) does not apply to the Commission's entire statutory authority—but only to counts predicated on unfairness.

Under a plain reading of the statute, deception and unfairness are referenced separately in Section 5(a), 15 U.S.C. § 45(a), providing two distinct bases for the FTC's law enforcement authority. *See Cantkier*, 767 F. Supp. 2d at 153 (citing *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d at 979 n. 27 and *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1061 (1984) ("Unlike deception, which focuses on "likely" injury, unfairness cases usually involve actual and completed harms")). Section 5(n) embodies the unfairness standard, providing that the FTC may not prohibit an act or practice as "unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Section 5(n) makes no reference to deception, and, by its clear language, Congress specifically intended to leave out deception, demonstrating that Section 5(n) only applies to practices that are alleged to be "unfair." *Cyberspace.Com LLC*, 453 F.3d at 1199 n.2 (noting that the "plain language" of Section 5(n) shows that its requirements do not apply to an FTC Act claim based on deception

and the FTC need not also prove that consumers could not reasonably have avoided injury); *Cantkier*, 767 F. Supp. 2d at 153 (finding that in addition to the plain text of Section 5(n), the legislative history reinforces that Section 5(n) only applies to unfairness cases). Indeed, the Commission previously has rejected the argument to import unfairness principles to deception claims, observing: "[n]o case has ever held that deception claims are subject to Section 5(n)." *In re Daniel Chapter One*, 2009 WL 5160000, at *22 (F.T.C., Dec. 24, 2009).

Thus, in a deception case, the Commission looks not to Section 5(n) and cases interpreting the unfairness standard but considers instead whether there was a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, and whether that representation is material. FTC Policy Statement on Deception, *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) ("Deception Statement"); *In re POM Wonderful LLC*, 2013 FTC LEXIS 6, *17-19 (FTC Jan. 10, 2013). "[C]apacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act." *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957); *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) ("Neither actual damage to the public nor actual deception need be shown."); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) (deception is established by "findings that an advertisement has the inherent capacity to deceive" and does not require "evidence of actual deception").

As discussed in Complaint Counsel's Memo, the undisputed evidence here not only shows that Respondents' advertisements were likely to deceive consumers but also that consumers were deceived, providing additional probative proof about the advertisements' tendency to deceive. *See*, *e.g.*, CC Mem. at 17 and 24.

II. RESPONDENTS DO NOT CONTEST THE FACTS DEMONSTRATING DECEPTION WITH RESPECT TO COVID-19 RELIEF AND PRIZE WINNINGS

Not only do Respondents premise their entire argument on the wrong body of case law, they also do not adequately contest – either by a separate counterstatement of facts as required by the rules or otherwise – the facts demonstrating that they deceived consumers with respect to COVID-19 stimulus relief claims and representations that consumers had won specific, valuable prizes. Respondents' specific legal arguments with respect to these two claims similarly miss the mark.

A. Deceptive COVID-19 Stimulus Relief Mailers

Respondents make no real factual showing to dispute that the COVID-19 mailers taken as a whole, including the envelope, insert, and check, deceptively claimed that consumers were receiving official COVID-19 stimulus information, including stimulus relief check, associated with, or approved by the government. For example, Respondents do not, and could not, challenge that the envelopes themselves claimed to be "TIME-SENSITIVE" with "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENT ENCLOSED." CC Mem. at 15. Respondents also do not dispute that the mailer included an official-looking letter from the "COVID-19 Economic Automotive Stimulus Program" with a prominent header stating "URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE" and, among other things, a watermark depicting the Great Seal of the United States. *See id.* at 16. Respondents also concede that the mailer included a purported check from the "Stimulus Relief Program" for thousands of dollars with an "Authorized Signature" and a space for the consumer to endorse on the back. *Id.*

Brushing aside those overwhelming facts, Respondents' counsel meekly argue that the admittedly fake checks within the mailers did not name a financial institution or set forth the

payment amount in words, and that they had a fine print disclaimer on the back. Resps. Mem. at 8. Respondents' attempt to concentrate on a few minor irrelevant or inadequate details of the check alone, however, is not helpful to them. The mailers, of course, must be considered as a whole, and Respondents tellingly say nothing about the misleading nature of the envelopes and official-looking letters that consumers would naturally read before getting to the checks. Even then, Respondents' arguments are not compelling. The check listed the "Stimulus Relief Program" where the name of a financial institution might appear, fostering the deceptive impression that it was associated with a government relief program. Thus, this fact accentuates, rather than reduces, the mailers' tendency to deceive. Respondents also concede that the check states a specific dollar amount by number but then provide no factual, legal, or logical basis for their unsubstantiated assertion that a consumer would necessarily conclude that a check with a payment amount stated as a number *to the penny,* but without that same amount written in words, was not real. Of course, most consumers would not notice the nuanced, post hoc distinctions advanced by Respondents, and certainly were not required to hunt through fine print disclaimers given all the prominent promises of government relief and affiliation throughout the envelope, letter, and check. *See FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) ("The buying public does not ordinarily carefully study or weigh each word in an advertisement. . . ."); *Cyberspace.com, LLC*, 453 F.3d at 1200 (holding that fine print disclaimer did not preclude liability under Section 5 of FTC Act, because "solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures").

