UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **HomeAdvisor, Inc., a corporation,** **d/b/a Angi Leads,** **d/b/a HomeAdvisor Powered by Angi.**	**DOCKET NO. 9407**

OPINION FOLLOWING ORDER DENYING SUMMARY DECISION

By Chair Lina M. Khan, for the Commission:

On April 7, 2022, Complaint Counsel moved for summary decision on all counts of the Complaint in this matter alleging that Respondent engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 5 U.S.C. § 45(a). Respondent opposed the motion. On August 2, 2022, the Commission issued an Order denying summary decision. Below, we explain our reasoning for that denial and address certain of Respondent's affirmative defenses raised in its opposition brief.

I. BACKGROUND

A. HomeAdvisor's Business

Respondent HomeAdvisor, Inc., also doing business as Angi Leads and HomeAdvisor Powered by Angi, is a Delaware corporation with its principal offices or places of business in Colorado. CCSF ¶ 2; RCCSF ¶ 2; Answer ¶ 1.[1] It seeks to connect homeowners nationwide

[1] We use the following abbreviations:

Compl.	Complaint
Answer	Answer and Defenses of Respondent HomeAdvisor, Inc.

with local professional service providers across an array of home service tasks, from handyman work and plumbing to landscaping and full-home remodels. *See* Answer at 2-3; RSF ¶ 28. Stated briefly, HomeAdvisor collects information about potential customers for home services (i.e., homeowners),[2] runs that information through various checks, and then potentially sells the information to service providers in its network in the form of a "lead." Answer ¶ 4; RCCSF ¶¶ 11-13.

Approximately [redacted] of the leads that HomeAdvisor sells are generated from information submitted by visitors to HomeAdvisor's websites. CCSF ¶ 4; RCCSF ¶ 4; Compl. ¶ 10; Answer ¶ 10; PX0028 (Smith Tr. 23:7-18). At the time of the Complaint, HomeAdvisor's website homeadvisor.com stated: "Find trusted local pros for any home project" and prompted visitors to enter their contact information and answer a series of questions about their potential projects. Compl. ¶ 10; Answer ¶ 10. Among the questions that users must typically answer are questions about their project status and timeframe. One question asks whether the project status is "Ready to Hire" or only "Planning & Budgeting." Compl. ¶ 32; Answer ¶ 32. Another asks when the user would like the project completed (e.g., "Timing is flexible," "Within 1 week," "1-2 weeks," or "More than 2 weeks"). Compl. ¶ 32; Answer ¶ 32. Yet another question asks whether the user is "the owner or authorized to make property changes." Compl. ¶ 32; Answer ¶ 32. [redacted] Answer ¶ 32.

HomeAdvisor also sells leads that are generated based on information provided by homeowners over the phone. Compl. ¶ 15; Answer ¶ 15; *see also* RSF ¶ 30. HomeAdvisor's telephone-generated leads contain the same types of information as leads from HomeAdvisor's website. Compl. ¶ 15; Answer ¶ 15. A HomeAdvisor corporate witness testified that approximately **5-10%** of leads HomeAdvisor sells to service providers are generated from information submitted telephonically to a HomeAdvisor representative. PX0028 (Smith Tr. 26:14-19); *see also* CCSF ¶ 4; RCSF ¶ 4.

Mot.	Memorandum in Support of Complaint Counsel's Motion for Summary Decision
Opp.	Respondent HomeAdvisor, Inc.'s Memorandum of Law in Opposition to Complaint Counsel's Motion for Summary Decision
Reply	Reply Memorandum in Support of Complaint Counsel's Motion for Summary Decision
CCSF	Complaint Counsel's Statement of Material Facts as to Which There Is No Genuine Issue for Trial
RCCSF	Respondent's Responses to Complaint Counsel's Statement of Purportedly Undisputed Facts (Part Two of Respondent's Statement of Material Facts for Which There Is a Genuine Issue for Trial)
RSF	Respondent's Counterstatement of Material Facts for Which There Is a Genuine Issue for Trial (Part One of Respondent's Statement of Material Facts for Which There Is a Genuine Issue for Trial)
Oral Arg.	Oral Argument Transcript (July 21, 2022)

[2] For ease of reference, we refer to these potential customers for home services as "homeowners," although we recognize that not all of them actually own the home for which they may be seeking services.

In addition, HomeAdvisor sells leads that originate from third-party affiliates. Compl. ¶ 14; Answer ¶ 14; *see also* RSF ¶ 30. Approximately [redacted] of the leads transmitted to service providers are sourced from affiliates. CCSF ¶ 4; RSF ¶ 150.

HomeAdvisor sells several types of leads, including Market Match leads, Exact Match leads, and Instant Booking leads. RCCSF ¶ 10. As HomeAdvisor explains, a Market Match lead is a blind match between the homeowner and service providers.} PX0044-0007. HomeAdvisor sells a Market Match lead to [redacted] service providers in its network who are profiled to perform the type of work specified in the service request in the relevant geographic area. *See* CCSF ¶ 11; RCCSF ¶ 11. The service providers then contact the homeowner to try to win the homeowner's business. *See* PX0044-0005. An Exact Match lead, on the other hand, allows a homeowner to view a directory of HomeAdvisor service providers and submit a service request lead directly to one or more service providers of the homeowner's choice. PX0044-0008; *see also* Compl. ¶ 13; Answer ¶ 13; CCSF ¶ 12; RCCSF ¶ 12. For an Instant Booking lead, a visitor makes an appointment with a specific service provider via a web-based application. Compl. ¶ 13; Answer ¶ 13. As of mid- to late 2020, approximately [redacted] of the leads HomeAdvisor sold to service providers were Market Match leads, [redacted] were Exact Match leads, and fewer than 5% were Instant Booking leads. CCSF ¶ 10; RCCSF ¶ 10.

HomeAdvisor automatically bills its service providers for each Market Match and Exact Match lead that it sends them, regardless of whether such leads convert into jobs for the service provider. CCSF ¶ 14; RCCSF ¶ 14. With respect to Instant Booking leads, a service provider is obligated to pay at the point the homeowner confirms a booked appointment with the service provider based on the service provider's availability calendar posted on HomeAdvisor's website. RCCSF ¶ 14.

Market Match lead fees vary depending on the type and geographic location of the project, but they generally cost less than Exact Match and Instant Booking leads. Compl. ¶ 19; Answer ¶ 19. Between July 2014 and September 2019, the average price of a lead, across lead types, tasks, and locations, was approximately [redacted]. RCCSF ¶ 16; Compl. ¶ 19; Answer ¶ 19.

