UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of	)	
Traffic Jam Events, LLC,	)	
a limited liability company,	)	
and	)	**Docket No. 9395**
David J. Jeansonne II,	)	
individually and as an officer of	)	
Traffic Jam Events, LLC.	)	

OPINION OF THE COMMISSION

By COMMISSIONER Christine S. Wilson, for a unanimous Commission.

Respondent Traffic Jam Events, LLC and its owner and president, Respondent David J. Jeansonne II (collectively, "Respondents"), conduct direct mail marketing on behalf of car dealerships. Compl. ¶¶ 2-3; Answer at 1 and ¶¶ 1-3.[1] The Complaint in this proceeding asserts that Respondents conducted two forms of deceptive marketing campaigns in violation of Section

[1] We use the following abbreviations for documents in this Opinion:

Compl.	Complaint (Aug. 7, 2020)
Answer	Answer and Defense of Respondents Traffic Jam Events, LLC, and David J. Jeansonne II (Sept. 7, 2020)
Mot.	Complaint Counsel's Motion for Summary Decision (Aug. 14, 2021)
CC Fact Stmt.	Complaint Counsel's Statement of Material Facts As to Which There Is No Genuine Issue for Trial, appended to Mot. (Aug. 14, 2021)
PX	Complaint Counsel's exhibit to Mot.
Opp.	Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision (Sept. 7, 2021)
Reply	Reply in Support of Complaint Counsel's Motion for Summary Decision (Sept. 8, 2021)

5 of the FTC Act, as amended, 15 U.S.C. § 45 *et seq.* (prohibiting "unfair or deceptive act[s] or practice[s]"). Compl. ¶¶ 5-12, 15-19. Complaint Counsel allege that these campaigns took place in multiple states. *See, e.g.,* Compl. ¶¶ 9 (Florida), 10 (Alabama), PX4 Att. 2 (Texas). The Complaint also asserts that Respondents violated Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1664, and the associated Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended, by advertising closed-end credit while failing properly to disclose certain required terms such as the amount or percentage of the down payment or the annual percentage rate. Compl. ¶¶ 14, 22-23. Complaint Counsel seek issuance of a cease and desist order pursuant to FTC Act § 5. Compl. at 9 (Notice of Contemplated Relief); Mot. at 35-38 and Proposed Order.

The parties conducted pretrial proceedings before the Chief Administrative Law Judge ("ALJ") during September 2020 – September 2021.[2] On August 14, 2021, Complaint Counsel moved for summary decision pursuant to Commission Rule 3.24, 16 C.F.R. § 3.24. Respondents timely opposed the Motion. As explained below, we have determined that summary decision should be granted.

I. THE ALLEGATIONS OF THE PLEADINGS

Respondent Traffic Jam Events, LLC is a Louisiana limited liability company with its principal place of business in Kenner, Louisiana. Answer at 12 ¶ 1. Respondent Jeansonne is the owner, managing member, and president of Traffic Jam Events. *Id.* ¶ 2.

Respondents create advertising, offer direct mail marketing services, and staff tent sale events for automotive dealerships. *Id.* ¶ 3. Respondents have advertised, marketed, sold and offered for sale or lease, motor vehicles on behalf of auto dealerships nationwide. *Id.*

The Complaint alleges three types of unlawful conduct by Respondents. Count I alleges that, beginning in or around March 2020, Respondents disseminated deceptive advertisements designed to lure consumers to auto dealerships under the guise that government relief related to COVID-19 was available at designated locations for a short period of time. Compl. ¶¶ 5-6. Respondents' advertisements allegedly included an advertisement for a Florida auto sales event that purported to be "TIME-SENSITIVE" and to contain "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS." *Id.* ¶ 9. According to the Complaint, the mailers contained various other indicia to connote official government status, such as a barcode labeled

[2] During the course of the pretrial proceedings, the ALJ granted motions to compel discovery on October 28, 2020 (Complaint Counsel's motion), December 16, 2020 (Complaint Counsel's motion), and July 15, 2021 (Respondents' motion); granted Complaint Counsel's Motions to Determine Sufficiency of Responses to Requests for Admission on August 11, 2021 and September 20, 2021; and sanctioned Respondents for failure to comply with his discovery orders on June 29, 2021 and August 9, 2021. At one point the Commission removed the case from adjudication, pausing it from December 28, 2020, through May 3, 2021, to allow for consideration of a proposed consent agreement that did not ultimately bear fruit. *See* Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date (May 3, 2021).

"COVID-19 STIMULUS (INDIVIDUAL)" and containing a notice number, and a watermark containing the Great Seal of the United States. *Id.* The notice allegedly provided an address in Bushnell, Florida, which it described as a "relief headquarters" and "designated local headquarters," and further stated that the consumer "must claim these stimulus incentives at your designated temporary 10-day site." *Id.* In at least some instances, the Complaint alleges, Respondents included in their mailer a purported check issued by "Stimulus Relief Program" with "COVID-19 AUTO STIMULUS" in the memo line and a space for an endorsement on the back. *Id.* Respondents allegedly disseminated at least one other similar COVID-19 stimulus mailer to entice consumers to an auto dealership in Dothan, Alabama. Compl. ¶ 10.

Count II of the Complaint alleges that Respondents disseminated deceptive mailings claiming that recipients had won prizes in order to lure them to auto sales events. Compl. ¶ 12. For example, from May through June 2020, the Complaint alleges, Respondents disseminated a "$15,000 INSTANT CASH GIVEAWAY" mailer that invited consumers to match their listed "official winning code," a code in a "Combination Box," and a code next to the specific prize of $ 2,500. *Id.* The mailer allegedly states that the matching codes mean the consumer is a "guaranteed winner"; however, only on the reverse side in fine print, contrary to the claim that the consumer is a "guaranteed winner," does the mailer reveal that the consumer must visit the dealership to see if they have won a prize, and that they only have 1/52000 odds of winning $2,500 cash even if their Combination Box contains the winning code. *Id.*

Count III of the Complaint alleges that Respondents disseminated advertisements that violated TILA by failing clearly and conspicuously to disclose certain lending terms. Compl. ¶¶ 14, 20-23. For example, Respondents' COVID-19 mailer for the Florida sales event allegedly states particular terms for credit such as a down payment amount and monthly payment for vehicles, without clearly and conspicuously disclosing other required terms such as the repayment term and the annual percentage rate. *Id.* at 14.

Respondents' Answer admitted that the COVID-19 and the prize notification mailers were sent, Answer at 1-3, but denied that any mailings were deceptive or violated TILA. *Id.* at 2, 7, 11-12.

The Louisiana TRO Action: Several weeks before issuance of the Complaint in this proceeding, Complaint Counsel filed a civil action in the Eastern District of Louisiana seeking an injunction against the COVID-19 mailer pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *FTC v. Traffic Jam Events, LLC, et al.,* Case No. 2:20-cv-01740 (E.D. La.) (filed Jun. 16, 2020). The court held a telephonic hearing on a motion for a temporary restraining order on June 25, 2020. The court declined to grant the preliminary relief for reasons inapplicable to this administrative proceeding. Specifically, the court found that Complaint Counsel had not shown that Respondents were (currently) "violating or [ ] about to violate" a provision of law enforced by the Commission, Order and Reasons (Jun. 26, 2020) at 7, a requirement for a § 13(b) injunction case in federal court. 15 U.S.C. § 53(b). But Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), governs the FTC's administrative actions, like this one. That section applies whenever the Commission has reason to believe that a person, partnership, or corporation "*has been* or is" using any unfair method of competition or unfair or deceptive act or practice, 15 U.S.C. § 45(b)

(emphasis supplied), a standard met here. *See also AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341, 1348 (2021) (purpose of § 13(b) is to stop seemingly unfair practices while the Commission determines their lawfulness in an administrative forum). The district court emphasized that the sole issue it decided was the Commission's entitlement to a temporary restraining order under § 13(b), which it deemed an "extraordinary remedy," Order and Reasons at 23, and it emphasized that it was "mak[ing] no finding regarding whether the FTC will succeed . . . in proving that Defendants have previously violated any provision of law enforced by the FTC."[3] *Id.* at 24. This latter determination, the court stated, "carries its own penalties." *Id.* Thus, we turn with fresh eyes to this case, which arises under our Section 5(b) relief authority encompassing past and current conduct.