Respondents do not dispute that the express claims in their advertisements are presumed to be material. *See* CC Mem. at 18. Instead, Respondents convolutedly argue that, as a matter of law, the claims can only be material if they affected the consumers' decision to purchase or lease

a vehicle. Resps. Mem. at 9-11. That is not the relevant inquiry. Materiality is a test of the likely effect of the claim on the conduct of a consumer and may affect conduct other than the decision to purchase a product or service, such as, in this case, to leave home during a pandemic in pursuit of a promised, but actually non-existent, government stimulus payment. *See* Deception Statement, 103 F.T.C. at 182 n. 45. Here, Respondents' mailers promised COVID-19 stimulus relief if consumers visited a specified "relief site" in order to lure them to a car sale. Whether or not the consumer purchased a vehicle or had any intent to do so is irrelevant. As discussed in Complaint Counsel's Memo, there is no question that the availability of monetary assistance is material to consumers and that misleading claims about government relief are actionable under the FTC Act. CC Mem. at 18 (citing cases).

B. Deceptive Prize Ads

Respondents likewise make no attempt to controvert the substantial evidence showing that Respondents designed and disseminated deceptive advertisements falsely representing that recipients had won specific prizes. Respondents' counsel raises the irrelevant argument that each recipient would have received some token prize and reprise their argument that misrepresentations are not material unless a consumer "tricked" into visiting the dealership "was harmed by either not buying a car or by purchasing a car on terms they were dissatisfied with." Resps. Mem. at 10.

A facial review of the prize ads shows Respondents misrepresented that recipients had won a specific prize that could be claimed at specified dealerships or locations. *See* CC Mem. at 18-23. The prizes were valuable items such as cars, televisions, gift cards, or substantial monetary amounts like "$2,500 INSTANT CASH." *Id.* Whether or not token gifts, such as a low-value smartwatch or a pair of earbuds (*id.* at n. 6), were given to consumers who visited the dealerships does not alter the deception. As discussed in Complaint Counsel's memo, receipt of

a token gift is irrelevant to the fact that consumers did not receive the promised prize. CC Mem. at n. 7; *see also FTC v. Dayton Family Prods.*, 2016 WL 1047353 at *8, 10 (D. Nev., Mar. 16, 2016) (fact that consumers received booklets on a chance to enter the sweepstakes and in some instances money orders for less than $2 did not change the misleading nature of the representations).

Respondents again are wrong on the law as to materiality. First, the express prize claims are presumed to be material. Deception Statement, 103 F.T.C. at 182. Moreover, misrepresentations that mislead consumers into believing that a prize is being given away have long been considered unlawful. *See* CC Mem. at 24 (citing cases). Here, Respondents' advertisements claimed consumers had won specific prizes, which would clearly affect a consumer's decision whether to visit a dealership or sales event. Indeed, Respondents appear to concede that using such advertisements to induce consumers to visit a dealership violates Section 5 in some instances. *See* Resps. Mem. at 11 ("actionable conduct would be a situation where the consumers, thinking only that they had won a prize (not to purchase a car), went to the dealership and either did not get their prize or purchased or leased an automobile they did not want"). Respondents also do not challenge the evidence showing that numerous consumers visited dealers after receiving Respondents' prize ads. *See* CC Mem. at 22 (discussing consumer complaints from people who visited dealerships). The law regarding materiality is not so tortured as Respondents' argue, and the Commission can summarily determine that Respondents' prize advertisements violate Section 5.

III. RESPONDENTS' ADVERTISING VIOLATED TILA

Respondents do not dispute that their advertisements have publicized triggering terms for close-end credit that do not properly disclose the additional required terms in accordance with TILA. *See* 12 C.F.R. § 224(d); CC Mem. at 25. In particular, Respondents do not contest that

critical terms such as the APR and period of repayment are, if disclosed at all, routinely buried in inconspicuous fine print that violates TILA's mandate that advertisements disclose these terms clearly and conspicuously. *Id.* at 26-27 (discussing examples of unlawful advertisements).