In order to receive leads from HomeAdvisor, service providers must join HomeAdvisor's network by purchasing a membership, and they must pass a background check. CCSF ¶¶ 17-18; RCCSF ¶¶ 17-18. HomeAdvisor offers several different types of memberships. RCCSF ¶ 17. One such membership, offered until January 2020, cost $347.98 annually and included a one-month subscription to mHelpDesk, a software that assists service providers with tasks such as scheduling appointments and processing payments. CCSF ¶¶ 20, 22; RCCSF ¶¶ 20, 22; Answer ¶¶ 7, 58. After the first month, those service providers were billed $59.99 monthly for mHelpDesk unless they cancelled their subscription to mHelpDesk. CCSF ¶ 21; RCCSF ¶ 21; Compl. ¶ 18, Answer ¶ 18. HomeAdvisor also offered a stand-alone annual membership for $287.99 if a service provider did not want a one-month subscription to mHelpDesk. CCSF ¶ 23; RCCSF ¶ 23; RCCSF ¶ 20; *see also* Compl. ¶ 58; Answer ¶ 58. In or about January 2020, HomeAdvisor ceased offering mHelpDesk to prospective service providers. RCCSF ¶ 22; Answer ¶ 54.

The majority of service providers in HomeAdvisor's network are small businesses and local proprietorships. Answer ¶ 5. *Cf.* RCCSF ¶ 36. A service provider can only join HomeAdvisor's network by speaking to a HomeAdvisor sales agent over the phone. Compl. ¶ 23; Answer ¶ 23. HomeAdvisor explains that, during the enrollment call, service providers create personalized HomeAdvisor online profile pages in which they select the specific tasks and geographic areas they wish to service. RSF ¶ 14. The online profile pages remain accessible to and under the control of the service providers and can be changed at any time. RSF ¶ 15.

HomeAdvisor maintains a credit policy pursuant to which it may give service providers credits for "illegitimate leads." RSF ¶¶ 71-72. According to HomeAdvisor, the credit policy is memorialized in its publicly-available Lead Credit Guidelines, which specify various situations that may be eligible or ineligible for a lead credit. RSF ¶ 72; RX0113; RX0114. If HomeAdvisor grants a service provider's credit request, HomeAdvisor then applies the credit against the cost of future leads. Compl. ¶ 21; Answer ¶ 21.

HomeAdvisor advertises its products on its websites, including homeadvisor.com and pro.homeadvisor.com, and via other media, including email marketing, direct marketing, radio spots, and social media. CCSF ¶ 24; RCCSF ¶ 24. HomeAdvisor also employs sales agents whose responsibilities have included conducting telephone sales outreach to service providers. CCSF ¶ 27; RCCSF ¶ 27; PX0105-0007. Per HomeAdvisor's corporate witness, as of November 2020, HomeAdvisor had about [redacted] sales reps. RCCSF ¶ 27; PX0030 (Schott Tr. 126:2-7). HomeAdvisor provides its sales representatives with training materials, including materials Complaint Counsel refer to as "scripts." *See* Mot. at 7-8, 16-17; RCCSF ¶ 30. The parties agree, however, that HomeAdvisor's [redacted] Mot. at 7-8; CCSF ¶ 30; RCCSF ¶ 30. HomeAdvisor has a quality assurance process [redacted] CCSF ¶ 52; RCCSF ¶ 52. [redacted] CCSF ¶ 54; RCCSF ¶ 54. [redacted] CCSF ¶ 55; RCCSF ¶ 55.

B. The Allegations

On March 11, 2022, the Commission filed a Complaint alleging that HomeAdvisor engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 5 U.S.C. § 45(a), in connection with its marketing and sale of its products to service providers. The Complaint contains three counts.

Count I alleges that HomeAdvisor misrepresented the quality, characteristics, and source of its leads. In particular, the Complaint asserts that HomeAdvisor made false or misleading representations that the leads the service providers would receive concern (a) individuals who intend to hire a service provider soon, (b) projects that match the types of services that service providers have expressed they perform, (c) projects that match the geographic areas the service providers serve, or (d) individuals who knowingly sought HomeAdvisor for assistance in

selecting a service provider. Compl. ¶¶ 61-63. With respect to the first claim, the Complaint asserts that many of the leads sold by HomeAdvisor concerned people who did not intend to hire a service provider soon, contrary to HomeAdvisor's representations. *Id.* ¶ 31. The Complaint alleges that some of HomeAdvisor's leads listed non-existent addresses or disconnected phone numbers, or were for people who were only interested in obtaining prices, wanted instructions on how to do the project themselves, or only answered the questions to become eligible to win a gift offered through a promotion. *Id.* The Complaint also states that many of the leads HomeAdvisor sold concerned people who actually indicated on their questionnaire that their project status was only "Planning & Budgeting," that they had an indefinite timeframe for project completion, or that they were not authorized to make property changes. *Id.* ¶ 32. With respect to representations that HomeAdvisor would match the types of services the provider offered in their geographic areas, the Complaint asserts that many service providers in fact received leads that concerned services they did not perform or were outside the providers' geographic preferences. *Id.* ¶ 39. Further, the Complaint asserts that contrary to HomeAdvisor's representations that its leads concerned people who knowingly sought its assistance in selecting a service provider, many of the leads that HomeAdvisor sold were purchased from affiliates and concerned individuals who did not knowingly seek HomeAdvisor's assistance. *Id.* ¶¶ 42, 45.

Count II asserts that HomeAdvisor made false, misleading, or unsubstantiated representations to service providers that its leads convert into jobs at or above certain rates. *Id.* ¶ 64. Specifically, the Complaint asserts that, although HomeAdvisor's own calculations showed that the rate at which leads purchased by service providers turned into jobs ranged from [redacted], HomeAdvisor's sales agents frequently represented that those rates were much higher. *Id.* ¶¶ 48-53.

Finally, Count III alleges that HomeAdvisor made false or misleading representations that the first month of mHelpDesk was free. *Id.* ¶¶ 66-68. In particular, the Complaint states that HomeAdvisor's sales agents represented to service providers that the cost of an annual membership was $347.98, including a free one-month subscription to mHelpDesk. *Id.* ¶ 54. In fact, however, the cost of the annual membership was $287.99, and the $347.98 price represented the cost of an annual membership plus one month of mHelpDesk, which was optional and cost an extra $59.99 per month. *Id.* ¶ 58. If a service provider did not want a one-month subscription to mHelpDesk, the provider could have purchased the annual membership for the lower price. *Id.*

HomeAdvisor denies any wrongdoing and asserts that the Complaint reflects a fundamental misunderstanding of HomeAdvisor's business, its provider and homeowner network, and the lead-generation industry generally. Answer at 1; Opp. at 2. Complaint Counsel have moved for summary decision on the Complaint, and Respondent has opposed. For the reasons discussed below, the Commission has denied the motion.

