

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of**

**TRAFFIC JAM EVENTS, LLC, a limited  
liability company**

**and**

**DAVID J. JEANSONNE II, individually and as  
an officer of TRAFFIC JAM EVENTS, LLC.**

**DOCKET NO. 9395**

**TRAFFIC JAM EVENTS, LLC AND DAVID J. JEANSONNE II'S  
OPPOSITION TO MOTION TO COMPEL**

Respondents Traffic Jam Events, LLC (“Traffic Jam”) and David J. Jeansonne II (collectively, “Respondents”), by and through counsel, hereby oppose Complaint Counsel’s Motion to Compel Respondents to Comply with their Discovery Obligations as to Initial Disclosures, Request for Production Responses, and Preliminary Witness List. For the reasons set forth herein, Complaint Counsel’s motion should be denied.

**BACKGROUND**

In its Motion to Compel, Complaint Counsel attempts to frame the discovery dispute as one in which Respondents are “shirking their discovery obligations at every turn.” But Complaint Counsel is merely grasping for straws and trying to support an unsubstantiated claim that discoverable information is simply whatever they want them to be. Respondents’ believe that this view is misguided, and the aggressive and vindictive nature of the requested discovery must be understood in the context of earlier federal court litigation involving these parties, as discussed below. According to Complaint Counsel, the broad framing of the issues raised in the Complaint allows Complaint Counsel to seek discovery of any and all materials it deems or may deem

responsive. Contrary to this unsupported contention, the Administrative Complaint (and, by extension, discovery) is limited to three violate, discrete actions cited therein. Despite this limitation, Complaint Counsel has gone on a fishing expedition for evidence of allegedly deceptive misconduct wholly unrelated to the allegations raised in the Complaint. Complaint Counsel's discovery requests are extraordinarily overbroad, and providing the unlimited discovery they demand would be extraordinarily burdensome. Thousands of hours would have to be spent, and significant costs would be incurred. Put simply, the law does not permit the unprecedented, costly and burdensome fishing expedition that Complaint Counsel now seeks.

By way of background, the FTC initiated a lawsuit in the Eastern District of Louisiana. *See Federal Trade Commission v. Traffic Jam Events, LLC et al.*, CV No. 2:20-CV-1740-WBV-DMD (Ed. La. 2020). That case involved a particular mailer sent back in March 2020 that allegedly included certain materials referencing a COVID promotion (the "Mailers"). Specifically, the FTC alleged that "[s]ince at least March 2020, Defendants have mailed or caused to be mailed deceptive advertisements purporting to provide COVID-19 stimulus relief to consumers." *See* Exhibit 1. The Complaint did not specifically allege any other specific conduct purportedly in violation of the law since March 2020. At the same time, the FTC filed a Motion for a Temporary Restraining Order, and Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should not Issue. Respondents filed a Memorandum in Response to the Motion for Temporary Restraining Order, which included an Affidavit of Mr. Jeansonne, II confirming the absence of any ongoing violations and representing under oath that Defendants will not send any future Mailers or other mailers substantially similar thereto (among various other things). The FTC also filed a Notice of Supplemental Authority and Amended Proposed Preliminary Relief, as well as a substituted proposed TRO. *See* Exhibits 2 and 3.

The hearing on the requested Temporary Restraining Order was re-set for June 25, 2020. *See Exhibit 4.* At the hearing, the FTC attempted to introduce additional evidence of alleged violations which are the very ads cited specifically in the current complaint. This was done by counsel for the FTC as a last ditch effort to substantiate the Eastern District action, a fact noted during questioning of counsel by the Court. *See Exhibit 5.* Following the June 25, 2020 hearing, on June 26, 2020, this Court issued an Order and Reasons, denying the Motion for Temporary Restraining Order. *See Exhibit 6.* In that Order and Reasons, this Court acknowledged the requirement under Section 13(b) that a party is violating or is about to violate the law, and found that “[t]he FTC has failed to show that it has reason to believe that Defendants are violating or are about to violate any provision of law enforced by the FTC, as required by Section 13(b) of the FTC Act and Fifth Circuit precedent.” *Id.*

The FTC was then faced with a motion to dismiss the entire action and, on the eve of the Court addressing that matter, voluntarily dismissed its action,<sup>1</sup> and subsequently instituted the instant action citing specifically only the same advertisements and events cited in the Eastern District action. But nothing has changed – the specific facts involve the discrete acts cited, not everything that Respondents have ever done.

### **LAW AND ARGUMENT**

Rule 3.31(c)(1) provides: “[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1); *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). A party’s ability to obtain relevant discovery is not unlimited, however. Respondent is not required to collect, review, and produce

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<sup>1</sup> Exhibit 7.

documents that are not in its possession, custody, or control. 16 C.F.R. § 3.37(a). Under Rule 3.31(c)(2)(i) discovery shall be further limited when “discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” 16 C.F.R. § 3.31(c)(2)(i). Discovery shall also be limited where “[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(2)(iii).

While a party may move the Administrative Law Judge for an order compelling disclosure or discovery, a motion to compel should be denied when “the Administrative Law Judge determines that the objection is justified.” 16 C.F.R. § 3.38(a). Here, the motion to compel should be denied.

**I. Complaint Counsel Has Failed To Comply With Meet And Confer Obligation.**

As an initial matter, the Administrative Law Judge should deny the Motion because Complaint Counsel failed to comply with its meet and confer obligations under Scheduling Order Additional Provision ¶ 4 and Rule 3.22(g) before filing its motion. Indeed, the Scheduling Order requires that “[e]ach motion . . . be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.” However, Complaint Counsel’s blanket assertion that it made a “good faith effort” to “meet and confer” fails to acknowledge the fact that the so-called “meet and confer” entailed nothing more than a few email exchanges and a single phone call between counsel that could not have been about specific discovery responses since those had not even been exchanged. This is wholly inadequate. Additionally, Complaint Counsel filed the Motion even though Respondents expressed interest in continuing the dialogue. *See* Exhibit 8 (L. Balart Oct. 15, 2020 8:17p.m. Email). And Complaint Counsel did not allow any meaningful “meet and confer” to take place as

it provided Respondents with only 24 hours’ notice within which to resolve the dispute before filing the present Motion. *Id.* Such conduct does not qualify as meeting and conferring in good faith. *See Aponte-Navedo v. Nalco Chem. Co.*, 268 F.R.D. 31, 40-41 (D.P.R. 2010) (finding the moving parties’ meet-and-confer certification statement deficient because “only two of the emails were sent by [the moving party], which instead of showing a good faith effort to reach an agreement, only showed [the moving party’s] point of view over the objections made.”); *see also Goodman v. Shalimar Investments, LLC*, No. 4:14-cv-00079-SEB-TAB, 2016 U.S. Dist. LEXIS 95129, at \*2 (S.D. Ind. July 21, 2016) (finding that an exchange of only four emails without a suggested date, time, or place to resolve the matter does not qualify as a “good faith attempt” to resolve discovery disputes). Identical to the conclusion in the cited decisions, it is clear from the timing of the motion to Compel that Complaint Counsel did not proceed in good faith, never intended to resolve any dispute, and never raised any specific concern about the responses to the Requests. Instead, the view of Complaint Counsel is that discovery must be their way or else. Consequently, Complaint Counsel’s Motion should be dismissed on this basis alone.

**II. Respondents Initial Disclosures Are Complete.**

Should this Court decide to turn to the merits of Complaint Counsel’s motion, dismissal is still warranted. In its Motion, Complaint Counsel contends that Respondents have failed to satisfy their initial disclosures obligation.