Respondents' sole argument against summary decision on Count III is a legal claim that only persons that satisfy TILA's definition of "creditors" may be held responsible for such unlawful ads. Resps. Mem. at 12-13 (citing 15 U.S.C. § 1602(g)). Respondents' argument misses the mark because TILA's advertising requirements include no such limitation. Although some TILA requirements impose obligations on "creditors," *see*, *e.g.*, 15 U.S.C. §§ 1638(a), 1669(a)(1), 1666a, the general advertising provisions at issue in Count III apply to any "advertisement" without reference to whether statements are made by a "creditor." *See* 15 U.S.C. § 1662 ("no advertisement"); § 1663 ("no advertisement"); § 1664 ("any advertisement"); *accord* 12 C.F.R. § 226.24 (2021). As discussed in Complaint Counsel's Memo, the plain text of these provisions apply to any actor engaged in advertising, and the official commentary and legislative history confirm that the advertising requirements apply to all persons[2]—not just creditors. *See* CC Mem. at 12-13 & n.2.

Respondents' only basis for contending that they are not subject to TILA is a provision in Regulation Z that does not address advertising and states, "[i]n general", the requirements of Regulation Z apply to those who satisfy the definition of "creditor." Resps. Mem. at 13 (quoting, without citation, from 12 C.F.R. § 226.1(c)). This sentence does not support Respondents' claim as the "[i]n general" qualification recognizes that the statement is not universally applicable, and

[2] A limited exception applies for owners and personnel of the medium disseminating the advertisement, *see* 15 U.S.C. § 1665, which is not applicable here given that Respondents are the creators of the advertisements, not merely media actors (e.g., newspapers, TV, radio) disseminating them.

the official commentary on the following section of Regulation Z complements the statutory framework, specifically observing that the obligation to comply with the advertising provisions is not limited to those that meet the definition of a "creditor." 12 C.F.R. Part 226 Supp. I § 226.2(a)(2) ¶ 2, *Persons covered*. Because there is no factual dispute that Respondents' advertisements violate TILA's disclosure requirements and no legal basis for Respondents' claim that they are not required to comply with TILA, the Commission should enter a summary decision against Respondents on Count III.

IV. RESPONDENT JEANSONNE IS INDIVIDUALLY LIABLE

Respondents offer no basis for finding a genuine dispute regarding the facts showing Respondent Jeansonne is individually liable for the conduct alleged in the Complaint. Instead, Respondents baldly assert the evidence is "wholly insufficient" and argue that "merely" owning of a business engaged in violations should not be enough to impose individual liability. Resps. Mem. at 12. Respondents' arguments on this front are not only conclusory but also entirely ignore the record. The evidence, including admissions by Jeansonne himself, shows that Jeansonne was not merely an owner of the business; he had both the authority to control the acts and practices at issue and participated in the challenged conduct. *See* CC Mem. at 28-30. The facts enumerated in Complaint Counsel's Memo and Statement of Material Facts unambiguously establish his individual liability.

V. THE COMMISSION HAS THE AUTHORITY TO ENTER COMPLAINT COUNSEL'S PROPOSED ORDER

Respondents do not specifically challenge any particular provision in the proposed order but vaguely suggest that the Commission's authority to declare acts and practices unlawful and issue a cease and desist order is somehow more limited than a district court's authority. *See* Resps. Mem. at 13-14. In any event, the law is clear that the Commission has wide discretion in

its choice of a remedy in addressing unlawful practices and that discretion includes the authority to order fencing-in relief that is "broader than the conduct that is declared unlawful." *In re POM Wonderful LLC*, 2013 FTC LEXIS at *156-57; *see also* CC Mem. at 35-36. The Commission need not restrict the order to a "narrow lane" of Respondents' past actions[3] and can even restrict legal conduct. *See id.* As discussed in Complaint Counsel's Memo, the proposed cease and desist order provides appropriate injunctive and fencing-in relief that is clear and reasonably related to the unlawful practices at issue.[4]

CONCLUSION

For the reasons stated above and in Complaint Counsel's Memo, there is no genuine dispute that Respondents' practices violate the FTC Act and TILA and that the proposed cease and desist order is warranted. Complaint Counsel respectfully requests that the Commission grant Complaint Counsel's Motion for Summary Decision.

Respectfully submitted,

September 8, 2021

by: */s/ Michael Tankersley*

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[3] Respondents also argued that their prior settlements should not be considered by the Commission, Resps. Mem. at 11-12, but these prior state law enforcement actions are clearly relevant, at a minimum, to the scope of relief and offer probative evidence of Respondents' awareness of the claim that were being conveyed and the deliberateness with which they pursued them. CC Mem. at 37.

[4] If the Commission concludes that relief sought in the proposed order requires modification, the Commission should enter relief to the fullest extent warranted on the summary decision record.

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021, I caused the foregoing Reply in Support of Complaint Counsel's Motion for Summary Decision to be served via the FTC's E-filing system and electronic mail to:

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I further certify that on September 8, 2021, I caused the foregoing document to be served via electronic mail to:

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September 8, 2021

by: */s/* Michael Tankersley
Federal Trade Commission
Bureau of Consumer Protection