II. STANDARD FOR SUMMARY DECISION

We review Complaint Counsel's motion for summary decision pursuant to Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24. Our analysis is analogous to that applied to motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re McWane, Inc. & Star Pipe Prods., Ltd.,* 2012 WL 4101793, at *5 (FTC Sept. 14, 2012); *In re Polygram Holding, Inc.,* 2002 WL 31433923, at *1 (FTC 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.'" *In re Benco Dental Supply Co.,* 2018 WL 6338485, at *2 (FTC Nov. 26, 2018) (quoting Commission Rule 3.24 and Fed. R. Civ. P. 56).

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). Commission Rule 3.24 provides that the movant must file a "separate and concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." 16 C.F.R. § 3.24(a)(1). Provided the movant meets this initial 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); *Carozza v. CVS Pharmacy, Inc.,* 992 F.3d 44, 56 (1st Cir. 2021). The non-movant must set forth these facts by filing its own, separate and concise counter-statement of facts. 16 C.F.R. § 3.24(a)(2).

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. *Benco Dental Supply Co.,* 2018 WL 6338485, at *3; *McWane, Inc.,* 2012 WL 4101793, at *5; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Where the "evidence [favoring the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50. However, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary

[3] The court also made no findings about the prize mailings or the alleged TILA violations, which were not before it.

judgment." *Impossible Elecs. Techniques, Inc. v. Wackenhut Protective Sys., Inc.,* 669 F.2d 1026, 1031 (5th Cir. 1982).

For the reasons stated below, we have determined to grant summary decision. As to Counts I and II, we find that the Respondents have failed to raise a genuine dispute of material fact regarding whether the challenged advertisements are deceptive, false, and the claims therein material to consumers. As to Count III, we find that Respondents have failed materially to dispute that Traffic Jam created and disseminated advertisements that failed to make the clear and conspicuous disclosures required by TILA. We further find Complaint Counsel have demonstrated, and Respondents have failed to raise a genuine dispute, that individual Respondent Jeansonne had authority and control over Respondent Traffic Jam Events and participated in its conduct regarding the pertinent advertisements, and we therefore find that summary decision is appropriate against both the individual and corporate Respondents for all three counts. Finally, we find that Complaint Counsel's proposed Order is appropriate and necessary to prevent further violations by the Respondents, and we therefore issue it.

III. FACTS ABOUT WHICH THERE IS NO GENUINE DISPUTE

Before we turn to summarizing the facts about which there is no triable dispute, we offer a note about our process. As required by Commission Rule 3.24, Complaint Counsel as the Movant identified the facts they claim are undisputed and supported those facts with record citations in a separate Statement of Material Facts. 16 C.F.R. § 3.24(a). Respondents do not make a serious attempt to controvert these facts. Respondents chose not to file a counter-statement of facts as required by the Rule. 16 C.F.R. § 3.24(a)(2). The statement should have identified "those material facts as to which [Respondents] contend[] there exists a genuine issue for trial." *Id.* The non-movant's statement of material facts is no mere procedural nicety, but goes to the heart of the non-movant's task on summary decision which is to demonstrate with evidence the need for a trial. *See Coseme-Rosado v. Serrano-Rodriguez,* 360 F.3d 42, 45-46 (1st Cir. 2004) (failure to submit counter-statement of facts, with citations to the record, justifies accepting the initial statement of facts as true). In any event, as explained herein, we have carefully considered each of the arguments that Respondents raised in their Opposition memorandum, and we find these arguments are fully capable of resolution on summary decision.

Respondents raise several legal arguments. First, as to Counts I and II, they contest the Commission's authority to act, which they contend is limited by 5 U.S.C. § 45(n). Opp. at 4-7. They also challenge Complaint Counsel's showing of the materiality of the claims in their advertisements. *Id.* at 7-8. As to Count III, they challenge the applicability of TILA to advertisers such as Respondents. *Id.* at 12-13. Respondent Jeansonne denies responsibility for the acts and practices of Traffic Jam Events. *Id.* at 12. Finally, Respondents also challenge the Commission's authority to award the relief sought by Complaint Counsel. Opp. at 13-14.

Legal issues such as those raised by Respondents are appropriate for summary disposition. *See Cremona v. R.S. Bacon Veneer Co.,* 433 F.3d 617, 620 (8th Cir. 2006) (case that involves only questions of law is "particularly appropriate" for summary judgment); *see also* 10A Fed. Prac. & Proc. Civ. (Wright & Miller) (4th Ed.) § 2712 (summary judgment can dispose of actions that involve only a question of law.) Respondents' arguments regarding materiality,

which involve the application of law to the undisputed contents of the advertisements, are equally appropriate for summary decision. Courts and the Commission regularly use the summary decision process to analyze the lawfulness of potentially deceptive advertisements. *See, e.g.*, *FTC v. Direct Marketing Concepts*, 569 F.Supp.2d 285, 300, 303 (D. Mass 2008), *aff'd,* 624 F.3d 1 (1st Cir. 2010) (analyzing the "net impression" of advertisement on summary judgment); *FTC v. Gill,* 71 F.Supp.2d 1030, 1043-44 (C.D. Cal. 1999) (same); *In re Jerk LLC,* 159 F.T.C. 885, 892-909 (2015) (analyzing deceptive advertising, including materiality, on summary decision), *aff'd in relevant part sub nom. Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016); *California Naturel,* 2016 WL 7228668, at *5-6 (Dec. 5, 2016) (conducting "facial analysis" of claims in advertising).

Based on our review of the Motion and the Opposition, with consideration of the uncontroverted facts, we find that Complaint Counsel have established the following beyond genuine dispute.

A. The Commission's Jurisdiction Over Respondents

Respondents create advertising, offer direct mail marketing services, and staff tent sale events for automotive dealerships. CC Fact Stmt. ¶ 5. Respondents' sales staff calls dealerships in different states to obtain new business, and Respondents have used email blasts to promote their products and services nationwide. *Id.* at ¶ 6.

Respondents' mailers have been disseminated to consumers throughout the United States. *Id.* at ¶ 7. Since at least July 2015, in the course of generating mailers to promote automotive sales events, Respondent Traffic Jam Events has employed the services of printers located in California and Florida. *Id.*

B. State Law Enforcement Actions Regarding Prize Mailings

In 2010, Respondent Traffic Jam Events entered into a consent order with the State of Kansas to resolve allegations that it had violated the Kansas Consumer Protection Act by disseminating mailings that implied consumers had the winning number for a grand prize drawing when they did not. CC Fact Stmt. ¶ 46. The order required payment of $25,000 and permanently enjoined Respondent from committing the acts or practices described in the complaint. *Id.* at ¶ 48.

In 2013, Respondent Traffic Jam Events entered another consent order with the State of Kansas that permanently enjoined Respondent from entering any consumer transactions in the State, due to asserted violations of the first order. *Id.* at ¶ 49. The order also required payment of $20,000. *Id.*

In February 2019, Respondent Traffic Jam Events entered into a consent order with the State of Indiana to resolve allegations that Respondent had contracted with automotive dealers to send mailings to thousands of Indiana consumers misrepresenting that they had won a specific prize. *Id.* at ¶¶ 51-52. The order prohibits deceptive prize promotions and is signed by Respondent Jeansonne. *Id.* at ¶ 52.

C. The COVID-19 Stimulus Mailer

In March 2020, Respondents designed a direct mail advertising campaign based on COVID-19 government relief. CC Fact Stmt. ¶ 9. The material facts of the mailings are uncontested.

Respondent Jeansonne acknowledged in testimony the COVID-19 relief mailers as his "brainchild." *Id.* at ¶ 10. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law on March 27, 2020 to provide financial assistance to individuals, families, and businesses. *Id.* at ¶ 9. Around this time, Respondents sent an email blast to dealerships nationwide promoting a direct mail advertisement to consumers that would tout a COVID-19 stimulus relief mailer "on an official letter format." *Id.* at ¶ 11.