Indeed, Rule 3.31(b) obligates counsel for each party, within five days of receiving a Respondent’s answer, to provide certain initial disclosures “*relevant to the allegations of the Commission’s complaint, to the proposed relief, or to the defenses of the respondent.*” (emphasis added). Complaint Counsel seems to think that it is entitled to information regarding all of Respondents’ potentially deceptive activities, not just those identified in the Complaint. To the contrary, this Complaint is based upon the purportedly deceptive nature of *three* specific

advertisements. Respondents have disclosed all relevant factual information related to the factual activities complained of in the Complaint, and Complaint Counsel has failed to specifically identify the purported deficiencies with Respondents Initial Disclosures. A conclusory assertion that other violative conduct may have occurred is inadequate and deficient as a basis to conduct discovery unfettered, without any factual underpinning. Consequently, this Court should deny Complaint Counsel's motion with respect to initial disclosures.

### **III. Complaint Counsel's Requests for Production Are Objectionable.**

Complaint Counsel's broad-reaching discovery requests for production of documents are objectionable on many grounds. They are extraordinarily broad, and providing the unlimited discovery they demand would be extraordinarily burdensome. As such, the law does not permit this unprecedented fishing expedition that Complaint Counsel seeks. As various district courts have recognized, "[d]iscovery is not intended as a fishing expedition permitting speculative pleading of a case first and then pursuing discovery to support it. The Plaintiff must have some basis in fact for the action. The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim." *Russell v. Choicepoint Services, Inc.*, 302 F. Supp. 2d 654, 671 (E.D. La. 2004) (citations omitted). Complaint Counsel is guilty of the precise course of conduct that these district courts condemn. After filing the Complaint, Complaint Counsel launched a vast fishing expedition to uncover any other purported violations committed by Respondents. By further way of example, Complaint Counsel seeks overly broad, unduly burdensome requests, including

All Documents relating to any audits, inquiries, investigations, proceedings, subpoenas, civil investigative demands, or reviews by any federal, state, county, or local agencies, including any determinations, findings, recommendations, reports, citations, fines, penalties, resolutions, or settlements relating to any Advertisement or Promotional Material."

Complaint Counsel Request for Production No. 15. Respondents properly objected, in part, to this overly broad request on the grounds that the request is

not reasonably expected to yield information **relevant to the allegations of the Complaint**, to the proposed relief, or to the defenses of any respondent because it is written in a way that is completely untethered to the allegations of the Complaint and the allegedly violative, discrete actions cited by Complainant. This request also calls for the discovery of electronically stored information from sources that are not reasonably accessible to Respondents because of undue burden or cost.

As previously stated, the Administrative Complaint is undisputedly limited to three purportedly deceptive advertisements. Complaint Counsel's request for information regarding investigations into conduct not alleged in the Complaint is simply not relevant. As such, Respondents have no obligation to produce this information as it is outside the scope of discovery.

Nor do Respondents have the obligation to produce information that is cumulative or duplicative. In an apparent attempt to bury Respondents in unnecessary discovery, Complaint Counsel continually seeks information that it already has in its possession. For instance, Complaint Counsel's Request for Production No. 14 seeks

All Documents relating to any Complaint relating to (i) Traffic Jam Events or (ii) any Advertisement or Promotional Material identified in response to Request for Production No. 1, including but not limited to any Complaint from any Better Business Bureau, your response to any Complaint, Traffic Jam Event's response to any Complaint, any settlement or resolution.

Complaint Counsel's Request for Production No. 14. Respondents objected to this request on the ground that Complaint Counsel "is already in possession of all communications to or from the FTC, Complainant has already communicated with the Florida AG and obtained documents and is therefore requesting Respondents to duplicate effort." *See* Respondents' Responses to FTC's First Set of Requests for Production of Documents. Because Rule 3.31(c)(2)(i) allows the Court to limit discovery when "discovery sought from a party or third party is unreasonably cumulative

or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,” this objection is clearly justified. *See* 16 C.F.R. § 3.31(c)(2)(i).

Consequently, this Court should deny Complaint Counsel’s motion to compel its broad-reaching, cumulative, and unduly burdensome discovery requests.

#### **IV. Respondents’ Preliminary Witness List is Adequate.**

Finally, Complaint Counsel contends that Respondents failed to provide a Preliminary Witness List that complies with the Court’s Scheduling Order. *See* Complaint Counsel’s Motion to Compel at p. 9. The Scheduling Order merely obligates a party to provide “a *brief* summary of the proposed testimony.” (emphasis added). Complaint Counsel, however, seems to interpret the Order as obligating Respondents to provide a detailed summary of the witness’s exact testimony. But Respondents are not privy to this information. Put simply, Respondents have no way of knowing what potential witness may state in his or her testimony. As such, Respondents’ purportedly “boiler plate” descriptions of the testimony are in compliance with the Scheduling Order.

### **CONCLUSION**

For the reasons discussed herein, this Court should deny Complaint Counsel’s Motion to Compel Respondents to Comply with their Discovery Obligations as to Initial Disclosures, Request for Production Responses, and Preliminary Witness List.



Respectfully Submitted,

/s/ L. Etienne Balart

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**Counsel for Respondents, Traffic Jam Events,  
LLC and David J. Jeanson II**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of October, 2020, I caused a true and correct copy of the foregoing to be filed through the Federal Trade Commission's E-filing platform and have served the following parties via email:

Thomas J. Widor  
Sanya Shahrabi  
Federal Trade Commission  
Bureau of Consumer Protection  
600 Pennsylvania Avenue, NW  
Mailstop CC-10232  
Washington, DC 20506  
twidor@ftc.gov  
sshahrabi@ftc.gov

/s/ L. Etienne Balart

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
company, and

DAVID J. JEANSONNE II, individually and as an  
officer of TRAFFIC JAM EVENTS, LLC,

Defendants.

**Civil Action No. 2:20-cv-1740**

**Judge:**

**Magistrate:**

**COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants’ acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Venue is proper in this District under 28 U.S.C. § 1391(b)(1), (b)(2), and (c)(2), and 15 U.S.C. § 53(b).

**PLAINTIFF**

4. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41–58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b).

**DEFENDANTS**

6. Defendant Traffic Jam Events, LLC is a Louisiana limited liability company with its principal place of business at 2232 Idaho Avenue, Kenner, LA 70062. Traffic Jam Events transacts or has transacted business in this District and throughout the United States. Traffic Jam Events offers direct mail marketing services and staffed tent sales events to automotive dealerships.

7. Defendant David J. Jeanson II, is the owner, managing member, and president of Traffic Jam Events. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Traffic Jam Events, including the acts and practices set forth in this Complaint. Defendant Jeanson resides in this District and, in connection with the matters alleged herein, transacts or has transacted business in this District and throughout the United States.

## COMMERCE

8. At all times material to this Complaint, Defendants Traffic Jam Events and Jeansonne (hereinafter Defendants or Traffic Jam Events) have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

### DEFENDANTS’ BUSINESS ACTIVITIES

9. Since at least March 2020, Defendants have mailed or caused to be mailed deceptive advertisements purporting to provide COVID-19 stimulus relief to consumers.