II. STANDARD FOR SUMMARY DECISION

Rule 3.24 of our Rules of Practice provides standards analogous to those that apply to a Rule 56 motion for summary judgment under Federal Rule of Civil Procedure 56. *See In re McWane, Inc., Ltd.,* No. 9351, 2012 WL 4101793, at *5 (F.T.C. Sept. 14, 2012); *In re Polygram*

Holding, Inc., No. 9298, 2002 WL 31433923, at *1 (F.T.C. Feb. 26, 2002). A party moving for summary decision must show that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); 16 C.F.R. § 3.24(a)(2).

As with a summary judgment motion, the party seeking summary decision "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (internal quotations omitted). Provided the movant meets this burden, the "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading" but must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24(a)(3); *Celotex*, 477 U.S. at 323. In evaluating the existence of a dispute for trial, we are required to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McWane, Inc.,* 2012 WL 4101793, at *5.

III. ASSESSING THE ALLEGED VIOLATIONS UNDER SUMMARY DECISION STANDARDS

A. Jurisdiction

Under the FTC Act, the Commission has jurisdiction over persons, partnerships, and corporations using unfair or deceptive acts or practices "in or affecting commerce." 15 U.S.C. § 45(a) (enumerating certain exceptions, not relevant here, to the persons, partnerships, and corporations covered). Respondent is a Delaware corporation that has its principal offices or places of business in Colorado. Answer ¶ 1. Since at least July 2014, Respondent has sold memberships and leads to service providers throughout the United States. *See* CCSF ¶ 35; RCCSF ¶ 35; RSF ¶ 114. Accordingly, the Commission has jurisdiction over Respondent with respect to its alleged deceptive acts and practices.

B. Legal Standard for Deception

"An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision." *In re POM Wonderful, LLC,* No. 9344, 2013 WL 268926, at *18 (F.T.C. Jan. 16, 2013), *aff'd sub nom. POM Wonderful, LLC v. FTC,* 777 F.3d 478 (D.C. Cir. 2015); *see also In re California Naturel, Inc.,* No. 9370, 2016 WL 7228668, at *5 (F.T.C. Dec. 5, 2016); *FTC Policy Statement on Deception,* 103 F.T.C. 174, 175 (1984), appended to *Cliffdale Assocs., Inc.,*103 F.T.C. 110 (1984) ("Deception Statement"). Thus, in determining whether an advertisement is deceptive, the Commission considers (1) what claims are conveyed in the ad; (2) whether those claims are false or misleading; and (3) whether the claims are material. *In re Health Rsch. Labs., LLC*, No. 9397, 2021 WL 5711355, at *5 (F.T.C. Nov. 19, 2021); *In re Traffic Jam Events*, No. 9395, 2021 WL 5124183, at *12 (F.T.C. Oct. 25, 2021), *pet. for review filed*, No. 21-60947 (5th Cir. Dec. 21, 2021); *California Naturel,* 2016 WL 7228668, at *5.

Claims may be express or implied: express claims are those that directly state the representation at issue, while implied claims are any that are not express. *Kraft, Inc.,* 114 F.T.C. 40, 120 (1991), *aff'd sub nom. Kraft, Inc. v. FTC,* 970 F.2d 311 (7th Cir. 1992). Absent an explicit representation, the Commission may determine whether the advertisement in question makes a representation by considering whether, from the point of view of a reasonable consumer-viewer, the "net impression" of the advertisement is to make such a representation. *Traffic Jam Events*, 2021 WL 5124183, at *12; *Jerk LLC,* 159 F.T.C. 885, 891 (2015); *FTC v. Direct Mktg. Concepts, Inc.,* 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *Removatron Int'l Corp. v. FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989) (looking to "common-sense net impression" of an advertisement). Extrinsic evidence is unnecessary if the claim is reasonably clear from the face of the advertisement. *POM Wonderful*, 2013 WL 268926, at *21. Both express and implied claims may be deceptive. *Fedders Corp. v. FTC,* 529 F.2d 1398, 1402-03 (2d Cir. 1976). "Deception may be accomplished by innuendo rather than by outright false statements." *FTC v. Wilcox,* 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (quoting *Regina Corp. v. FTC,* 322 F.2d 765, 768 (3d Cir. 1963)); *FTC v. Cap. Choice Consumer Credit, Inc.,* No. 02-21050 CIV., 2003 WL 25429612, at *4 (S.D. Fla. Jun. 2, 2003) (same).

Turning to the second element, the determination of whether a representation or omission is deceptive turns on whether it is likely to mislead, not whether it has caused actual deception. Deception Statement at 176; *Thompson Med. Co. v. FTC,* 791 F.2d 189, 197 (D.C. Cir. 1986); *Trans World Accts., Inc. v. FTC,* 594 F.2d 212, 214 (9th Cir. 1979) ("[p]roof of actual deception is unnecessary to establish a violation of Section 5"). The question is whether the claim is likely to mislead a consumer acting reasonably under the circumstances. *Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1436 (9th Cir. 1986); *FTC v. Wilcox,* 926 F. Supp. at 1098.

The third element is materiality. A representation is considered "material" if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com, LLC,* 453 F.3d 1196, 1201 (9th Cir. 2006) (quotation omitted); *see also Kraft,* 970 F.2d at 322; *Jerk,* 159 F.T.C. at 891. Express claims are presumed material, *see FTC v. Pantron I Corp.,* 33 F.3d 1088, 1095-96 (9th Cir. 1994), and consumer action based on express statements is presumptively reasonable. *See FTC v. Five-Star Auto Club, Inc.,* 97 F. Supp.2d 502, 528 (S.D.N.Y. 2000) (citations omitted). Where evidence exists that a seller intended to make an implied claim, the Commission will infer materiality. Deception Statement at 182. The Commission also presumes materiality where claims relate to central characteristics of the product or service such as its purpose, safety, efficacy, or cost. *Id.*; *Thompson Med. Co.,* 104 F.T.C. 648, 816-17 (1984).

C. Count I: Misrepresentations About the Intent to Hire, Type and Geographic Location of Projects, and Source of Leads

The first count in the Complaint alleges that Respondent falsely represented that its leads concern (1) individuals who intend to hire a service provider soon, (2) projects that match the types of services that the service providers have expressed they perform in the geographic areas that they have expressed they serve, and (3) individuals who knowingly sought HomeAdvisor for assistance in selecting a service provider. Although styled as a single count, the allegations

involve separate representations and are effectively separate sub-counts, so we discuss them separately.