Respondents' COVID-19 stimulus relief mailer was distributed to approximately 35,000 consumers. *Id.* at ¶ 12. The mailer promoted an auto dealership, New Wave Auto Sales, also known as MK Automotive, in Bushnell, Florida. *Id.*

The mailers bore characteristics that were designed to associate them with a government program, including:

a. The mailers were sent in manila envelopes that stated "Official Documents Enclosed" "Do not tamper or mutilate" on one side and "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENT ENCLOSED" on the other. *Id.* Both sides of the envelopes contained bar codes and stated in bold font, "TIME-SENSITIVE FAST-TRACKED MAIL: OPEN IMMEDIATELY." *Id.*

b. The enclosed notice stated at the top in bold: "URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS." *Id.*

c. The notice header also included a barcode with a notice number that claims relate to "COVID-19 STIMULUS (INDIVIDUAL)" and a watermark depicting the Great Seal of the United States. *Id.*

d. A box on the notice touted specific relief similar to the CARES Act, including thousands in relief funds and payment deferrals. *Id.* The notice repeatedly described the location as "relief headquarters," "your designated temporary 10-day site," and "designated local headquarters." *Id.*

e. The notice represented that consumers "must claim these stimulus incentives at your designated temporary 10-day site" and provided an address in Bushnell, FL. *Id.*

f. The notice also included a list of "Mandatory qualifications to receive Stimulus Relief Funds": 1) Must be permanent U.S. resident. 2) Must have a valid driver's license. 3) Annual Income cannot exceed $91,300. *Id.*

g. The mailer also included a mock check issued by "Stimulus Relief Program." *Id.* The check's memo field stated "COVID-19 AUTO STIMULUS" and included an "AUTHORIZED SIGNATURE" with a watermark of a lock; the back of the check included the statement "ORIGINAL DOCUMENT" and a space to endorse on the back with the instruction "DO NOT WRITE, STAMP OR SIGN BELOW THE LINE. RESERVED FOR FINANCIAL BANK USE." *Id.*

Images from the Bushnell, Florida mailer are attached to this Opinion as Appendix A.

Beginning on or around March 25, 2020, Respondent Traffic Jam Events disseminated or caused to be disseminated another COVID-19 mailer to 18,103 consumers in Alabama. CC Fact Stmt. ¶ 13. The mailer was used for a sales event for the dealership Dothan Chrysler Dodge Jeep Ram Fiat in Dothan, Alabama. *Id.* The mailers were sent in manila envelopes that state in bold font "ECONOMIC STIMULUS DOCUMENTS ENCLOSED" on one side and "TIME SENSITIVE FAST-TRACKED MAIL: OPEN IMMEDIATELY" on both sides *Id.*

D. <u>The Prize Advertisements</u>

Respondents do not dispute that Traffic Jam Events generated so-called "combination box" prize mailings to promote auto dealerships in at least six states. CC Fact Stmt. ¶¶ 17-18; *see also,* Opp. Ex. 4 (Lilley Dep.) 31:15-19 (referring to "combination box" mailer as a "saturation mailing"). The mailing for Landers McLarty Toyota in Madison, Alabama, attached to Respondents' Answer, provides an example. Answer, Ex. C. Images from the Landers McLarty Toyota prize promotion are attached to this Opinion as Appendix B. The mailer states: "If your digital electronic combination box matches the official winning code and one of the codes below, you are a guaranteed winner with a possible $15,000 INSTANT CASH . . . ." Answer, Ex. C. Respondent Traffic Jam admits that the mailer was sent to residents in Alabama in May 2020. PX4 at Request for Admission 27. The practice of Respondent Traffic Jam was to design the mailers, obtain approval from the dealer, then direct a printing company to produce and mail the pieces. Opp. Ex. 4 (Lilley Dep.) 37:17-23; *see also* PX13, 19 (examples of printer records containing mailing instructions); PX 28, 29 (examples of postal statements); CC Fact Stmt. 30 (uncontested assertion of numerous ads disseminated by Respondents).

The Madison, Alabama advertisement lists an "OFFICIAL WINNING CODE" of 74937. CC Fact Stmt. ¶ 20. Below the OFFICIAL WINNING CODE is a Combination Box code. *Id.* The OFFICIAL WINNING CODE and the Combination Box code match. *Id.* In fact, the Combination Box code was always 74937 on all mailers and it always matched the official winning code. Opp. Ex. 4 (Lilley Dep.) 109:15-24. An arrow points rightward from the "Official winning code match here" to a selection of prizes. CC Fact Stmt. ¶ 21. Following that arrow, to the right of the "OFFICIAL WINNING CODE" and Combination Box code is a prize panel featuring five prizes with codes above each one. *Id.* The $2,500 INSTANT CASH prize lists the number 74937 and matches both the "OFFICIAL WINNING CODE" and the Combination Box code. *Id.* at ¶ 22.

The reverse side of the advertisement includes fine print in the bottom right corner. *Id.* at 23. The fine print disclaimer states: "If the winning number on your invitation matches the prize board at the dealership, you have won one (1) of the following prizes: #1 $15,000 Instant Cash 1:52,000 #2 $2,500 Instant Cash 1:52,000 #3 $800 Amazon Gift Card 1:52,000 #4 All-New Wireless Earpods Pro w/Charging Case 51,996:52,000 #5 $250 Walmart Gift Card 1:52,000." *Id.* at 24. The cost for the earpods depicted in these advertisements is around $6.00. *Id.* at 27.

The mailer lists a telephone number and website that consumers can use to verify their prize and schedule a time to come to the dealership. *Id.* at ¶ 28. Above that information is the consumer's first name, followed by "your combinations above must match to win!" Answer Ex. C. Consumers who call or go online are congratulated and told that they are indeed a winner and need to visit the dealership to claim their prize. PX14 (prize call script sample) ("Wow!!! My computer just verified that your code is a winner! To claim your prize, you must bring your invitation to Test Demo Dealership as shown on your invitation, during the sale dates and hours where your code will be verified and prize awarded."); PX15 (website screenshot).

In reality, the "official winning code" was not that at all: rather, to win, the consumer needed to match a different, unique number hidden within the ad to a different set of numbers on a prize board at the dealership. Opp. Ex. 4 (Lilley Dep.) at 59:15-18; PX2 (Jeansonne Dep.) 163:18-20. The unique number is hard to find because it is printed in fine print in inconspicuous locations. Even Respondent Jeansonne himself had trouble finding it: when asked if the ad stated that the prize board number was the number consumers had to match, he gravitated toward connecting the prominent combination code and "official winning code" numbers of 74937 with the matching number associated with the $2,500 prize: "It says right here, If your digital electronic combination box matches the official winning code and one of the codes below, you're a guaranteed winner with a possible $15,000 instant cash. So you look at it, you have 74937. You have 74937; and then when you go in – I see where you're going, that it's above the 2,500 [dollars.]" CC Fact Stmt. 25. Jeansonne was asked if there was any disclaimer on the page, and replied, "No, I don't see that." PX2 (Jeansonne Dep.) at 165:1-4.