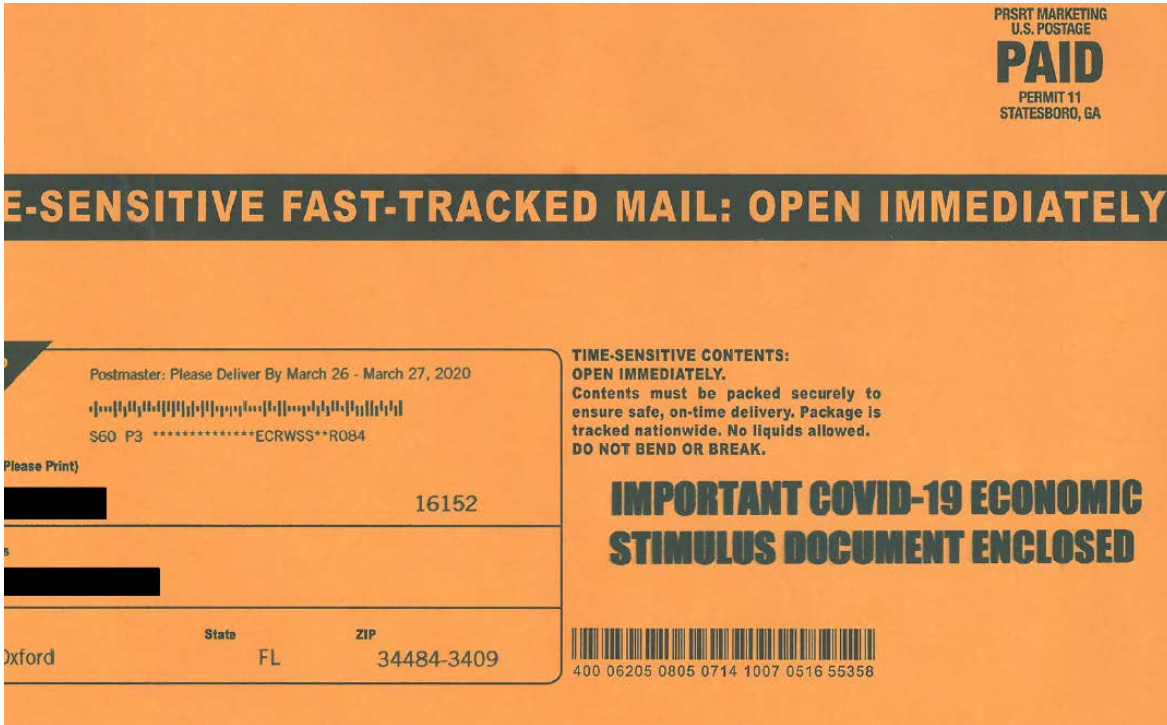
10. The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), P.L. 116-136, was enacted to provide immediate assistance to individuals, families, and businesses affected by the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. The CARES Act provides a \$1,200 stimulus payment to individuals and a \$2,400 payment for married couples, with an additional \$500 payment per qualifying child. Relief begins phasing out when incomes exceed \$75,000 for individual filers and \$150,000 for joint filers.

11. In addition to the monetary relief, the CARES Act provides deferrals on payments for federally-backed mortgages and federal student loans. It does not provide relief relating to auto loans or auto-related financing.

### Traffic Jam Events’ Deceptive Advertising

12. Traffic Jam Events has sought to lure individuals and families to auto sales events under the guise that valuable stimulus relief was available at designated locations for a short period of time.

13. For example, Traffic Jam Events solicited consumers to a Florida auto sale with a “TIME-SENSITIVE” mailer purporting to contain “IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS.”



A copy of the mailer envelope is attached as Exhibit A.

14. The notice contained in the mailer states at the top in bold: “URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS.” The notice header also includes a barcode with a notice number that claims to relate to “COVID-19 STIMULUS (INDIVIDUAL)” and a watermark depicting a likeness of the Great Seal of the United States.

**URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM  
RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS**

**Eligible Dates:  
March 27th thru  
April 5th, 2020**



COVID-19 STIMULUS (INDIVIDUAL)  
NOTICE NO. FB02-021225-096781

DATE: 03/25/20  
NOTICE NO: FB02-021225-096781  
ACCOUNT TYPE: COVID-19 STIMULUS (INDIVIDUAL)  
DESCRIPTION: URGENT NOTICE - READ IMMEDIATELY

A copy of the notice is attached as Exhibit B.

15. Below the header information, the notice claims in bold that “[a] special **COVID-19 Economic Automotive Stimulus Program with relief funds and other incentives will be held at 5925 SW 20th St., Bushnell, FL 33513.**” A highlighted box touts specific relief similar to the CARES Act relief, including thousands in relief funds and payment deferrals.

At the specified relief headquarters, the following incentives may be available to ALL residents of Bushnell, FL:

- **0% A.P.R. financing for 60 months.** A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down. <sup>(1)</sup>
- **All payments will be deferred for 120 days.** Do not make a car payment for 120 days/4 months. <sup>(2)</sup>
- **Receive a \$100 Walmart 🌟 Gift Card with every vehicle purchase.** Extra funds to be used for any other needs you may have during this time. <sup>(3)</sup>
- **Thousands in Relief Funds with this notice.** Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

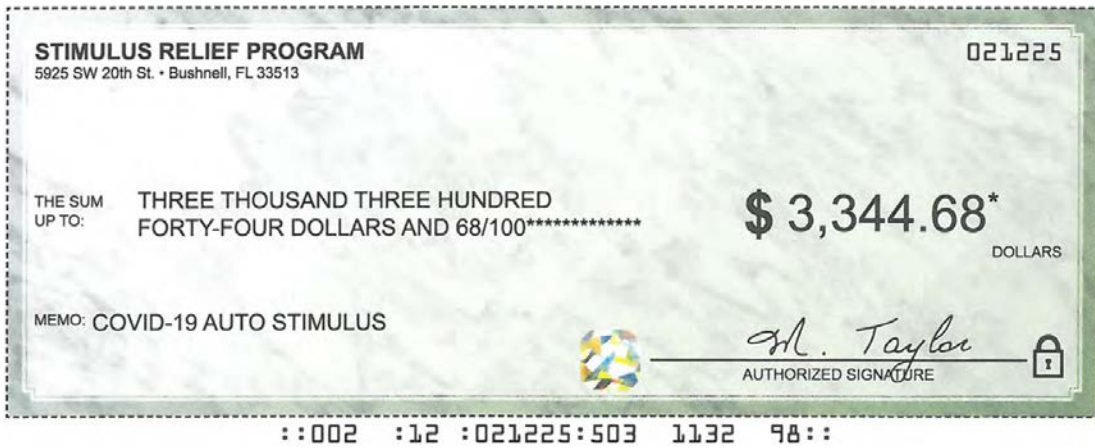
16. The notice repeatedly describes the location as “relief headquarters,” “your designated temporary 10-day site,” and “designated local headquarters.” In particular, the notice represents that consumers “must claim these stimulus incentives at your designated temporary 10-day site: 5925 SW 20th St., Bushnell, FL 33513.”

17. The notice additionally purports to describe “Mandatory qualifications to receive Stimulus Relief Funds:”

Mandatory qualifications to receive Stimulus Relief Funds:

- 1) Must be permanent U.S. resident.
- 2) Must have valid driver's license.
- 3) Annual Income cannot exceed \$91,300.00.

18. Defendants also have included a supposed check issued by “Stimulus Relief Program” with the memo field stating “COVID-19 AUTO STIMULUS” and a space to endorse the check on the back.



A copy of the purported check is attached as Exhibit C.

19. In fact, Defendants are not providing important COVID-19 stimulus information or stimulus relief, including stimulus checks. Additionally, Defendants are not affiliated or otherwise associated with, or approved by, the government, or otherwise permitted to use the Great Seal of the United States.

20. Defendants have been the subject of prior law enforcement actions for using deceptive advertising campaigns, including two by the State of Kansas in 2010 and 2012 and another by the State of Indiana in 2018. The Florida Attorney General also sued Defendants on April 23, 2020 over the Florida mailers, yet Defendants continue to provide advertising and marketing services to the automotive industry nationwide.

21. Based on the facts and violations of law alleged in this Complaint, the FTC has reason to believe that Defendants are violating or are about to violate laws enforced by the Commission.

### **VIOLATIONS OF THE FTC ACT**

22. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”

23. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

### **Count I**

#### **Misrepresentations Regarding COVID-19 Relief**

24. In numerous instances in connection with the advertising, marketing, promotion, or offering for sale, or sale of auto vehicles, including through the means described in Paragraphs 12-18, Defendants have represented, directly or indirectly, expressly or by implication, that

- a) Consumers are receiving official COVID-19 stimulus information;
- b) Consumers are receiving COVID-19 stimulus relief, including stimulus checks; and
- c) Defendants are affiliated or otherwise associated with, or approved by, the government.