1. Intent to Hire

Complaint Counsel allege that Respondent made false or misleading, express and implied, representations that its leads concern homeowners who are ready to hire a service provider soon. Mot. at 12-13; Compl. ¶ 6. According to Complaint Counsel, express representations include statements indicating that the homeowners are "ready to hire" and "not just window shopping." Mot. at 13-14. Implied representations include assertions that the homeowners are "serious" or "project-ready" or other terms that strongly imply the same meaning. *Id.*

To support the claim that Respondent made the alleged representations about intent to hire, Complaint Counsel point to statements on HomeAdvisor's website and in its advertising, transcripts from a sample of recorded sales calls, as well as declarations from service providers and former HomeAdvisor employees. *See* CCSF ¶¶ 62, 65. These materials provide examples of HomeAdvisor or its sales reps describing its leads as concerning homeowners who are "ready to hire," "ready to buy," "project-ready," "serious," "actively seeking the services you provide," or other similar phrases. *Id.* ¶¶ 62, 65. Complaint Counsel also cite to [redacted] *Id.* ¶ 63; RCCSF ¶ 63; PX0050-0003. Respondent contests much of this evidence, arguing that the cited deponents are not credible, disputing the significance and characterization of the [redacted], and asserting that the recorded sales calls have not been shown to be representative of the hundreds of thousands of sales calls that took place over the relevant period. Opp. at 7-12; RCCSF ¶¶ 63, 65. Respondent also asserts that Complaint Counsel have failed to establish what "net impression" would have come across the multitude of conversations between sales reps and service providers. Opp. at 12. And, Respondent asserts that it is not clear how terms such as "serious" or "project-ready" would have been understood by service providers, who it claims are sophisticated and understand the lead-generation industry and the product they are purchasing. *Id.* at 13, 17.

With respect to falsity, Complaint Counsel present two basic arguments. The first is that Respondent sold leads [redacted] *See* Mot. at 14.[3] The second argument is that many of the leads concerned individuals who were not interested in the service at all, such as leads coming from children, leads with obviously fake information, or leads for homeowners who insisted they were not looking for a service provider. *Id.* at 14-15. As to this latter argument, Respondent claims that no filtering process is foolproof and that it is widely understood that some number of illegitimate service requests are likely to reach service providers in any lead-generation company. Opp. at

[3] Complaint Counsel also state that HomeAdvisor [redacted] *Id.*

20. Respondent also points to its credit policy, which it claims allows service providers to obtain credits for illegitimate leads not caught by the filtering system. *Id.*

With respect to the materiality of the claims concerning readiness to hire, Complaint Counsel apply the presumptions for express representations and for representations that concern the central characteristics, purpose, and efficacy of the product. Mot. at 16. Complaint Counsel also point to, among other things, a shareholder letter from HomeAdvisor's parent company stating that, from the service provider's perspective, a more valuable customer "may be a customer contemplating a bigger job, but more often it's just a customer closer to doing a job, period." Mot. at 12 (quoting PX0084-0002). Respondent admits that lead quality is important to service providers. RCCSF ¶ 61. Respondent asserts, however, that whether a service request is in the "Planning & Budgeting" stage or in the "Ready to Hire" stage does not determine whether a lead will be converted to a job. RCCSF ¶ 7 (citing service provider declarations indicating that planning and budgeting leads are valuable and often convert into jobs).

We find that Respondent has raised genuine disputes of fact with respect to the implied representations, including whether and how the alleged sophistication of service providers would have affected their understanding of phrases like "serious" and "project-ready," as well as whether HomeAdvisor's homeowners could accurately be described by those terms. Our determination regarding these issues would benefit from fuller development of the facts at trial.

Complaint Counsel's claims regarding HomeAdvisor's express statements are stronger. Respondent's website describes its homeowners as "ready to hire" and not "just window shop[ping]." *See* PX0018-0073 ("HomeAdvisor connects contractors with homeowners who are ready to hire pros for their home projects[.]"); PX0019-0049 (same); PX0018-0025 ("You won't have to waste your time with customers who just window-shop. HomeAdvisor allows you to spend time with the ri ht 'read -to-bu ' customers." · PX0019-0012 similar . But Resı ondent has admitted that

[redacted]

See Answer ¶ 32; CCSF ¶7; RCCSF ¶ 7. In other words, despite promoting its leads as concerning "ready to hire" homeowners, Respondent [redacted] Indeed, Respondent's own declarants state that they received leads from people who were only planning and budgeting, just looking for a quote, or merely browsing with no intention to have work performed soon. RX0066, 68-71.

Respondent argues that Complaint Counsel must, but have failed to, show that the alleged misrepresentations were made "systemically or as a general or widespread pattern or practice." Opp. at 7. But the cases Respondent cites do not stand for such a broad proposition. In those cases, the Commission simply found that there was not substantial evidence of a deceptive statement having been made because the evidence consisted of only a few isolated instances of individual salespersons making the misrepresentation. *See Benjamin L. Hill*, 51 F.T.C. 48, 50

(1954); *Nat'l Exec. Search, Inc.*, 76 F.T.C. 962, 998 (1969).[4] That argument has no bearing on claims based on statements on HomeAdvisor's website; such statements are HomeAdvisor's own representations put forward for public viewing. To be sure, it is correct that, in a case where representations are made only orally on a one-on-one basis in an unscripted environment, a handful of isolated statements by a few individual sales representatives may not in and of itself constitute substantial evidence of misrepresentation by the company. However, there is no general requirement that Complaint Counsel prove a pattern or practice of misrepresentation in order to show a violation of Section 5 of the FTC Act. A single statement on a web page can suffice. *See Fox Film Corp. v. FTC,* 296 F. 353, 356 (2d Cir. 1924) ("One act that constitutes an unfair practice may of itself be offensive to the act.").

Respondent does, however, make some factual contentions with respect to the express readiness-to-hire claim. Notably, Respondent argues that homeowners who indicated that they were only in the planning and budgeting phase could still accurately be described as "ready to hire" as that term would have been understood by sophisticated service providers. Oral Arg. at 56:19-57:1, 73:7-74:15; *see also* Opp. at 13-18 (discussing service provider sophistication and understanding of the lead-generation industry). Because at summary decision the Commission is bound to draw all justifiable inferences in favor of the non-moving party, we have denied summary decision on the intent-to-hire sub-count; the question of whether the express ready-to-hire claim is likely to mislead consumers could benefit from fuller development under the evidentiary standards applicable at trial.

2. Type and Geographic Location of Projects

Complaint Counsel assert that HomeAdvisor has represented that service providers will receive only those leads that match the type of work that they perform and the geographic areas where they want to work. Mot. at 16-17. Complaint Counsel contend, however, that HomeAdvisor's leads regularly have concerned tasks or geographic areas that do not match the services or geographic areas of the service providers. *Id.* at 18. With respect to project type, Complaint Counsel argue that HomeAdvisor's platform is "structurally incapable of delivering the unqualified precision it advertises," because the platform "only allows service providers to select job type preferences within a finite list of preset categories, without allowing those providers to further narrow the categories to match more unique specializations or scale preferences." *Id.* Complaint Counsel also assert that HomeAdvisor's leads are often not in the service provider's selected location or for the selected task because "HomeAdvisor assumes the homeowners accurately and completely describe their potential projects in their answers to multiple-choice questions that HomeAdvisor uses to generate leads." *Id.*[5]

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[4] The federal case cited by Respondent, *FTC v. Lucaslaw Ctr. "Incorporated"*, 2010 WL 11523900 (C.D. Cal. June 21, 2010), is no different. That case, too, concerned the lack of evidence regarding individual statements made by call operators. *Id.* at *2.