Respondents do not contest that Traffic Jam created and disseminated other prize mailers that were similar to the Madison, Alabama example. For example, one October 2020 "Match & Win" mailer entitled "$20,000 Instant Cash Giveaway" used pull-tabs in lieu of a combination box. Mot. at 22 and PX8. The mailer instructed the recipient to "PULL THE TABS TO SEE IF YOU'VE WON" and that "IF YOU HAVE A ROW OF MATCHING SYMBOLS, YOU ARE A GUARANTEED WINNER!*" The pull tabs showed matching 777s, which appeared on a prize panel next to $2,500 INSTANT CASH. *Id.* Another variation was the "$10,000 Pre-Loaded Instant Money Card Giveaway" disseminated in November 2020. PX9. Behind the scratch off was the number 74937, which corresponded with the winning number 74937 and matched the $2,500 INSTANT CASH prize. *Id.*

Consumers recorded numerous complaints with public websites, the Better Business Bureau, and law enforcement agencies regarding the mailers. CC Fact Stmt. ¶¶ 59-61, 63, 65-66. Consumers complained that they had been "scammed to come into [a dealership] with a promotion saying that I had won $1,500 instant cash." *Id.* at ¶ 59. A consumer who matched the three numbers with a valuable prize, checked by phone that they had won, and then was told that

the bar code number determined their prize, commented that "this is misleading advertising and is just a bait to get you into [the] dealership." PX 1 Att. JI. As one consumer explained, "displaying your prizes right next to the codes always implies correlation. I drive for an hour to be told that, despite sitting right next to one another, those are not the prizes for those codes. The fine print did not convey that, either. Walked in for money, came out with bootlegged airpods." PX 1 Att. KW; *see also* PX 1 Atts. JJ, JU (customers explaining that the matching prize codes were withdrawn upon appearing at the dealer).

Facts suggest that Respondents understood that consumers would misperceive the mailers to mean that they had actually won. Former employee William Lilley describes many of the advertisements as "aggressive" prize panels. CC Fact Stmt. ¶ 31. By "aggressive," he means advertisements where "you get customers that, you know, sometimes perceive that they won a certain prize because of, you know, the way the prize is and the numbers are laid out." *Id.*

E. The Alleged TILA Violations

Visual inspection of Respondents' mailings shows that Respondents have regularly created advertisements to aid, promote, or assist closed-end credit transactions.[4] *See, e.g.,* Answer Ex. C (describing monthly payment amounts for credit offers); PX1 at Atts. G-BI, CI-JE. Such advertisements are thus subject to Section 144 of TILA, 15 U.S.C. § 1664 and its implementing regulation, Section 1026.24 of Regulation Z, 12 C.F.R. § 1026.24.

TILA and Regulation Z require advertisements for closed-end credit to disclose certain terms when "triggering terms" appear in the ad. Specifically, if an ad contains an amount or percentage of a down payment, the amount or number of installment payments, the amount of any finance charge, or the period of repayment, then the ad must also state additional terms such as the terms of repayment and the annual percentage rate ("APR"), using that term. 15 U.S.C. § 1664(d); 12 C.F.R. § 1026.24(d). These disclosures must be set forth "clearly and conspicuously." 12 C.F.R. § 1026.24(b).

Respondents' advertisements follow a pattern: monthly payment amounts appear prominently in colorful type, while other credit terms such as APR and number of monthly payments appear in a different part of the ad, in obscure, small type. CC Fact Stmt. ¶ 33.

In some advertisements, the monthly payment appears prominently on the first page and the number of payments and APR appear on a separate page, buried at the bottom, in minute type. *Id.* at ¶ 34.

In other advertisements, financing with 0% APR or a low APR appears in colorful, prominent type, in close proximity to images of vehicles and monthly payment amounts – but the fine print states that the APR for the vehicles pictured in the ad is substantially higher. *Id.* at ¶ 35.

[4] The advertisements were for "closed-end credit" because for auto loans, creditors do not make additional credit available as consumers repay their balances. 12 C.F.R. §§ 1026.2(a)(10), (20).

In some instances, the advertisements state a monthly payment amount but do not disclose the down payment or the number of monthly payments. PX4, Request for Admission 24 Att. 24.

Respondent Traffic Jam Events admits creating these advertisements. Amended Response to Req. for Admission 31 (PX4 at 16). Both Traffic Jam Events and Respondent Jeansonne deny legal responsibility for the advertisements, arguing that the dealers are responsible. *Id.*[5]

F. Respondent Jeansonne's Participation in and Control of the Activities of Respondent Traffic Jam Events

As noted previously, Respondent Jeansonne is the owner, managing member, and president of Respondent Traffic Jam Events. Answer, ¶ 2. Jeansonne considered himself a "strategist" at the company whose duties were to "oversee all departments." PX 2 (Jeansonne Dep.) 20:12-13. He had a broad range of responsibilities, "dipping [his] foot in sales, dipping [his] foot in a mail piece, dipping [his] foot in operations, dipping [his] foot in adequate procedures." *Id.* at 20:21-25. Jeansonne exercised control over Traffic Jam Events' hiring and firing decisions. CC Fact Stmt. ¶ 39. He set payment amounts and approved payment methods for the mailing pieces. Id. at ¶ 40. It was protocol for direct mail advertisements, indeed for "anything that ever left the company," to "always" go past Jeansonne's email first. Opp. Ex. 4 (Lilley Dep.) at 103:20-108:3. Jeansonne does not contest these facts, nor his involvement in the specific mailings described below.

Jeansonne involved himself in the decision making for the advertising challenged here. He acknowledged that the COVID-19 stimulus relief mailers were his "brainchild" and that he "did the creation." CC Fact Stmt. ¶¶ 43, 41. Jeansonne explained to a dealer that "the catch phrase right now s [*sic*] Stimulus Relief Funds. People are somewhat running from COVID-19. . . . but everyone is running to Stimulus Relief Funds." *Id.* at ¶ 43. In a discussion with a dealer about how strongly to word the mailer, Jeansonne wrote, "Mike, this is what I do and the piece is legal. If we are going to start watering down the pieces it won't work." PX26.

Jeansonne provided input on one mailer, stating "I would like (Especially on the Pulltab piece) to see a little more emphasis on the obvious, there has been a lot of stimulus money allocated to the automotive industry to allow YOU the public to buy a vehicle at never before seen prices!! Do not hesitate to be at this site." CC Fact Stmt. ¶ 43. Jeansonne's employee responded to him saying, "updated pieces with more Stimulus verbiage," noting "[o]n the pull tab piece I added a lot more Stimulus relief stuff and included all the verbiage you sent over in

[5] At least some dealers, in turn, appear to blame Respondents. *See, e.g.,* PX16 (Better Business Bureau Dec.) attachment, dealer apologizing to a consumer for the "misunderstanding"; "[t]his event was handled by a third party vendor and they have stated the bar code is only there to validate the authenticity of the game piece in the event someone wins the large prizes." PX16 at 6.

the newspaper clipping on the back." *Id.* Moreover, Jeansonne testified that he made the decision to pay upfront for the development and dissemination of the mailers. PX17 at 44:13-14.

Regarding the prize mailers, Jeansonne exercised authority and control by settling state law enforcement actions. CC Fact Stmt. ¶ 42; PX2 (Jeansonne Dep.) 182:5-7. He was involved in communications with the printers and dealers about the telephone scripts, the success or failure of promotions, the type of glue-on pieces to use, the timing of mail drops, and other issues. CC Fact Stmt. ¶ 44; PX19-PX23.

IV. ANALYSIS

A. The Commission Has Jurisdiction Over the Challenged Advertising Activity

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). Traffic Jam describes itself as offering "industry-leading direct-response mail and staffed-event campaigns for dealerships across the U.S.A." CC Fact Stmt. ¶ 6. Respondents promoted their services by email blast to dealers across the country and disseminated the challenged mailings to tens of thousands of consumers. *Id.* ¶¶ 6, 12; Opp. at 3 (acknowledging dissemination of COVID-19 mailer to 35,000 consumers for a tent sale in Florida and 10,000 for a tent sale in Alabama). Respondents have utilized the services of printers in multiple states to produce mailings. CC Fact Stmt. ¶ 7. We find that we have jurisdiction over Respondents' allegedly deceptive advertising activities pursuant to Section 5 of the FTC Act.

We also have jurisdiction over Respondents' alleged TILA violations. Section 108(c) of TILA, 15 U.S.C. § 1607(c), authorizes the Commission to enforce compliance by any person with TILA's requirements, "irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act." For the purpose of our exercise of enforcement authority, Section 108(c) deems a violation of any requirement imposed by TILA to be a violation of a requirement imposed by the FTC Act. *Id.* We thus have jurisdiction to address Respondents' alleged violations of TILA.