25. In truth and in fact, in numerous instances in which Defendants have made the representations set forth in Paragraph 24:

- a) Consumers are not receiving important COVID-19 stimulus information;
- b) Consumers are not receiving COVID-19 stimulus relief, including stimulus checks; and



c) Defendants are not affiliated or otherwise associated with, or approved by, the government.

26. Therefore, Defendants' representations as set forth in Paragraph 24 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

### **CONSUMER INJURY**

27. Consumers are suffering, have suffered, and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

### **THIS COURT'S POWER TO GRANT RELIEF**

28. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that the Court:

A. Award Plaintiff such preliminary injunctive and ancillary relief as may be

necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including, but not limited to, a temporary and preliminary injunction;

B. Enter a permanent injunction to prevent future violations of the FTC Act by Defendants;

C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

D. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

ALDEN F. ABBOTT  
General Counsel

Dated: 6/16/2020

/s/ Sanya Shahrasi  
SANYA SHAHRASBI  
(DC Bar No. 1671001)  
THOMAS J. WIDOR  
(DC Bar No. 490184)

Federal Trade Commission  
600 Pennsylvania Ave., NW, CC-10232  
Washington, DC 20580  
(202) 326-2709 (Shahrasi)  
(202) 326-3039 (Widor)  
sshahrasi@ftc.gov  
twidor@ftc.gov

# EXHIBIT A



**TIME-SENSITIVE FAST-TRACKED MAIL: OPEN IMMEDIATELY**

**ORIGINAL DOCUMENTS ENCLOSED  
Do not tamper or mutilate.**

**- DO NOT BEND -**

11516-912711



400 06205 0805 0714 1007 0516 55358

# EXHIBIT B

**URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM**  
**RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS**

**Eligible Dates:**  
**March 27th thru**  
**April 5th, 2020**



COVID-19 STIMULUS (INDIVIDUAL)  
NOTICE NO. FB02-021225-096781

DATE: 03/25/20  
NOTICE NO: FB02-021225-096781  
ACCOUNT TYPE: COVID-19 STIMULUS (INDIVIDUAL)  
DESCRIPTION: URGENT NOTICE - READ IMMEDIATELY

Dear Florida residents,

A special COVID-19 Economic Automotive Stimulus Program with relief funds and other incentives will be held at 5925 SW 20th St., Bushnell, FL 33513, across the street from Walmart 🌟, March 27th thru April 5th, 2020. This program has been established to help local residents purchase automobiles with 120 days until first payment during these challenging times with special discounts, credit and finance opportunities to drastically reduce your out-of-pocket costs.

At the specified relief headquarters, the following incentives may be available to ALL residents of Bushnell, FL:

- 0% A.P.R. financing for 60 months. A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down. >
- All payments will be deferred for 120 days. Do not make a car payment for 120 days/4 months. >
- Receive a \$100 Walmart 🌟 Gift Card with every vehicle purchase. Extra funds to be used for any other needs you may have during this time. >
- Thousands in Relief Funds with this notice. Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

You must claim these stimulus incentives at your designated temporary 10-day site: 5925 SW 20th St., Bushnell, FL 33513, across the street from Walmart 🌟. Bring this notice to collect all of these program benefits toward your vehicle purchase.

Please bring this notice to your designated local headquarters:

**5925 SW 20th St.**  
**Bushnell, FL 33513**  
**Across the street from Walmart 🌟!**

Eligible dates: March 27th thru April 5th, 2020  
Monday–Saturday:  
9:00am until all attendees have been assisted.  
Sunday:  
11:00am until all attendees have been assisted.

Look for the set-up tents and speak to an event representative upon your arrival.

MAP OF TEMPORARY 10-DAY RELIEF SITE:



**Mandatory qualifications to receive Stimulus Relief Funds:**

- 1) Must be permanent U.S. resident.
- 2) Must have valid driver's license.
- 3) Annual Income cannot exceed \$91,300.00.

This COVID-19 Economic Automotive Stimulus Program will include hundreds of quality, clean cars, trucks, vans and SUVs from participating dealerships in the area. Bring this notice to the relief temporary 10-day site at 5925 SW 20th St., Bushnell, FL 33513, across the street from Walmart 🌟 and choose any of the available vehicles. Here are a couple examples of the more popular vehicles in-stock - with hundreds more available:

**Mercedes-Benz M-Class**  
**\$0 down \$116 per mo. <sup>(4)</sup>**

**Nissan Versa**  
**\$0 down \$133 per mo. <sup>(5)</sup>**

- **0% A.P.R. financing for 60 months.** A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down. <sup>(1)</sup>
- **All payments will be deferred for 120 days.** Do not make a car payment for 120 days/4 months. <sup>(2)</sup>
- **Receive a \$100 Walmart 🌟 Gift Card with every vehicle purchase.** Extra funds to be used for any other needs you may have during this time. <sup>(3)</sup>
- **Thousands in Relief Funds with this notice.** Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

**Stimulus Temporary 10-Day Relief Site:**  
**5925 SW 20th St. • Bushnell, FL 33513**  
**Across the street from Walmart 🌟!**

**Eligible dates: March 27th thru April 5th, 2020**  
**Monday–Saturday:**  
**9:00am until all attendees have been assisted.**  
**Sunday:**  
**11:00am until all attendees have been assisted.**  
Look for the set-up tents and speak to an event representative upon your arrival.

MAP OF TEMPORARY 10-DAY RELIEF SITE:



DATE: 03/25/20  
NOTICE NO: FB02-021225-096781  
ACCOUNT TYPE: COVID-19 STIMULUS (INDIVIDUAL)

(1) 0% APR available on select models for up to 60 months financing subject to lender's approval with approved credit. (2) No payments for 120 days subject to lender's approval with approved credit. Interest accrues from date of purchase. (3) Receive one (1) \$100 gift card to Walmart with any vehicle purchase during the event dates. (4) \$0 down, plus tax, title and license \$116 per month example: 2009 Mercedes-Benz M-Class stk#TRA26442 sale price \$7,399 72 months at 3.9% APR with approved credit. (5) \$0 down, plus tax, title and license \$133 per month example: 2018 Nissan Versa stk#MAR09694 sale price \$8,489 72 months at 3.9% APR with approved credit. New Wave Auto Sales employees and associates, mail house, associated sponsors or agencies, and their family members and members of same household are ineligible. Address must redeem original mail piece in person by close of business on April 5th, 2020. Vehicles are subject to prior sale. Void where prohibited by law. All offers end April 5th, 2020.



# EXHIBIT C

**STIMULUS RELIEF PROGRAM**

5925 SW 20th St. • Bushnell, FL 33513

021225

THE SUM UP TO: THREE THOUSAND THREE HUNDRED FORTY-FOUR DOLLARS AND 68/100\*\*\*\*\*

**\$ 3,344.68\***

DOLLARS

MEMO: COVID-19 AUTO STIMULUS



*M. Taylor*

AUTHORIZED SIGNATURE



::002 :12 :021225:503 1132 98::

STIMULUS RELIEF PROGRAM

021225

Date	Type	Reference	Original Amt.	Balance Due	Payment
03/25/20	Stimulus Fund	BUSHN-021225	3,344.68	0.00	3,344.68

STIMULUS RELIEF PROGRAM

week ending 04/05/2020 3,344.68  
FOR RECIPIENT'S RECORDS

021225

ENDORSE HERE

DO NOT WRITE, STAMP OR SIGN BELOW THE LINE  
RESERVED FOR FINANCIAL BANK USE

ORIGINAL  
DOCUMENT



void where prohibited, certificate has no cash value, non-  
negotiable certificate. This is not a check. Only valid if  
presented upon registration. Amount paid toward leased pri-  
vately owned vehicles. Cannot be used in conjunction with any other  
offer. Expires April 5th, 2020.