[5] Complaint Counsel also assert, in a footnote, that [redacted] Mot. at 18 n.3. But Complaint Counsel provide little information about that claim, and Respondent does not appear to address it.

Respondent raises a number of arguments in defense, focusing in large part on disputing the alleged falsity of HomeAdvisor's representations that its leads match service providers' desired task types and geographic locations. First, Respondent notes that, during the enrollment process, service providers themselves select their task and geographic preferences, which are then available on their profiles and can be changed at any time. Opp. at 21-22; RSF ¶¶ 14-15, 140. With respect to the allegation that HomeAdvisor's platform is structurally incapable of precise task matching, Respondent points out that HomeAdvisor has maintained over [redacted] unique Task IDs that service providers can add to their profile to capture extremely granular aspects of various fields. Opp. at 22-23; RSF ¶ 136. Respondent further argues that claims about granularity are claims about competitive quality, not deception. Opp. at 23. As for mismatches that occur because of homeowner inaccuracy, Respondent asserts that homeowners are sometimes mistaken about the details of their projects (for example, whether a leaky roof needs to be replaced or merely repaired) or may make typographical errors when entering location information, but these are one-off events and do not amount to deception on the part of HomeAdvisor. Opp. at 22-23.[6] Respondent notes that "only approximately [redacted] of leads resulted in a credit request based on task or location. *Id*. at 24-25. Respondent further states that it is HomeAdvisor's policy to grant credits to service providers if they receive a lead for a task or geographic area for which they are not profiled. *Id*. at 23; RSF ¶ 141. In light of these various contentions, many of which go to the central question of whether HomeAdvisor's representations were false, we find that a decision on this sub-count should await the factual development of an evidentiary hearing.

3. Source of Leads

The last sub-count of Count I alleges that HomeAdvisor falsely represented to prospective customers that its leads concern homeowners who have intentionally sought the company's help. Mot. at 19. To support the claim that HomeAdvisor made this representation, Complaint Counsel cite former employee and service provider declarations as well as various statements from HomeAdvisor's sales training scripts, transcripts from recorded sales calls, and HomeAdvisor's website. *See* CCSF ¶¶ 83-84, 86; PX0014-0001 (former employee declaration: "We told prospects that if they joined HomeAdvisor, they would receive high quality leads from homeowners who visited the HomeAdvisor website looking for a contractor . . ."); PX0051-0001 [redacted] PX0022, 2595:19-21 [redacted] PX0018-0024 (website: "How do consumers use the HomeAdvisor site? . . . In order to quickly find the best local service professionals, customers submit a brief description of their services using the HomeAdvisor interview on the Web site."); PX0018-0092 (website: "Consumers come to HomeAdvisor.com and give us detailed info about their projects. We match that info with your work and area preferences, and connect you with homeowners that match your needs.").

[6] Respondent also argues that, to the extent that service providers are affected by leads that include inaccurate information from the homeowners, HomeAdvisor is immune from liability under the Communications Decency Act. That argument is discussed in Section IV.B.

Complaint Counsel argue that these representations are false because HomeAdvisor sold **millions of** leads based on information obtained from third-party affiliates; according to Complaint Counsel, these leads did not concern individuals who knowingly sought out HomeAdvisor's assistance in selecting a service provider. Mot. at 20. Complaint Counsel claim that the alleged misrepresentations are material because leads sourced from affiliates are of lower quality. *Id*. at 21. Complaint Counsel explain that, because affiliate websites made little, if any, mention of HomeAdvisor, homeowners were frequently surprised they were called by a service provider claiming to have gotten their info from HomeAdvisor. *Id*. at 20-21; PX0008-0002 (service provider declaration: "[I]t was basically like making a cold call; these leads certainly didn't have the same value as a lead who knew they had entered their information into the HomeAdvisor site and expected a call."). Complaint Counsel cite to [redacted] *See, e.g.*, PX0096-0004, -0010 [redacted] PX0120-0005 [redacted] PX0120-0034 [redacted] *see also* PX0028 (Smith Tr. 119:16-25) [redacted]

Respondent makes a variety of factual contentions with respect to all three elements of deception – the representation made, falsity, and materiality. First, Respondent disputes that it represented that all leads provided to service providers come from homeowners who submitted service requests on HomeAdvisor's online platform or over the phone to a HomeAdvisor representative. RCCSF ¶¶ 84, 86. Respondent asserts that declarants relied upon by Complaint Counsel are not credible and contends that the selected recorded sales calls were taken from an unrepresentative and unreliable sample. RCCSF ¶ 86. Respondent objects to reliance on "scripts" because it asserts that sales agents do not use scripts or read them verbatim during sales calls with service providers. RCCSF ¶ 84. Respondent also raises the question of whether one of the quoted webpages actually would have been accessible to service providers from its website. *See* Respondent HomeAdvisor, Inc.'s Demonstratives for the Commission's July 21, 2022 Hearing at 36. Moreover, Respondent claims that HomeAdvisor's website publicly discloses the use of affiliates to generate leads. Opp. at 25; RSF ¶ 148.

Further, Respondent contends that the statements quoted by Complaint Counsel are true. Respondent argues that those statements do not suggest that all leads would be from homeowners who submitted service requests to HomeAdvisor directly and that in fact over [redacted] of the leads sold to service providers are from homeowners who came directly to HomeAdvisor. *See* Opp. at 25; RCCSF ¶¶ 83-84. Moreover, Respondent argues that affiliate websites identify their association with HomeAdvisor and therefore affiliate leads are actually from homeowners who have "intentionally sought HomeAdvisor's help." Opp. at 26.

Respondent additionally disputes that the alleged misrepresentations are material. It points to alleged deficiencies in the various [redacted], and it asserts that its robust contractual

and other controls ensure quality from all leads from affiliates. Opp. at 25-26; RCCSF ¶ 89. Respondent also challenges Complaint Counsel's assertion that homeowners who submit their information through affiliate websites would be surprised to hear from HomeAdvisor service providers, because affiliates are contractually required to disclose to homeowners that their requests will be submitted to HomeAdvisor. Opp. at 26. Moreover, Respondent argues that, when enrolling, service providers often do not consider whether HomeAdvisor sources some of its leads from third parties. *Id.*; RSF ¶ 151 (citing service provider testimony).