B. Respondents Have Violated Section 5 of the FTC Act As Alleged in Counts I and II

1. Legal Standard

"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." *POM Wonderful LLC,* 2013 WL 268926, at *18 n.5 (FTC 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.,* 2016 WL 7228668, at *5; *FTC Policy Statement on Deception,* 103 F.T.C. 174, 175 (1984) ("*Deception Statement*"), appended to *In re Cliffdale Assocs., Inc.,*103 F.T.C. 110 (1984). We thus utilize a three-part inquiry to evaluate whether, as a matter of law: (1) the advertising conveyed the claims alleged in the complaint; (2) the claim was false or misleading; and (3) the claim was material. *California Naturel,* 2016 WL 7228668, at *5; *FTC v. Direct Marketing Concepts, Inc.* 569 F. Supp. 2d at 297; *see also FTC v. Pantron I Corp.,* 33 F.3d 1088, 1095-6 (9th Cir. 1994).

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. *In re: 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. *In re Jerk LLC,* 159 F.T.C. at 891; *Direct Marketing Concepts,* 569 F. Supp.2d at 298; *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 *20-21. The analysis looks at the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. *In re Thompson Med. Co.,* 104 FTC 648, 793 & n.17 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986).

Both express and implied claims may be deceptive. *Fedders Corp. v. FTC,* 529 F.2d 1398, 1402-03 (2nd 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 (3rd Cir. 1963); *FTC v. Capital Choice Consumer Credit, Inc.,* No. 02-21050 CIV, 2003 WL 25429612, at *4 (S.D. Fla. Jun. 2, 2003). Furthermore, false advertising can be based on deceptive visual representations. *Sterling Drug, Inc. v. FTC,* 741 F.2d 1146, 1152, 1154 (9th Cir. 1984).

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., Inc. v. FTC,* 791 F.2d at 197; *Trans World Accounts, 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, Inc. v. FTC,* 970 F.2d at 322; *In re Jerk LLC,* 159 FTC at 891. Express claims are presumed material, *see FTC v. Pantron I Corp.,* 33 F.3d at 1095-96, 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; In re Thompson Med. Co.,* 104 F.T.C. at 816-17.

2. Count I: COVID-19 Stimulus Relief Mailer

Applying our three-part test, we find that Complaint Counsel have succeeded in demonstrating that the Respondents' COVID-19 stimulus relief mailers constituted deceptive

advertising in violation of the FTC Act. Respondents disseminated the ads at or near the enactment of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), CC Fact Stmt. ¶ 9, at a time when many Americans may have expected a relief check based on widespread press coverage of the Act. Through a combination of express and implied claims, the mailers sought to convey that they originated from, or were affiliated with, a government stimulus program. The envelope stated, in bold letters, "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS ENCLOSED," and the enclosed notice stated "URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE · ALL PAYMENTS DEFERRED FOR 120 DAYS." CC Fact Stmt. ¶ 12. The notice header contained a barcode with the legend "COVID-19 STIMULUS (INDIVIDUAL)" and "URGENT NOTICE – READ IMMEDIATELY." Topping off the implied connection with an official stimulus program, the mailers included a watermark depicting the Great Seal of the United States and contained an ersatz check purported to be from the "Stimulus Relief Program" with "COVID-19 AUTO STIMULUS" in the memo line. *Id.* The mailing directed the recipient to appear at a "relief headquarters," the "designated local headquarters," or "your designated temporary 10-day site" in order to claim benefits. *Id.*

Looking at all the elements together, we find that the overall net impression is that the mailers originated from, or were associated with, a government stimulus program; that they provided official information regarding government stimulus benefits; and that they offered an opportunity for receiving COVID-19 stimulus relief, including an auto stimulus check. Respondents created and disseminated the mailer in the spring of 2020 when the news and public discourse in this country were consumed by discussion of the government stimulus package and how it might mitigate the effects of the global coronavirus pandemic. Through a series of references to COVID-19 stimulus, relief, and benefits and by using indicia of official correspondence, Respondents exploited this climate and created an impression of government affiliation and relief.

As to the second element, we can readily dispense with the mailers' claim as false. Respondents are private actors who acknowledge that the U.S. government did not authorize or approve the stimulus mailer. PX4, Response to Request for Admission 26.

The third element is materiality. We find that representations designed to induce consumers to leave home and attend an automobile tent sale in the midst of a global pandemic, prompted by the understanding that they would receive a benefit from a government relief program designed to alleviate the effects of that pandemic, are "likely to affect the consumer's conduct" and are therefore material. *See* Deception Statement at 175; *Cyberspace.com,* 453 F.3d at 1201 (solicitations created the misleading impression that checks were a refund, when in reality they signed consumers up for services); *In re Jerk LLC,* 159 F.T.C. at 907-08 (representations about the source of content posted on a social media website were material to users).

Respondents' counter-arguments are unavailing.

a. Attributes of Purported Stimulus Check

Respondents argue that the mock stimulus check could not have deceived any consumer because it did not include the name of a financial institution; it contained disclaimers stating "no cash value" and "This is not a check"; and it showed no actual payee.[6] Opp. at 8. First, as to the disclaimers, Respondents appear to be referring to statements in tiny font on the back of the check. The check image proffered by Complaint Counsel bears no disclaimer. *Compare* CC Fact Stmt. ¶ 12(g) (front of check; no disclaimer); Compl. Ex. C (same); Answer at 9 (enlarged version of text, possibly from the back of the check, appears to show disclaimers described by Respondents).[7] Furthermore, courts have repeatedly held that fine print disclaimers may not overcome a clear net impression created by an ad. *See, e.g., FTC v. Grant Connect, LLC,* 827 F. Supp. 2d 1199, 1214, 1220 (D. Nev. 2011), *aff'd in part, rev'd in part on other grounds* 763 F.3d 1094 (9th Cir. 2014) (disclosures in fine print may not overcome an advertisement's deceptive net impression); *Cyberspace.com,* 453 F.3d at 1200-01 (fine print notices on reverse side of check did not overcome net impression that the check was a refund or rebate); *FTC v. QT, Inc.,* 448 F.Supp.2d 908, 924 (sprinkling of small-print disclaimers insufficient to overcome net impression of infomercial); *see also, FTC v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 43 (D.C. Cir. 1985) (disclaimer did not alter prominent claim); *Removatron Int'l Corp. v. FTC,* 884 F.2d at 1497 (disclaimers ineffective "unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression") (citation omitted). Respondents point to other check attributes that also fail to overcome the net impression. Specifically, the lack of a financial institution would be unremarkable on a federal government check, and the absence of a payee could have been addressed when the consumer appeared at the designated "relief headquarters" to claim the benefits.

In any event, Respondents' arguments regarding the check are a diversion. The question at issue is whether consumers acting reasonably would likely have regarded the challenged mailings as associated with a government stimulus program and as providing official information about an opportunity for receiving COVID-19 stimulus relief. Complaint Counsel assert that the purported check is one portion of the mailings that contributes to the overall net impression of the COVID-19 advertisement. The evidence is ample for that purpose. Complaint Counsel have demonstrated that the mailer as a whole – including but not limited to the manila envelope stating "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENT ENCLOSED," other quasi-official language, the Great Seal of the United States, the mock check with space to endorse, and the direction to attend a "relief headquarters" and a "designated temporary 10-day site" – was likely to mislead a consumer acting reasonably.

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[6] Respondents also argue that the checks did not have the amount "written out," Opp. at 8, but upon inspecting the sample check, we are persuaded that the amount is typed out similar to a government or commercial printed check.