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Federal Trade Commission

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Thomas J. Widor, Sanya Shahrabsi Federal Trade Commission 600 Pennsylvania Ave., N.W., Washington, DC 20580, (202) 326-3039

DEFENDANTS

Traffic Jam Events, a limited liability company, and David J. Jeansonne II, individually and as an officer of Traffic Jam Events, LLC

County of Residence of First Listed Defendant Jefferson Parish (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. § 45(a)

Brief description of cause:

The Complaint alleges deceptive and unlawful trade practices that violate the Federal Trade Commission Act.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

06/16/2020 Sanya Shahrabsi

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG JUDGE

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.  
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.  
**PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Louisiana

Federal Trade Commission,

Plaintiff(s)

v.

Traffic Jam Events, a limited liability company, and David J. Jeansonne II, individually and as an officer of Traffic Jam Events, LLC

Defendant(s)

Civil Action No. 2:20-cv-1740

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Traffic Jam Events, LLC
2232 Idaho Avenue
Kenner LA 70062

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Thomas J. Widor, Federal Trade Commission, 600 Pennsylvania Ave., NW, CC-10232, Washington, DC 20580

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. 2:20-cv-1740

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_ .

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*:

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
company, and

DAVID J. JEANSONNE II, individually and as an  
officer of TRAFFIC JAM EVENTS, LLC,

Defendants.

**Civil Action No. 2:20-cv-1740**

**Judge: Wendy B. Vitter**

**Magistrate: Dana Douglas**

**NOTICE OF SUPPLEMENTAL AUTHORITY AND AMENDED PROPOSED  
PRELIMINARY RELIEF**

The Federal Trade Commission respectfully submits this notice of controlling and supplemental authority and amended proposed preliminary relief. First, *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), cited by Defendants, is inconsistent with controlling precedent. Second, based on these facts, the FTC has met the standard for preliminary injunction. Finally, the FTC is attaching an amended proposed order for preliminary relief.<sup>1</sup>

Defendant's reliance on *Shire*, 917 F.3d 147 is directly adverse to controlling precedent. In *FTC v. Southwest Sunsites*, 665 F.2d 711 (5th Cir. 1982) (Ex. A), the Fifth Circuit explicitly rejected the defendant's argument that the FTC needed to show continuing or future violations for the case to be heard in federal court. *Id.* at 723. This decision remains controlling, good law. Indeed, another district court in this circuit recently rejected *Shire* as not controlling and unpersuasive in light of the binding *Southwest Sunsites*. See *FTC v. Educare Centre Services*,

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<sup>1</sup> The FTC previously submitted a proposed TRO that would prohibit Defendants from making deceptive claims, including about COVID-19 stimulus relief, and would require certain expedited discovery provisions. The FTC is attaching a temporary restraining order that would instead simply require Defendants to cease making the deceptive claims at issue.



*Inc.*, No. 3:19-cv-00196-KC, 2020 WL 218519 (W.D. Tex. Jan. 14, 2020) (Ex. B). As the *Educare* court explained, “the Fifth Circuit read the phrases ‘reason to believe’ and ‘about to violate’ in § 13(b) as covering situations where defendants claim that violations have ceased.”<sup>2</sup> *Id.*

Further, the facts alleged in the Complaint and cited in the motion seeking preliminary relief demonstrate the need for injunctive relief. The Complaint alleges that Defendants have engaged in this conduct in the midst of a pandemic since at least March 2020, seeking to lure consumers to auto tent sales. Compl. ¶¶ 9-10, 12. Defendant Jeansonne still owns and operates Traffic Jam Events. And while Defendants self-servingly assert that they will sin no more, to the extent Defendants actually suspended this one deceptive marketing campaign, Defendants did so only after the Florida Attorney General began investigating.<sup>3</sup> Further, Defendants have not acknowledged any wrongdoing. PX2, Exh. B. Defendants have insisted that this is simply “effective marketing.” TRO, PX1, Att. D. Considering that Defendants have been the subject of three prior state law enforcement actions for deceptive advertising (one of which led to being permanently enjoined from “any consumer transaction” originating within the State, PX1. Att. F)) and continue to provide the same advertising and marketing nationwide, Compl. ¶ 20, there is a significant likelihood that Defendants will resume their deceptive practices if not enjoined.

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<sup>2</sup> Further, the “reason to believe” language in 13(b) gives the Court significant discretion in assessing “is or is about to” and cannot be disturbed absent a finding of bad faith or illegality, which is completely absent here. Courts have recognized the FTC’s enforcement discretion and refused to second-guess the FTC’s “reason to believe” determinations. *See, e.g., Standard Oil Co. v. FTC*, 596 F.2d 1381, 1385 (9th Cir. 1979) (stating “reason to believe” determination is “committed to agency discretion”), *rev’d on other grounds*, 449 U.S. 232 (1980); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779 (D. Del. 1980) (construing analogous language in Section 5(b) of the FTC Act).

<sup>3</sup> As courts have held, cessation of wrongful conduct is not a valid defense when the misconduct ceased only as a result of the government’s investigation. *See, e.g., FTC v. Sage Seminars*, 1995 WL 798938, \*6 (N.D. Cal. Nov. 2, 1995) (Indeed, the Supreme Court has counseled that courts should be wary of a defendant’s termination of illegal conduct when, as here, such action is taken in anticipation of formal intervention.) (citing *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 n.50 (1953)); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976); *see also In re Int’l Assoc. of Conf. Interpreters*, 123 F.T.C. 465, 658 (1997), (quoting *In re Zale Corp.*, 78 F.T.C. 1195, 1240 (1971) (rejecting defense where the alleged discontinuance occurred “only after the Commission’s hand was on the respondent’s shoulder.”))

*Southwest Sunsites*, 665 F.2d at 723; *FTC v. Investment Dev., Inc.*, No. 89-642, 1989 U.S. Dist. LEXIS 6502, at \*10 (E.D. La. 7, 1989).

These facts meet the standard for a government litigant charged with safeguarding the public interest and enforcing consumer protection laws. Courts have repeatedly held that the FTC need only show (1) likelihood of success on the merits and that (2) the equities tip in favor of the injunctive relief to prevail on injunctive relief. As part of this analysis, as discussed in the FTC’s memorandum of the TRO motion, irreparable harm is presumed. R. Doc. 6 at 9; *FTC v. Inv. Dev., Inc.*, Case No. 89-civ-642, 1989 U.S. Dist. LEXIS 6502, at \*13 (E.D. La. June 8, 1989).

Finally, the amended proposed TRO order is appropriate to protect consumers from further harm. The amended proposed TRO order simply prohibits Defendants from making the deceptive claims at issue. It also narrows record preservation requirements in TRO Section VII to documents that “relate in any way to the activities alleged in the complaint” and narrows order distribution in TRO Section XI to Rule 65(b)(2) enumerated persons—as already required under the law and Federal Rules.

Dated: June 22, 2020

Respectfully submitted,

/s/ Sanya Shahrabi  
SANYA SHAHRASBI (D.C. Bar No. 1671001)  
THOMAS J. WIDOR (D.C. Bar No. 490184)  
FEDERAL TRADE COMMISSION  
600 Pennsylvania Ave., NW, CC-10232  
Washington, DC 20580  
(202) 326-2709 (Shahrabi)  
(202) 326-3039 (Widor)  
sshahrabi@ftc.gov  
twidor@ftc.gov  
Fax: 202-326-3768

# EXHIBIT A



Positive

As of: June 18, 2020 11:56 PM Z

## *Federal Trade Com. v. Southwest Sunsites, Inc.*

United States Court of Appeals for the Fifth Circuit

January 14, 1982

No. 80-1793

### Reporter

665 F.2d 711 \*; 1982 U.S. App. LEXIS 22615 \*\*; 1982-1 Trade Cas. (CCH) P64,466

FEDERAL TRADE COMMISSION, Plaintiff-Appellant  
Cross-Appellee, v. SOUTHWEST SUNSITES, INC., et al.,  
Defendants-Appellees Cross-Appellants

**Prior History:** [\*\*1] Appeals from the United States  
District Court for the Northern District of Texas.

### Core Terms

district court, consumer, injunction, purchasers, equitable  
jurisdiction, preliminary relief, misrepresentations, Federal  
Trade Commission Act, violations, enjoining, redress,  
notification, ancillary relief, practices, cease, administrative  
proceeding, injunctive relief, public interest, desist,  
preliminary injunction, omissions, powers, sales, contract of  
purchase, material fact, compulsory, purposes, farming,  
parties, escrow

### Case Summary

#### Procedural Posture

Plaintiff Federal Trade Commission and defendant companies  
appealed a decision of the United States District Court for the  
Northern District of Texas which issued a preliminary  
injunction against defendant companies and denied ancillary  
relief in an action arising from deceptive land sales.