Given the numerous disputes of material fact raised by Respondent, which we must view in the light most favorable to Respondent, we find that summary decision is not appropriate for this sub-count.[7]

D. Count II: Misrepresentation About Rates at Which Leads Convert to Jobs

For the second count, Complaint Counsel assert that HomeAdvisor sales agents have repeatedly told prospective customers that HomeAdvisor's leads converted to jobs at specific rates ("win rates"), but those rates were inflated and unsubstantiated. *See* Compl. ¶ 51; Mot. at 21. Complaint Counsel cite in large part to HomeAdvisor's [redacted] to support its assertion that HomeAdvisor represented a [redacted] percent or greater win rate for its Instant Booking leads and a [redacted] percent or greater win rate for Market Match leads or across all leads.} *See, e.g.*, PX0042-0021 [redacted] PX0049-0002 [redacted] PX0066-0001 [redacted] PX0057-0001 [redacted] ; PX0022-0196:11-16 [redacted] Complaint Counsel further assert that Respondent lacked adequate data to substantiate any win rate claims, and what data it did have contradicted the claims it made. Mot. at 21-22, 24. Complaint Counsel note that [redacted]

[7] To the extent Respondent argues that any alleged misrepresentation is mitigated or cured by disclosures on the HomeAdvisor website, we note that the Commission has previously held that disclaimers are ineffective when they are not in close proximity to the triggering representation. *See California Naturel*, 2016 WL 7228668, at *6 ("Adding a disclaimer to the bottom of the webpage that is well removed from proximity to the 'all natural' claims - and, in fact, not visible at all without scrolling down - does not change the net impression conveyed to consumers that the product is 'all natural.'"); *see also FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1274 (M.D. Fla. 2012), *aff'd sub nom. FTC v. Washington Data Res., Inc.*, 704 F.3d 1323 (11th Cir. 2013) (rejecting defendants' argument that a disclaimer in the retainer agreement sufficiently dispelled a misrepresentation about whether a home loan was guaranteed); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (rejecting defendant's argument that truthful fine print notices on reverse side of checks, invoices, and marketing inserts cured deception that check/invoice was a refund rather than offer for services); *Cap. Choice Consumer Credit*, 2003 WL 25429612, at *5 (finding that "fine print on reverse side" of ad was inadequate to modify net impression), *aff'd*, 157 F. App'x 248 (11th Cir. 2005); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001) (granting FTC's motion for summary judgment and holding that a disclaimer in a contract consumers eventually signed was inadequate to overcome deceptive representations in defendants' advertisements); *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) ("The Federal Trade Act is violated if [the seller] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.").

[redacted] *d*. at 24.

Respondent disputes these claims. First, it disputes that these representations about win rate were widely made, asserting that they were neither common nor approved. Opp. at 28. Respondent dismisses the sales call transcripts as a "handful of recorded sales calls" with respect to which Complaint Counsel have "failed to follow even basic statistical procedures to determine the representativeness." *Id*. at 27. As for the [redacted] Respondent asserts that [redacted] *Id*. at 28. [redacted] *Id*. at 27; RSF ¶ 156. [redacted] RCCSF ¶ 103. Respondent further asserts that, [redacted], though it admits the topic may come up naturally over the course of thousands of calls. Opp. at 27; RSF ¶ 155.

Respondent also takes issue with Complaint Counsel's assertions that the alleged statements are false and unsubstantiated. With respect to Instant Booking rates, Respondent claims that [redacted] RCCSF ¶ 101. [redacted] *Id*. [redacted] *See* Opp. at 28. So, too, Respondent defends a [redacted] win rate for other leads, arguing among other things that [redacted] RCCSF ¶ 98 (citing RX0120 at '987). [redacted] RCCSF ¶ 98.

Through these assertions, Respondent has disputed material facts underlying Complaint Counsel's claims. An evidentiary hearing will allow the Administrative Law Judge to make initial rulings on the merits of these disputes. We have therefore denied summary decision on the second count.

E. Count III: Misrepresentations Regarding mHelpDesk

With respect to the final count, Complaint Counsel allege that, until it ceased offering mHelpDesk in 2020, HomeAdvisor often misled service providers to think the first month of its optional mHelpDesk software would be free with an annual membership, when in truth that first month cost $59.99, the same as every other month. Compl. ¶¶ 7, 18, 54, 58; Mot. at 25-26; *see also* Answer ¶ 7. HomeAdvisor simply tacked on that extra charge to its existing $287.99 membership fee, selling the two as a bundled package for a combined price of $347.98. Mot. at 26; Compl. ¶ 58; *see also* Answer ¶ 58.

Complaint Counsel cite to, among other things, sales call transcripts, in which sales reps indicated that the first month of mHelpDesk would be free, Better Business Bureau complaints, in which customers expressed their belief that the first month was free, a form email to service providers confirming their purchase of an annual membership, which stated that $347.98 was the cost of the annual membership and a "free" month of mHelpDesk, as well as an internal HomeAdvisor email recognizing that service providers are aware that they would be receiving a "free trial" of mHelpDesk. Compl. ¶¶ 55, 57; Mot. at 25-26; CCSF ¶¶ 115, 117. In addition, Complaint Counsel cite to [redacted] Mot. at 25-26; PX0051-0003, PX0052-0003, PX0132-0003. Complaint Counsel note that [redacted] Mot. at 26. Complaint Counsel suggest that service providers may not have accepted a month of mHelpDesk had they known it was not actually free but cost an additional $59.99. *See id.*

Respondent disputes Complaint Counsel's allegations. It claims that the cited statements about the first month of mHelpDesk being "free" were not encouraged or condoned by HomeAdvisor management. To the contrary, [redacted] Opp. at 30; RSF ¶¶ 169-70. Further, Respondent claims that five of the six sales agent statements about mHelpDesk cited by Complaint Counsel [redacted] Opp. at 30; RSF ¶ 173. With respect to the membership purchase confirmation email referring to a "free" month of mHelpDesk, Respondent claims that this phrase was later changed and that Complaint Counsel offer no evidence it was used after February 2016. RCCSF ¶ 114. Moreover, Respondent appears to deny that service providers were not told that they could purchase a stand-alone membership for $287.99, noting that fewer than [redacted] of all sales for memberships were for the option that included the first month of mHelpDesk. Opp. at 30; *see also* RCCSF ¶¶ 21, 112. Drawing all inferences and resolving all factual ambiguities in a light most favorable to Respondent, as we must, we find that this count too would benefit from the fuller factual development of an evidentiary hearing.

Accordingly, we have denied summary decision on all counts of the Complaint in order to allow the parties' respective factual contentions to be further developed and tested at trial.

IV. AFFIRMATIVE DEFENSES

Respondent has asserted several affirmative defenses that the parties have now briefed. We provide guidance below for the proceeding on remand.