[7] The exemplar of a *prize mailer* that Respondents attached to their Answer did contain a purported check stating on the front (in tiny print) "[t]his is not a check," but here we are dealing with the Covid-19 Stimulus Relief mailer, not the prize mailer. With regard to the prize mailers, Complaint Counsel based their theory of deception on the layout and representations of the game text, not on the presence of a purported check. Compare Answer Ex. C p.2 to Compl. Ex. C.

b. Absence of Actual Deception

As to both deceptiveness and materiality, Respondents rely heavily on what they claim is a lack of proof of actual deception. Misstating the legal standard, Respondents claim that "no reasonable consumer acting reasonably under the circumstances *was* misled or deceived." Opp. at 2 (emphasis supplied); *but see* Deception Statement, 103 FTC at 175 (advertisements "likely to mislead" are unlawful). In other variations of this argument, Respondents assert that any deception in enticing consumers to a car dealership is not material because it does not relate to the purchase or lease of an automobile, Opp. at 10; that very few consumers attended the sales, *id.* at 2-3; and that consumer complaints about "fake checks" show that consumers were not, in fact, deceived, *id.* at 8, 10-11.

Respondents appear to concede that approximately 40 people did attend the Florida and Alabama tent sales, Opp. at 10, and Complaint Counsel do, in fact, produce several customer complaints regarding Respondents' COVID-19 stimulus mailer and a press report alerting the public to the fake stimulus checks. CC Fact Stmt. ¶¶ 60, 62, 64. Complainants expressed frustration that the checks were not the stimulus payments they purported to be. This suggests that actual deception, although not necessary, did occur. But in any event, Respondents' arguments contradict the long-established law of deceptive advertising, that holds that Complaint Counsel need not show actual deception. *See* Section IV.b.1 above.

We are similarly unpersuaded by Respondents' additional argument that their mailings were designed to bring consumers to an auto sales site and are therefore distinct from any deception in the actual buyer-seller (or lessor-lessee) transaction for the car. Anticipating such arguments, the law defines a material misrepresentation as one that is "likely to affect a consumer's choice of *or conduct regarding* a product." Deception Statement, 103 F.T.C. at 182 (emphasis supplied); *see, e.g.*, *POM Wonderful LLC*, 2013 WL 268926, at *52; *Cyberspace.com,* 453 F.3d at 1201; *cf. In re Household Sewing Mach. Co.*, 76 F.T.C. 207, 239 (1969) (the problem with bait-and-switch is not that the consumer always takes the bait, but that it serves as an "opening gambit to get the salesman over the doorstep"). We are satisfied that a consumer's decision to attend an automobile sales event, during a global pandemic, constitutes relevant "conduct regarding a product" sufficient to establish materiality.

c. 15 U.S.C. § 45(n) Is Not a Barrier to Relief

Respondents devote significant space in their brief arguing that the Commission is without authority to act due to the provisions of 15 U.S.C. § 45(n). Opp. at 4-7. For cases brought under our unfairness authority, Section 45(n) requires that 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." Contrary to Respondents' argument, that subsection simply does not apply in this deception case. Section 5 establishes deception and unfairness as two distinct grounds for Commission enforcement. *American Fin. Servs. Ass'n v. FTC,* 767 F.2d 957, 979 n.27 (D.C. Cir. 1985); *FTC v. Cantkier,* 767 F.Supp.2d 147, 153 (D.C. Dist. 2011). Congress passed the statute that became § 45(n) because it was concerned about the perceived breadth and undefined

nature of the Commission's enforcement under its unfairness authority. *See FTC v. Wyndham Worldwide Corp.,* 799 F.3d 236, 243-44 (3d Cir. 2015) (discussing history of unfairness policy and § 45(n)); *American Fin. Servs. Ass'n. v. FTC,* 767 F.2d at 969 (describing history of 1980 policy statement later embodied in § 45(n)). It is therefore no accident that § 45(n) by its plain language restricts itself to unfairness cases only. The section affects neither the Commission's authority to bring an enforcement action against deception nor the elements of such a case. *Cantkier,* 767 F.Supp.2d at 153; *FTC v. Lights of America Inc.,* SACV 10-1333 JVS (MLGx), 2011 WL 13308569, at *5 (Apr. 29, 2011); *see CyberSpace.com LLC,* 453 F.3d at 1199 n.2. We therefore reject Respondents' claim that Complaint Counsel must demonstrate actual or likely substantial consumer injury.

3. Count II: Respondents' Deceptive Prize Advertisements

Complaint Counsel's uncontroverted facts establish that Respondents' prize advertisements violated Section 5. The advertisements stated that the consumer needed to match three unique numbers in order to win, then showed all three numbers as a match, with the third number appearing next to a valuable prize. The advertisements thus represented, and a consumer acting reasonably under the circumstances would understand, that he or she had won a specific, valuable prize. This impression would be confirmed when, as directed by the ad, the consumer called a telephone operator or visited a website that, in turn, would confirm that the consumer was a winner. Only upon appearing at the dealership would the consumer learn that he or she had not won the indicated prize, but, if anything, some other nominal door prize based on matching a fourth number with a "prize board." CC Fact Stmt. ¶¶ 24-27; Opp. Ex. 4 (Lilley Dep.) at 59:15-18; PX2 (Jeansonne Dep.) 163:18-20. As one consumer succinctly explained, this is "misleading advertis[ing] and is just a bait to get you into [the] dealership." PX 1 Att. JI.

Having found that the advertisements made false representations, we now turn to the final element, materiality. Telling consumers that they have won a valuable prize, such as $2,500 instant cash, in order to lure them to a car sale is doubtless material, as the information is important to consumers and capable of influencing their decision about how to proceed. *See, e.g.*, *Cyberspace.com,* 453 F.3d at 1201 (relying on Deception Statement, 103 F.T.C. at 182); *Kraft*, 970 F.2d at 322 (same). Several consumers complained that they had driven far out of their way to claim the prize that the ads represented they had won. *See, e.g.,* PX1 Atts. KW, KX, KY (loss of "time, money and frustration"). Indeed, the goal of these ads was to get consumers to appear at the dealership when they might not otherwise do so, potentially at substantial inconvenience, and at risk to their health, and the ads were therefore material. As the Supreme Court has stated, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." Deception Statement, 103 F.T.C. at 182, *quoting Central Hudson Gas & Elec. Co. v. PSC,* 447 U.S. 557, 567 (1980).

Respondents make no attempt to controvert the facts that underpin Count II, and offer only a token defense on materiality. Respondents submit that the recipient of each mailer received at least one prize if they showed up at the dealer, and furthermore that there was at least one grand prize winner in each advertisement. Opp. at 11. Putting aside for the moment that

Respondents' method appears to have been to represent to consumers that they won a valuable *second-place* prize such as $2,500 or $5,000 cash, *see, e.g.,* CC Fact Stmt. ¶ 21 and PX1 Atts. AH-AQ, the fact that consumers may have been offered an item of trivial value is not a defense to materiality. A promised cash payout of $2,500 would likely affect consumer behavior significantly more than would a $6 pair of earbuds. *See* PX1 Att. KW (consumer drove for an hour, "walked in for money, walked out with bootlegged airpods"); *see also, FTC v. Standard Education Soc'y,* 302 U.S. 112, 113-117 (1937) (finding it unlawful to deceive consumers into believing that a product was being given away); *accord Kalwajtys v. FTC,* 237 F.2d 654, 655-6 (7th Cir. 1956) (noting that consumers were told that they were members of a "selected" group of consumers receiving free products); *FTC v. Dayton Family Prods.,* 2016 WL 1047353, at *8, 10 (D. Nev., Mar 16, 2016) (holding that the fact that consumers received booklets on a chance to enter a sweepstakes and in some instances money orders for less than $2 did not change the misleading nature of the representations). In addition, the presence of at least one grand prize winner in no way mitigates the deception of the other consumers, who were told they had won a specific, valuable prize but, in fact, had not.

Finally, for the same reasons stated in regard to Count I above, we reject Respondents' arguments that mailings designed to lure consumers to an auto dealership do not affect consumer conduct with regard to a product and that 15 U.S.C. § 45(n) prevents us from acting in this deception case. We therefore grant summary decision on Count II.