### Overview

Plaintiff Federal Trade Commission (FTC) investigated  
defendant companies for deceptive practices connected with  
sales of undeveloped land in violation of § 5 of the Federal  
Trade Commission Act, 15 U.S.C.S. § 45. Plaintiff FTC  
petitioned the district court for an order escrowing the assets  
of defendant companies and requiring notification to the land  
purchasers. The district court preliminarily enjoined  
defendant companies from future misrepresentations but  
declined to issue the ancillary relief of escrowing funds and  
requiring consumer notification. On appeal by plaintiff FTC  
and cross-appeal by defendant companies, the court  
determined that the Act authorized the district court to issue  
equitable relief. Thus, the court affirmed the injunction and  
reversed the decision on ancillary relief, remanding for further  
consideration.

### Outcome

The court affirmed the preliminary injunction against future  
misrepresentations by defendant companies, reversed the  
denial of orders requiring escrow and consumer notification,  
and remanded because the district court had equitable  
jurisdiction.

### LexisNexis® Headnotes

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

upon an erroneous legal premise is reviewable as is any conclusion of law.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN1](#)  **Antitrust & Trade Law, Federal Trade Commission Act**

See [15 U.S.C.S. § 53\(b\)](#).

Labor & Employment Law > Wage & Hour Laws > Remedies > Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

[HN2](#)  **Antitrust & Trade Law, Federal Trade Commission Act**

See [15 U.S.C.S. § 45](#).

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > Federal Trade Commission Act > General Overview


Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

[HN3](#)  **Antitrust & Trade Law, Federal Trade Commission Act**

See [15 U.S.C.S. § 57\(b\)](#).

[HN5](#)  **Remedial Powers, Federal Trade Commission Act**

By authorizing the Federal Trade Commission (FTC) to petition a district court for preliminary injunctive relief, § 13(b) of the Federal Trade Commission Act, [15 U.S.C.S. § 53\(b\)](#), posts a clear entrance sign for FTC provisional relief applications. Although the plain language of the statute speaks only of enjoining an allegedly unlawful act of practice, virtually identical statutes permitting other agencies to seek preliminary injunctions have been interpreted as invoking the full equitable jurisdiction of the district court.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

[HN4](#)  **Standards of Review, Abuse of Discretion**

While the grant or denial of a preliminary injunction is generally left to the discretion of the district court and will not be disturbed absent an abuse of that discretion, denial based

Civil Procedure > Preliminary Considerations > Equity > General Overview

Antitrust & Trade Law > Federal Trade Commission  
Act > General Overview

## [HN6](#) Remedial Powers, Federal Trade Commission Act

A grant of jurisdiction such as that contained in § 13(b) of the Federal Trade Commission Act, [15 U.S.C.S. § 53\(b\)](#), carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it.

Civil Procedure > Judgments > Relief From  
Judgments > Independent Actions

Civil Procedure > Preliminary  
Considerations > Equity > General Overview

Civil Procedure > Preliminary  
Considerations > Equity > Relief

Civil Procedure > Judgments > Relief From  
Judgments > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary  
& Temporary Injunctions

## [HN7](#) Relief From Judgments, Independent Actions

When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. In the exercise of this inherent equitable jurisdiction the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case.

Civil Procedure > Preliminary  
Considerations > Equity > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary  
& Temporary Injunctions

## [HN8](#) Preliminary Considerations, Equity

Simply because the complete resolution of a matter will require a two-step process does not relieve a court of the task of determining how to preserve a state of affairs such that a meaningful decision can be rendered after full consideration of the merits. Indeed, although it may seem unusual at first to seek preliminary relief with reference to a separate action, it

has long been considered within a court's equitable jurisdiction to issue an injunction preserving property pending a subsequent determination in another forum of the rights of parties in the property.

Civil Procedure > Preliminary  
Considerations > Equity > General Overview

Governments > Legislation > Interpretation

## [HN9](#) Preliminary Considerations, Equity

The doctrine of inherent equitable jurisdiction is fully applicable where Congress has utilized the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest.

**Counsel:** Charles D. Nelson, W. Dennis Cross, F. T. C.,  
Washington, D. C., for plaintiff-appellant cross-appellee.

Stein, Mitchell & Mezines, Glenn A. Mitchell, Washington,  
D. C., for all defendants-appellees cross-appellants except  
Porters.

Alston, Miller & Gaines, John H. Brebbia, Washington, D. C.,  
for Porter Realty, Inc. and Irvin Porter.

**Judges:** Before INGRAHAM and TATE, Circuit Judges \*

**Opinion by:** INGRAHAM

## Opinion

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[\*714] This case presents novel questions concerning the scope of the Federal Trade Commission's statutory

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\* Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

authorization to seek preliminary injunctive relief from the district courts. Federal Trade Commission Act § 13(b), [15 U.S.C. § 53\(b\) \(1976\)](#).<sup>1</sup> Pursuant to Section 13(b), the Commission asked the court below for an order escrowing certain assets of the appellees and other defendants, all of whom [\*\*2] were targets of an investigation into land sales in Southwest Texas, and other relief including compulsory notification to consumers who had purchased land from appellees and were continuing to make payments under their contracts. After referral to a magistrate for an evidentiary hearing, the district court preliminarily enjoined appellees from future misrepresentations and omissions in connection with these sales of land in question, but declined to order the ancillary relief requested by the Commission in the belief that Section 13(b) did not authorize such relief. We affirm the

order enjoining further violations of the Federal Trade Commission Act, but reverse on the issue of ancillary relief and remand for further consideration of the appropriateness of the Commission's request.

### [\*\*3] I. Factual Background

The Commission initiated its investigation of appellee Southwest Sunsites, Inc. in late 1973, shortly after the corporation began selling undeveloped land in Culberson and Jeff Davis Counties, located in Southwest Texas. This investigation later expanded to include appellees Green Valley Acres, Inc., and Green Valley Acres, Inc., II. All these companies are Texas corporations, operated by two principal individuals, Sidney Gross and Edwin Kritzler.<sup>2</sup> Defendant Porter Realty, a real estate broker which sold approximately sixty per cent of the land in question, was not made subject to the preliminary injunction and is therefore not before us on this appeal.

The findings of the magistrate, as adopted by the district court, show that Culberson and Jeff Davis Counties are sparsely populated, and the climate is generally described as semi-arid to arid. [\*\*4] The approximate rainfall is eight to nine inches per year. Appellees acquired large tracts of essentially barren land in this area, subdivided [\*\*715] the land and offered it for sale in parcels of between five and forty acres, for approximately \$ 600 to \$ 700 per acre. Among other representations, appellees' main sales claims were that the property had good potential for homesites, farming, ranching and for commercial purposes, that water and utilities were readily accessible to the property, and that the area surrounding the properties was growing and developing.

Contrary to these representations, it appears that portions of the properties are not located above available ground water, and that where ground water is available it is between 325 to 800 feet below the surface. A well to provide water for a family of four on a five acre tract would cost in excess of \$ 6000. Similarly, most of the property is not near electric or telephone utility lines and installation of such services is estimated at up to \$ 2500. In short, the land sold by appellees has no economically feasible commercial application in the relatively small parcels made available, and parcels of this size [\*\*5] have no resale value.