A. Proximate Cause

In its Answer, Respondent asserts that "[t]he FTC's claims are barred, in whole or in part, because the losses or injuries allegedly suffered were not proximately caused by any act or omission of HomeAdvisor." Answer, Def. 7. Respondent explains that success with leads depends largely on the service provider's own efforts to contact and nurture the leads it receives. Opp. at 31. Respondent asserts that discovery is needed to determine whether any given service provider's success or failure with its leads was caused proximately by HomeAdvisor's actions or the service provider's own acts or omissions. *Id.*

Respondent's asserted defense relates to proximate cause of loss or injury and does not apply in a cease and desist proceeding. Complaint Counsel seek an order under Section 5 of the Act to halt alleged unfair or deceptive acts or practices by the Respondent. As discussed in Section III.B. above, the elements of such a claim are: (1) a representation or omission of fact (2) that is likely to mislead a consumer acting reasonably under the circumstances, and (3) that is material to a consumer's purchasing decision. Neither proof of consumer reliance nor consumer injury is required to establish a Section 5 violation. *FTC v. Freecom Commc'ns., Inc.,* 401 F.3d 1192, 1203 (10th Cir. 2005). Proximate cause is therefore not an element of the claim.[8]

B. Communications Decency Act

Respondent asserts that, to the extent that service providers are affected by leads that include inaccurate information *from the homeowners,* as opposed to HomeAdvisor, HomeAdvisor is immune from liability under the Communications Decency Act ("CDA"). Opp. at 32, (citing 47 U.S.C. § 230(c)(1); *FTC v. Match Grp. Inc.,* No. 3:19-CV-2281-K, 2022 WL 877107, at *5-10 (N.D. Tex. Mar. 24, 2022)).

Section 230(c)(1) of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). With limited exceptions, the CDA confers immunity from federal and state claims for an interactive computer service provider's or user's "exercise of a publisher's traditional editorial functions—such as deciding

[8] Respondent's citation to *FTC v. Dantuma,* 748 F. App'x 735, 738 n.1 (9th Cir. 2018), *cert. granted, judgment vacated on unrelated grounds in light of AMG, sub nom. Publishers Bus. Servs., Inc. v. FTC*, 141 S. Ct. 2589 (2021), is not to the contrary. That case involved the FTC's effort to recover equitable monetary relief in court under Section 13(b) of the Act, *id.* at 737, a context that required proof of harm to consumers. Such proof is not required here.

whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997).

Complaint Counsel do not appear to dispute that HomeAdvisor qualifies as an interactive computer service provider under the CDA. Mot. at 34; Reply at 22-23. However, Complaint Counsel point out that the CDA grants immunity only when a claim seeks to hold an entity responsible as the publisher or speaker of content provided *by another* information content provider. Reply at 22; *see also, FTC v. LeadClick Media, LLC,* 838 F.3d 158, 174 (2d Cir. 2016); *FTC v. Accusearch, Inc.,* 570 F.3d 1187, 1196 (10th Cir. 2009). Complaint Counsel argue that their claims are based on representations that *Respondent made* to prospective service providers on its website and via telephone sales calls. Reply at 22-23 (citing RCCSF ¶¶ 24, 27). Thus, they argue, CDA immunity does not apply.

As the proponent of an immunity defense, Respondent bears the burden to demonstrate the defense. *Elliott v. Donegan,* No. 18-CV-5680, 2022 WL 992527, at *2 (E.D.N.Y. Mar. 31, 2022) (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Establishing immunity under the CDA is a highly fact-specific exercise. Greater factual development around HomeAdvisor's lead-filtering process, for example, is needed, especially for the leads that involve task type and geographic location mismatches, where HomeAdvisor relies upon homeowners to correctly answer multiple-choice questions that help to describe their needs. Mot. at 18. As with, perhaps, many such cases, adjudicating CDA protection at this point in the litigation, before substantial fact development, would foreclose close scrutiny of the actual nature of the relationship between Respondent and the allegedly illegal statements and conduct at issue.

Of course, the law is clear that HomeAdvisor can be held liable for its *own* speech. *Universal Commc'n Sys., Inc. v. Lycos, Inc.,* 478 F.3d 413, 419-20 (1st Cir. 2007) (citing *Anthony v. Yahoo!, Inc.*, 421 F. Supp. 2d 1257, 1262-63 (N.D. Cal. 2006)).[9] The CDA does not grant HomeAdvisor a license to misrepresent lead quality and accuracy either in sales calls or on its website, nor do we understand Respondent to so argue. Opp. at 32 (limiting assertion of immunity to information *from homeowners*); *see also* Oral Arg. at 45 (Respondent is not asserting immunity for mHelpDesk claims or other matters that relate solely to Respondent's representations). Factual development at trial should help establish the prevalence of homeowner errors and misstatements and their relationship to Complaint Counsel's claims.

C. Affirmative Misconduct

In its brief, Respondent asserts that [redacted] Opp. at 32-33. At oral argument, Respondent pivoted to an allegation that [redacted]

[9] As the *Anthony* court put it, "the CDA only entitles Yahoo! not to be 'the publisher or speaker' of the profiles. It does not absolve Yahoo! from liability for any accompanying misrepresentations. Because Anthony posits that Yahoo!'s manner of presenting the profiles – not the underlying profiles themselves – constitute fraud, the CDA does not apply." 421 F. Supp. 2d at 1263.

[redacted] Oral Arg. at 78-79. Based on these allegations, Respondent asserts affirmative defenses of affirmative misconduct, equitable estoppel, *in pari delicto,* and unclean hands. Answer, Defs. 13-15; Opp. at 32-33. Respondent states that it is pursuing discovery to determine the full extent of the alleged impropriety. Opp. at 33.

First, we find that Respondent has failed to demonstrate that the defenses of equitable estoppel or *in pari delicto* apply here. The traditional elements of equitable estoppel are: (1) false representation; (2) a purpose to invite action by the party to whom the representation was made; (3) ignorance of the true facts by that party; and (4) reliance. *United States v. Philip Morris, Inc.,* 300 F. Supp. 2d 61, 71 (D.D.C. 2004). Respondent alleges none of these elements. Further, plaintiffs who are "truly *in pari delicto* are those who themselves violated the law in cooperation with the defendant." *Pinter v. Dahl,* 486 U.S. 622, 636 (1988) (quotation omitted). Respondent makes no such allegation here. *See United States v. Philip Morris, Inc.,* 300 F. Supp. 2d at 66.