C. Respondents Have Violated TILA as Alleged in Count III

Complaint Counsel demonstrated that Respondents created and disseminated many dozens if not hundreds of advertisements to "aid, promote, or assist" closed-end credit transactions, and that these ads violate TILA by failing properly to disclose required loan terms. Respondents' advertisements contained "triggering terms" in the form of monthly payment amounts next to the image of a vehicle. *See, e.g.,* PX 1 Atts. F-BI, CI-JE. Rather than making the required "clear[] and conspicuous[]" disclosures of the additional required terms, such as the term of repayment and the annual percentage rate ("APR"), the ads disclosed this information, if at all, in small print in another part of the ad. Complaint Counsel's evidence of these ads stands uncontroverted, and we may evaluate as a matter of law whether the disclosures are conspicuous. *Burghy v. Dayton Racquet Club, Inc.,* 695 F. Supp.2d 689, 696 (S.D. Oh. 2010) (collecting cases). Under TILA, "conspicuous" means "obvious to the eye" or "plainly visible." *See Applebaum v. Nissan Motor Acceptance Corp.,* 226 F.3d 214, 220 (3rd Cir. 2000) (interpreting "clear and conspicuous" requirement in Consumer Leasing Act, embodied in TILA); *Gilberg v. Calif. Check Cashing Stores, LLC,* 913 F.3d 1169, 1176 (9th Cir. 2019) (conspicuous pursuant to TILA means "readily noticeable to the consumer"). Disclosures in tiny print, condensed text, or in difficult-to-find locations are not conspicuous under TILA. *See Barrer v. Chase Bank USA, N.A.,* 566 F.3d 883, 891-92 (9th Cir. 2009) (TILA disclosure buried in dense fine print five pages after related disclosure was not clear and conspicuous as a matter of law); *accord, Tucker v. New Rogers Pontiac, Inc.,* No. 03 C 862, 2003 WL 22078297, at *5 (N.D. Ill. Sept. 9, 2003) (rejecting claims that disclosures that appear in barely legible, smallest-sized font on the document are conspicuous).

Respondents do not contest the content of the ads, nor do they argue that the disclosures are clear and conspicuous. Instead, Respondents argue that TILA does not apply to them because they do not offer credit. Opp. at 12-13, citing 15 U.S.C. § 1602 (definition of "creditor"). This argument misses the mark. Complaint Counsel brought a claim under Section 144 of TILA, 15 U.S.C. § 1664, which facially applies to "any advertisement to aid, promote, or assist directly or indirectly" any consumer credit transaction other than an open end credit plan (emphasis supplied); *see also,* 12 C.F.R. § 1026.2 ("advertisement" defined as "a commercial message in any medium that promotes, directly or indirectly, a credit transaction").

There are, as Complaint Counsel acknowledges, some TILA duties that apply only to creditors. *See, e.g.,* 15 U.S.C. §§ 1638(a), 1669(a)(1), 1666a. The advertising obligations are not among them. 15 U.S.C. § 1664; *see also,* 12 C.F.R. § 1026.24(a) (2021) (applying Regulation Z to "an advertisement for credit"; no limitation to creditors); *compare* 12 C.F.R. § 1026.18 ("the creditor shall disclose the following information . . .") to 12 C.F.R. § 1026.24 ("If an advertisement states a rate of finance charge, it shall state the rate as an 'annual percentage rate' . . . ."). We note that the staff interpretation of Regulation Z, issued by the Federal Reserve, states, "Persons covered. All *persons* must comply with the advertising provisions in §§ 226.16 and 226.24,[8] not just those that meet the definition of creditor in 226.2(a)(17). Thus . . . others who are not themselves creditors must comply with the advertising provisions of the regulation if they advertise consumer credit transactions." 12 C.F.R. Part 226 Supp. I § 226.2(a)(2) ¶ 2 (emphasis in original). We find this to be a reasonable interpretation of the statutory text and we reach the same conclusion.

Respondents further point to language in Regulation Z stating that, "in general," it applies to those who extend credit. Opp. at 13. However, the use of the phrase "in general" implies that there are particular circumstances that differ. As discussed above, advertisements are just such an area, based on the statute's reference to "any advertisement" to aid, promote, etc., any extension of consumer credit. 15 U.S.C. § 1664(a) (emphasis supplied).

D. Respondent Jeansonne Is Individually Liable

Citing no legal authority and without controverting Complaint Counsel's facts, Respondents nonetheless assert that Complaint Counsel's showing of David J. Jeansonne II's individual liability falls short. Opp. at 12. After due consideration, we reject this argument.

An individual is liable for a business entity's deceptive acts or practices if the individual either had the authority to control or participated directly in the acts or practices at issue. *E.g.*, *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005); *FTC v. Amy Travel Servs., Inc*., 875 F.2d 564, 573 (7th Cir. 1989), *overruled in part on other grounds by AMG Capital Mgmt, LLC v. FTC,* 141 S. Ct. at 1348-49. Here, Complaint Counsel have demonstrated both. As the owner, managing member, and president of Respondent Traffic Jam Events, Mr. Jeansonne does not contest that he "overs[aw] all departments," exercising day-to-day control over hiring, firing, and other

[8] Due to a non-substantive re-numbering of Regulation Z effective December 30, 2011, these sections are now numbered 12 C.F.R. §§ 1026.16, 1026.24, and 1026(a)(17). *See* 76 Fed. Reg. 79767 (Dec. 22, 2011).

corporate affairs while simultaneously "dipping [his] foot in" operational matters such as sales, mailings, and what he called "adequate procedures." CC Fact Stmt. ¶¶ 38-40; PX2 at 20:13, 21-25.

Respondent Jeansonne also involved himself in the particular mailings disseminated by Traffic Jam Events. The uncontested testimony of his former employee established that nothing left Traffic Jam Events without going through Mr. Jeansonne's email inbox first. Opp. Ex. 4 (Lilley Dep.) at 103:20-108:3. Indeed, Mr. Jeansonne portrayed the COVID-19 stimulus mailers as has personal "brainchild," PX17 at 50:3-4, and he participated in their design. CC Fact Stmt. ¶ 43. He even explained to a dealer that those mailers should not be "water[ed] down" or they "won't work." *Id.* at ¶11; PX26. As to the prize mailers, Mr. Jeansonne similarly had input on their design, CC Fact Stmt. ¶ 44, and knowledge of their content as he settled multiple state enforcement actions alleging deceptive conduct related to these mailers. PX2 at 180:6-7, 19-21.

We find that Complaint Counsel have established Respondent Jeansonne's individual liability for Traffic Jam Events' deceptive acts and practices. We therefore find that summary decision is appropriate against both Respondents on all three counts.

V. RELIEF

The Commission has wide discretion in its choice of a remedy in addressing unlawful practices. *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 611 (1946). A cease and desist order is appropriate if the Commission determines that the order is sufficiently clear and reasonably related to the unlawful practices at issue. *In re POM Wonderful*, 2013 WL 268926, at *62 (citing *Colgate-Palmolive Co.,* 380 U.S. 374, 392, 394-95 (1965)).

Where appropriate the Commission may order "fencing-in" relief, which refers to provisions that are "broader than the conduct that is declared unlawful." *Telebrands Corp. v. FTC*, 457 F.3d 354, 356 n.5 (4th Cir. 2006). *See FTC v. Nat'l Lead Co.,* 352 U.S. 419, 431 (1957) ("[T]hose caught violating the [FTC] Act must expect some fencing in.") Thus, in carrying out its function of preventing unlawful conduct, the Commission "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952). The Commission has the power to forbid acts that are lawful, when necessary "to prevent a continuance of the unfair competitive practices that are found to exist." *FTC v. Nat'l Lead Co.,* 352 U.S. at 430.

When determining whether an order is reasonably related to the unlawful practices, the Commission considers three factors: "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the Respondent has a history of prior violations." *Stouffer Foods Corp.* 118 F.T.C. 746, 811 (F.T.C. 1994); *see also, POM Wonderful,* 2013 WL 268926, at *62. "The reasonable relationship analysis operates on a sliding scale – any one factor's importance varies depending on the extent to which the others are found." *Telebrands,* 457 F.3d at 358. In applying the three-

part analysis, the Commission considers the circumstances of the violation as a whole, and not merely the presence or absence of any one factor. *Kraft, Inc. v. FTC,* 970 F.2d at 327-28 (upholding the FTC's imposition of fencing-in relief, despite absence of prior violations by Kraft, in light of seriousness, deliberateness, and transferability of violations).