The vast majority of purchasers entered into purchase

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<sup>1</sup> Section 13(b) provides as follows:

[HNI](#) [↑] Temporary restraining orders; preliminary injunctions

(b) Whenever the Commission has reason to believe-

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public-

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Although the lower court in [Federal Trade Commission v. British Oxygen Co.](#), [529 F.2d 196 \(3d Cir. 1976\)](#), ordered relief under 13(b) similar to that sought by the Commission here, the Third Circuit vacated the order and stated that it was unnecessary to reach the question of the proper scope of Section 13(b) relief. [529 F.2d at 199](#). Accordingly, the scope of Section 13(b) preliminary relief appears to be a question of first impression in this circuit and elsewhere.

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<sup>2</sup> The Commission's complaint as to individual defendants was dismissed for lack of personal jurisdiction. This ruling was not appealed.

contracts without viewing the property. A majority of the purchasers were not residents of the State of Texas, and had been solicited through extensive nationwide advertising and sales efforts. Under the purchase contracts purchasers were permitted to pay principal plus interest over periods of time up to one hundred and twenty months. Title to the property would not transfer to the purchaser until the full price was paid, and failure to make a payment would subject a purchaser to cancellation of the contract and forfeiture of all monies already paid. According to appellees' records the total balance of outstanding accounts receivable on purchase contracts as of June 1979 was approximately \$ 10,000,000.

The magistrate and district court concluded that there was substantial evidence appellees had misrepresented the value of the land, and omitted and failed to advise purchasers of facts such as the expenditures required for water and utilities, the unfeasibility of farming and ranching on the small tracts made available, and the fact that photographs used in Southwest Sunsites' sales materials were not **[\*\*6]** representative of the land as a whole. On the basis of these and other findings the district court concluded that the Commission had sufficiently established the probability that the defendants had engaged in acts and practices in violation of Section 5 of the Federal Trade Commission Act,<sup>3</sup> that the

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<sup>3</sup> Section 5 of the Federal Trade Commission Act, [15 U.S.C. § 45 \(1976\)](#), provides in part as follows:

[HN2](#)<sup>[↑]</sup> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall

Commission demonstrated **[\*716]** a likelihood of success on the merits in an administrative proceeding against defendants, and that it would be in the public interest to maintain the status quo during pendency of the administrative proceeding under Section 5.

**[\*\*7]** Accordingly, the district court ordered the appellees to cease and desist from making misrepresentations and failing to disclose material facts concerning the investment potential and suitability of appellees' land for homesites or commercial purposes. The court declined, however, to order ancillary relief as requested by the Commission. Pointing to the transfer of funds from the corporate defendants to the various individuals controlling these corporations, the Commission had sought an escrow of present and incoming assets to preserve the possibility of an action for consumer redress under Section 19 of the Federal Trade Commission Act.<sup>4</sup>

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issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

<sup>4</sup> Section 19 of the Federal Trade Commission Act provides as follows:

[HN3](#)<sup>[↑]</sup> (a)(1) If any person, partnership, or corporation violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of [section 45\(a\)](#) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) of this section in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair



Both the magistrate and the district court concluded that such a "freeze" order was not authorized by Section 13(b). The magistrate did recommend that the appellees be required to notify purchasers of the ongoing proceedings before collecting any further payments; however, this relief was also denied by the district court.

## [\*\*8] II. Discussion

The Commission raises the following issues on appeal: whether the district court erred in concluding that Section 13(b) of the Federal Trade Commission Act did not permit the court to order ancillary relief in the form of an escrow of corporate assets, and compulsory notification of affected consumers; and whether the requested injunctive [\*\*717] relief should have been granted in light of the district court's findings that the defendants had engaged in unfair and deceptive acts and practices. On cross-appeal, appellees attack the injunction as issued, contending that there was no evidence of continuing or future violations of the Federal Trade Commission Act that would justify an injunction and that the injunction order improperly requires reference to the magistrate's recommendations in order to ascertain the acts and practices enjoined.

### A. The Scope of Preliminary Relief under Section 13.

In its complaint the Commission requested an injunction

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or deceptive act or practice (within the meaning of [section 45\(a\)](#) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

Nature of relief available

(b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

[15 U.S.C.A. § 57b \(Supp.1981\).](#)

preventing future misrepresentations and omissions, and ordering the defendants to do the following: place and maintain in an escrow account, subject to the court's control, all payments to be received under land purchase [\*\*9] contracts; make all tax, mortgage and other payments necessary to protect the purchasers' interests in the land; refrain from cancelling any contracts for a purchaser's failure to meet any obligations under the contract; and refrain from transferring, selling, assigning or in any way encumbering the land, sales contracts or other assets of the corporate defendants without specific approval of the district court. The complaint also sought to enjoin the brokers, Porter Realty and Irvin Porter, from receiving further commissions or residual commissions during the pendency of the action. In its brief to this court the Commission explains that this relief is necessary in light of the significant threat of dissipation of corporate assets: the corporations are closely held and pay the individuals involved large loan repayments and a substantial percentage of incoming payments as fixed commissions or "overrides;" and both the corporations and the individuals face a number of other legal actions. Implicit in the Commission's requests is the future availability of an action for consumer redress, including refunds, under Section 19 of the Federal Trade Commission Act. With Section 19 in mind, [\*\*10] the Commission argues, the requested relief is within a district court's inherent equitable jurisdiction to preserve the possibility of complete and effective relief at the conclusion of the process of adjudication on the merits. The magistrate and district court concluded that, from a plain reading of Section 13(b), the Commission may seek only that preliminary relief necessary to restrain alleged unfair practices, pending a Section 5 administrative proceeding. In this view, the scope of preliminary relief is limited to the relief which may be ordered by the Commission itself under Section 5. The ancillary relief sought here, the district court stated, could not be characterized as "merely enjoining the improper act or practice found likely to occur." Both the magistrate and district court considered the possibility of an eventual Section 19 consumer redress proceeding to be an attenuated and inadequate justification for preliminary relief.

[HN4](#) [↑] While the grant or denial of a preliminary injunction is generally left to the discretion of the district court and will not be disturbed absent an abuse [\*\*11] of that discretion, [Foley v. Alabama State Bar, 648 F.2d 355, 358 \(5th Cir. 1981\)](#), denial based upon an erroneous legal premise is reviewable as is any conclusion of law. [Douglas v. Beneficial Finance Co. of Anchorage, 469 F.2d 453, 454 \(9th Cir. 1972\)](#). We believe the district court adopted an unduly narrow view of its powers and responsibilities under the Act and will remand for further consideration of the requested relief under the principles discussed here.

HN5 [↑] By authorizing the Federal Trade Commission to petition a district court for preliminary injunctive relief, Section 13(b) "posts a clear entrance sign for FTC provisional relief applications." Federal Trade Commission v. Weyerhaeuser Co., 1981-2 Trade Cas. (CCH) P 64,263 at 74,123, --- F.2d --- (D.C.Cir. Sept. 1, 1981). Although the plain language of the statute speaks only of enjoining an allegedly unlawful act of practice, virtually identical statutes permitting other agencies to seek preliminary injunctions have been interpreted as invoking the full equitable jurisdiction [\*718] [\*12] of the district court. Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960) (Section 17 of the Fair Labor Standards Act; jurisdiction granted "to restrain violations" of the Act); Porter v. Warner Holding Co., 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) (Section 205(a) of Emergency Price Control Act of 1942; application for order enjoining violations of the Act); Interstate Commerce Commission v. B & T Transportation Co., 613 F.2d 1182 (1st Cir. 1980) (Section 322(b)(1) of Motor Carrier Act; jurisdiction to restrain "further violation"). See also Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429 (5th Cir. 1981); United States v. Coca Cola Bottling Co. of Los Angeles, 575 F.2d 222 (9th Cir.), cert. denied 439 U.S. 959, 99 S. Ct. 362, 58 L. Ed. 2d 351 (1978); Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296 (5th Cir. 1978). These cases make indisputably clear that HN6 [↑] a grant of jurisdiction such as that contained in [\*13] Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it. The doctrine is summarized in the following often quoted discussion in Porter :

Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Virginian R. Co. v. System Federation, 300 U.S. 515, 552 (57 S. Ct. 592, 601, 81 L. Ed. 789). Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329 (64 S. Ct. 587, 591, 88 L. Ed. 754). It may act so as to adjust and [\*14] reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought

before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. Camp v. Boyd, 229 U.S. 530, 551-552 (33 S. Ct. 785, 793, 57 L. Ed. 1317).