As to defenses of affirmative misconduct and unclean hands, the bar is high. *See Masters Pharm., Inc. v. DEA,* 861 F.3d 206, 225 (D.C. Cir. 2017) ("The bar for establishing 'affirmative misconduct' is high, requiring a showing of 'misrepresentation or concealment, or, at least, behav[ior] . . . that . . . will cause an *egregiously unfair result*'" (quoting *GAO v. Gen. Acct. Off. Pers. Appeal Bd.,* 698 F.2d 516, 526 (D.C. Cir. 1983)) (emphasis added). Some courts have found that the affirmative defense of unclean hands does not lie against the government when it brings an action in the public interest. *See United States v. Philip Morris, Inc.,* 300 F. Supp. 2d at 75 (unclean hands defense unavailable as a matter of law when the government sues in the public interest); *United States v. Neb. Beef, Ltd.*, No. 8:15CV370, 2016 WL 6088267, at *4 (D. Neb. May 6, 2016) (noting that "[c]ourts are divided on the issue whether a party may assert the affirmative defense of unclean hands against the government in an enforcement action pursuant to the public interest") (collecting cases). Where courts have permitted equitable defenses to be raised against the government in a public interest suit, "they have required that the agency's misconduct be egregious and [that] the resulting prejudice to the defendant rise to a constitutional level." *Bartko v. SEC,* 845 F.3d 1217, 1227 (D.C. Cir. 2017), (quoting *SEC v. Elecs. Warehouse, Inc.,* 689 F. Supp. 53, 73 (D. Conn. 1988)); *accord, SEC v. Cuban,* 798 F. Supp. 2d 783, 794 (N.D. Tex. 2011).

Respondent points to no evidence suggesting that it will be able to demonstrate the required level of prejudice from the alleged improprieties here. Complaint Counsel [redacted] Respondent has not explained how it could be unlawfully prejudiced even if [redacted]

[10] *See* RX0142 at 1 (definition of "Parties"); ¶ 14 ("Persons Bound by Order"). In the case that Respondent cites for the proposition that Complaint Counsel are bound, *Martindell v. Int'l Tel. & Tel., Corp.* 594 F.2d 291, 296 (2d Cir. 1979), the Second Circuit emphasized the importance of protective orders and denied the government's effort to modify such an order to obtain materials for use in a grand jury investigation. But *Martindell* did not hold that the government was bound as a party to the order.

[redacted] so long as any liability in this proceeding rests on determinations by the Commission adequately supported by facts in the administrative record and applicable law.

Nevertheless, we have determined not to deny the affirmative misconduct and unclean hands defenses at this time because Respondent has indicated that discovery regarding the allegations is ongoing. Opp. at 33. As to such future discovery, we note that courts generally disfavor the practice of taking depositions of opposing counsel. *Theriot v. Par. of Jefferson,* 185 F.3d 477, 491 (5th Cir. 1999); *Abiomed Inc. v. Maquet Cardiovascular LLC,* No. CV 1:16-10914-FDS, 2017 WL 11625640, at *2 (D. Mass. Oct. 6, 2017) ("Any time a deposition notice names an opposing party's counsel, current or former, as the deponent, red flags go up") (citing *Bogosian v. Woloohollian Realty Corp.,* 323 F.3d 55, 66 (1st Cir. 2003). In *Shelton v. American Motors Corp.,* 805 F.2d 1323, 1327 (8th Cir. 1986), the court explained:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony.

See also W. Peninsular Title Co. v. Palm Beach Cnty., 132 F.R.D. 301, 302 (S.D. Fla. 1990) ("Federal courts . . . have held that depositions of attorneys inherently constitute an invitation to harass the attorney and parties, and to disrupt and delay the case."). The party who wishes to depose opposing counsel should bear the burden to demonstrate good cause for such a deposition, including the exhaustion of alternative discovery mechanisms such as interrogatories and document requests and the existence of important non-privileged information to be discovered. *See Shelton,* 805 F.2d at 1327 (requiring that "no other means exist to obtain the information," that "the information sought is relevant and nonprivileged," and that "the information is crucial to the preparation of the case"); *Nationwide Mut. Ins. Co. v. Home Ins. Co.,* 278 F.3d 621, 628 (6th Cir. 2002) (same); *Boughton v. Cotter Corp.,* 65 F.3d 823, 830 (10th Cir. 1995) (approving of *Shelton* factors); *W. Peninsular Title,* 132 F.R.D. at 302 (recommending that written interrogatories be employed instead of deposing opposing counsel); *Kelling v. Bridgestone/Firestone, Inc.,* 153 F.R.D. 170, 171 (D. Kan. 1994) (denying motion to compel deposition because "other methods, such as written interrogatories, requests for production, or requests for admission, which do not involve the same dangers as an oral deposition of opposing counsel, should be employed"); Oral Arg. at 80 [redacted]. The Commission is not dismissing the affirmative defense in order to allow discovery but reminds Respondent that it must meet the high standard set forth in these cases before being permitted to depose Complaint Counsel. Specifically, Respondent must attempt to seek the discovery through other avenues and, if it believes it requires depositions of Complaint Counsel, be prepared to demonstrate that the testimony is crucial and all other means employed proved insufficient to obtain the necessary information.

D. Constitutional Defenses

Respondent asserts several constitutional defenses to this proceeding in its Answer. Answer, Defs. 17-18, 20-24. It addresses the following affirmative defenses in its brief:

1. a claim that the FTC Act, which provides that a Commissioner may be removed only for "inefficiency, neglect of duty, or malfeasance in office," 15 U.S.C. § 41, violates the separation of powers and Article II's Appointments Clause. Answer, Def. 20; Opp. at 33;

2. a claim that the President's authority to appoint Commissioners is unconstitutionally constrained by the political-party restrictions of 15 U.S.C. § 41, in violation of Article II of the Constitution and the First Amendment. Opp. at 33;

3. a claim that adjudication of this matter by the ALJ and the Commission violates the right to due process under the Fifth Amendment, including because these proceedings assertedly lack a neutral decisionmaker and lack equal protection. *Id.*; Answer, Def. 23; and

4. a claim that, to the extent that the findings in this proceeding are used in a potential legal action for damages under FTC Act § 19, such administrative fact-finding would violate Respondent's right to have those facts found by a jury in an Article III court. Opp. at 33.[11]

Respondent's brief requests denial of the motion for summary decision and raises these constitutional issues. Opp. at 34. However, at oral argument, Respondent's counsel stated that Respondent presently seeks only denial of Complaint Counsel's motion for summary decision and that such denial is the only issue that the Commission needs to decide now. Oral Arg. at 43-44. We concur that the constitutional defenses need not be decided at this time. Respondent has preserved its constitutional defenses, and we reserve them for a future determination should it prove necessary.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: September 9, 2022

[11] Respondent also expressly preserves an affirmative defense that having an administrative law judge preside over and administer this proceeding violates the separation of powers and Article II's Appointments Clause. Opp. at 34 n.144; *see* Answer, Def. 21.