Here, Complaint Counsel's proposed Order prohibits three areas of conduct. Part I prohibits Respondents from engaging in businesses that involve advertising, marketing, promoting, distributing, offering for sale or lease, or selling or leasing motor vehicles. Part II prohibits Respondents from misrepresenting any material fact in connection with advertising, marketing, promoting, or offering for sale or lease any product or service, including but not limited to matters such as affiliation with or financial relief from the government, or prizes or sweepstakes. Part III, in its essence, prohibits Respondents from violating Section 144 of TILA or Regulation Z by stating the amount of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without also clearly and conspicuously disclosing all of the additional required terms.[9] Part III also forbids Respondents from representing a rate of finance charge without stating the term as an annual percentage rate or APR.

Applying the Commission's three-part test, we find first that the Respondents' violations were sufficiently serious and deliberate to warrant the requested relief. The COVID-19 stimulus mailers used deception to lure consumers to attend public sales events during a public health emergency, preying on their need for government assistance at a time when many individuals (including persons with health vulnerabilities) were attempting to avoid any unnecessary public events. As Mr. Jeansonne explained, "People are somewhat running from COVID-19 . . . but everyone is runing (sic) for and to Stimulus Relief Funds." PX6; CC Fact Stmt. ¶ 43. Respondents' email blast to dealers expressly touted the ads as using "an official letter format." CC Fact Stmt. ¶ 11. The mailers featured, not merely one or two, but numerous attributes seeking to create a perception of government affiliation (U.S. government watermark, purported check, direction to appear at "stimulus headquarters," manila envelope with bold "STIMULUS DOCUMENT ENCLOSED," etc.). Respondents justified these strong features on grounds that "[i]f we are going to start watering down the pieces it won't work." PX26. And as egregious as the mailers were, Mr. Jeansonne stated to a federal judge that the mailers were "so watered down" that in his view they were a "flop." PX17 (TRO Hear'g Transcript) at 44:12-13. All of this suggests the seriousness and deliberateness of the conduct that justifies the fencing-in relief.

The persistence with which Respondents pursued their prize mailing campaigns also is notable. Respondents persisted in the unlawful mailings despite entering consent orders with the States of Kansas in 2010 and 2013 for prize and credit violations (the latter order banning Respondents from doing business in the state), and with Indiana for the prize violations in 2019. PX1, Atts. LX – LZ, MA. The state actions, at a minimum, alerted Respondents' to the potential deception concerns raised by their advertising. Yet Respondent Jeansonne testified that he did

[9] The additional required terms are: the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate ("APR"), including any potential increase of the APR post-transaction.

not change his company's practices in other states because of the Kansas consent orders. PX2 at 181:25-182:7. Similarly, Mr. Jeansonne said he made no changes to Traffic Jam Events' mailers because of Indiana's law enforcement action, except to include language in the emails to dealers attempting to shift responsibility to them. *Id.* at 186:16-24; *see also* 185:2-3 ("[We] implement[ed] at the bottom of his email that it's up to you, Mr. Dealer. We're not responsible."). The determination to continue their advertising campaigns without modification despite the state actions reflects a deliberate choice to employ practices challenged by law enforcement as deceptive. Moreover, even without the enforcement actions, Respondents knew the prize ads were misleading some consumers because consumers complained directly to them: Mr. Jeansonne's former employee acknowledged receiving complaints from "customers that, you know, sometimes perceive that they won a certain prize because of, you know, the way the prize is and the numbers are laid out." PX3 at 70:23-71:1.

All three of the violations – the egregious COVID-19 mailers, the voluminous prize mailers, and the TILA violations numbering in the many dozens if not hundreds after Respondents had already encountered law enforcement in the Kansas order – support the need to ban the Respondents from the auto industry in this case. *See FTC v. Nat'l Lead Co.,* 352 U.S. at 430 (on appeal from a Commission order, "the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices"); *cf. FTC v. Gill,* 265 F.3d at 957-58 (in federal court action, affirming a ban on engaging in the credit repair business due to systematic and repeated violations); *FTC v. Somenzi,* No. 16-cv-07101, 2017 WL 6049371, at *7-8 (C.D. Cal. Jul. 24, 2017) (default judgment including a lifetime ban on participating in or assisting others in engaging in prize promotion schemes, due to cognizable danger of recurrent violation); *FTC v. Inc21.com Corp.,* 745 F. Supp. 2d 975, 1009-10 (N.D. Cal. 2010) (ban on telephonic billing); *FTC v. Publ'g Clearing House, Inc.,* No. CV-S-94-623, 1995 WL 367901, at *4 (D. Nev. May 12, 1995) (ban on participating in any telephone premium promotion).

Applying the second part of the remedy analysis, we find that in the absence of complete relief, Respondents readily could transfer their deceptive practices to markets other than the sale or lease of motor vehicles. Bogus prize mailers could be used to tout any product that consumers typically buy in-person or through the mail. In a similar vein, fake promises of government largesse could lure customers to in-person sales for a variety of products, particularly where they are told they must present themselves at a "headquarters" during a limited time to claim what is due them. The ease of transferability, along with the elements described for factor one above, particularly supports Parts II and III of Complaint Counsel's proposed order (ban on deception in any industry; ban on TILA violations in any advertisement). The remedy seeks to "close all roads to the prohibited goal" of deceiving consumers. *FTC v. Ruberoid Co.,* 343 U.S. at 473.

Given the strength of our findings under the first two factors, we need not make a finding under the third – whether the Respondents have a history of prior violation; the first two factors alone are enough to support the relief sought by Complaint Counsel.[10] Here we know of three

[10] *See Telebrands*, 457 F.3d at 362 (seriousness/deliberateness and transferability were sufficient to justify fencing-in relief); *Kraft, Inc. v. FTC,* 970 F.2d at 327-28 (approving application of

prior state challenges to Respondents' advertising activities, two in Kansas and one in Indiana. Although these actions were settled without liability findings, in *Telebrands*, we found that a pattern of narrow settlements, if ineffective in stopping unlawful conduct, could help establish the need for broader relief.[11] Federal courts similarly consider the "failure of prior enforcement efforts in . . . stopping unlawful activity" when considering how broad a remedy to impose.[12] Applying these standards, we believe the Respondents' committing multiple violations despite entering three consent orders involving similar conduct to the violations at issue here supports the imposition of broad fencing-in relief.

In sum, we find that Respondents have demonstrated a commitment to their pattern of conduct and a willingness to mislead in ways that are widely transferable. The Order's clear limitations on Respondents' conduct, including the ban on participation in the automotive industry, are appropriate and no broader than necessary to prevent recurrence of the violations.

VI. CONCLUSION

We have determined to grant Complaint Counsel's Motion for Summary Decision. Complaint Counsel have met their burden to demonstrate that Respondents violated Section 5 of the FTC Act as alleged in Counts I and II, and TILA as alleged in Count III. Respondents have failed to raise a genuine issue of material fact as to these claims, and their statutory defenses lack merit. Respondent Jeansonne is individually liable for the violations along with Respondent Traffic Jam Events. We conclude that Complaint Counsel are entitled to summary decision as to both Respondents as a matter of law. Finally, we enter the accompanying Final Order, in the form of Complaint Counsel's proposed Order as a necessary and appropriate measure to prevent further violations.

Date of Decision: October 25, 2021

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fencing-in relief despite absence of prior violations, in light of seriousness, deliberateness, and transferability of violations).

[11] *Telebrands Corp.,* 140 F.T.C. 278, 340 (2005)

[12] *FTC v. Think Achievement Corp.,* 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000); *see also, FTC v. Wilcox,* 926 F. Supp. 1091, 1103 (S.D. Fla. 1995); *FTC v. Five-Star Auto Club, Inc.,* 97 F. Supp. 2d 502, 536-37 (S.D.N.Y. 2000).