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

328 U.S. at 397-98, 66 S. Ct. at 1088-1089. The Supreme Court's reaffirmation of this principle in DeMario contained this further explanation:

[\*15] HN7 [↑] When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to ... give effect to the policy of the legislature." Clark v. Smith, 38 U.S. (13 Pet.) 195, 203 (10 L. Ed. 123).

361 U.S. at 291-92, 80 S. Ct. at 334-335. In the exercise of this inherent equitable jurisdiction the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case. Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429 (5th Cir. 1981) (appointment of receiver); Commodity Futures Trading Commission v. Muller, 570 F.2d 1296 (5th Cir. 1978) ("freeze" of defendant's assets); Securities [\*719] and Exchange Commission v. Manor Nursing Centers, 458 F.2d 1082 (2d Cir. 1972) (freeze [\*16] of assets pending transfer to trustee). As this court found in Muller, such an order may be required "to preserve the status quo so that an ultimate decision for the Commission may be effective." 570 F.2d at 1300 (citations omitted).

The holdings of these cases are directly applicable to this case. Section 13(b) contains no express limitations on the otherwise full powers of the district court to mold appropriate decrees under its traditional equitable jurisdiction, and we decline to tie the hands of the district court without such

express limitation. A similar conclusion was recently reached by the D.C. Circuit in its holding that Section 13(b) authorized the district court to order an acquiring company to hold separate a portion of the assets acquired through a merger. *Federal Trade Commission v. Weyerhaeuser Co.*, -- F.2d -- (D.C.Cir.1981). The D.C. Circuit reviewed the legislative history and purposes of Section 13(b) and concluded that Congress intended this section to be used flexibly and with reference to "the historic injunctive process," citing [Hecht Co. v. Bowles](#), 321 U.S. 321, 329, 64 S. Ct. 587, 591, 88 L. Ed. 754 (1944).

We also **[\*\*17]** believe that the exhortation in DeMario to preserve the possibility of complete relief, which merely restates the purpose of preliminary injunctions in general, see *Developments in the Law-Injunctions*, 78 Harv.L.Rev. 994, 1096 (1965), makes it appropriate to consider that the final, complete relief in this case may entail consumer redress through a Section 19 proceeding. [HN8](#)<sup>[↑]</sup> Simply because the complete resolution of a matter will require a two-step process does not relieve a court of the task of determining how to preserve a state of affairs such that a meaningful decision can be rendered after full consideration of the merits. Indeed, although it may seem unusual at first to seek preliminary relief with reference to a separate action, it has long been considered within a court's equitable jurisdiction to issue an injunction preserving property pending a subsequent determination in another forum of the rights of parties in the property. See *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658, 679, 83 S. Ct. 984, 995, 10 L. Ed. 2d 52 (1963) (Clark, J., dissenting); **[\*\*18]** [Erhardt v. Boaro](#), 113 U.S. 537, 5 S. Ct. 565, 28 L. Ed. 1116 (1885).

We observe also that several commentators have characterized a consumer redress action as a continuous two-phase process, the first phase being administrative adjudication, and the second judicial determination of appropriate redress. II S. Kanwit, *Federal Trade Commission § 21.05* (1980); Kintner & Westermeier, *Obtaining Refunds for Consumers Under Section 19 of the FTC Act*, 29 Syracuse L.Rev. 1025, 1034-36 (1978). Such a characterization, which strikes us as a reasonable one, makes even more apparent the propriety of framing preliminary relief with the entire process in mind.

These conclusions are entirely consistent with the legislative history of both Sections 13(b) and 19. Section 13(b) was introduced by Senator Jackson as a floor amendment to S. 1081, the Federal Lands Right-of-Way Act, and became Section 408(f) of the Trans-Alaska Pipeline Authorization Act, Pub.L. No. 93-153, [15 U.S.C. § 53\(b\)](#) (1976). Senator Jackson stated that the proposed new Commission authority, of which Section 13(b) was one of several provisions, was

"designed to enable the Commission **[\*\*19]** to carry out its mandate to protect the public interest through a prompt and aggressive enforcement of the laws it administers." 119 Cong.Rec. 22979 (July 10, 1973). See also Sections 408(a) (1), and (b), Pub.L. No. 93-153, 87 Stat. 591. Although the preliminary relief provisions were intended to apply to both deceptive practices and anti-competitive conduct cases, as indicated by the express application of Section 13(b) to "any provision of law enforced by the FTC," most of the discussion in the House concerned the need for preliminary relief in anti-competitive-merger cases. Nevertheless this discussion is revealing; Representative Smith noted that substantial public injury can take place during the pendency **[\*720]** of a Commission proceeding, and that "without injunctive powers the Federal Trade Commission frequently is left with having to impose remedies that are conspicuously inadequate .... The Commission may rule the conduct illegal but during this operation the patient may die.... Without this injunction power consumers have no protection at all during the pendency of the suit.... It is only good sense that where there is a probability that the act will eventually **[\*\*20]** be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision." 119 Cong.Rec. 36608-9 (Nov. 12, 1973). The conference report did not specifically address the scope of 13(b) relief.

Approximately one year later, Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub.L. No. 93-637, 88 Stat. 2183. Section 206, Consumer Redress, added the new Section 19 of the Federal Trade Commission Act. This legislation was explicitly intended to improve the Commission's consumer protection powers. See S.Conf.Rep. 93-1408, 93d Cong. 2d Sess. 1 (1974), (1974) U.S.Code Cong. & Admin.News, 7702, 7755. Significantly, Representative Eckhardt, quoting an administration spokesman, urged that consumer fraud be rendered "pursuable, punishable, and profitless." 120 Cong.Rec. 31735 (Sept. 19, 1974). The evident intent of these 1975 amendments was to add significant new weapons to the Commission's enforcement arsenal in order to make more meaningful and complete consumer relief possible. It seems to us that not only is the use of preliminary relief a desirable **[\*\*21]** and effective method of implementing consumer redress under Section 19, but that precluding such preliminary relief could entirely prevent the effectuation of Section 19 in circumstances such as those alleged by the Commission in this case.

We believe that through these various recent amendments to the Federal Trade Commission Act, "Congress was evolving a statutory plan for the protection of the ... public." [Securities and Exchange Commission v. Keller Corp.](#), 323 F.2d 397, 403

(7th Cir. 1963). The Act clearly makes the district court a vital "enforcement arm" of the statute. Renegotiation Board v. Bannerkraft Clothing Co., Inc., 415 U.S. 1, 19-20, 94 S. Ct. 1028, 1038, 39 L. Ed. 2d 123 (1974). The type of ancillary relief sought by the Commission in this case appears to be well within the jurisdiction of the district court under Section 13(b), in order to preserve the status quo pendente lite and assure the possibility of complete relief following administrative adjudication.

Appellees raise two principal objections to the application of the inherent equitable jurisdiction doctrine to this case.<sup>5</sup> First, appellees argue that all the cases involving [\*\*22] agencies other than the Federal Trade Commission are inapplicable because those other agencies all bring their enforcement actions directly in federal district court, where the court has continuing supervision [\*\*721] over the litigation. In contrast, the Commission does not rely on the district courts for this purpose but rather conducts its own administrative hearings, over which the district court that issues preliminary relief has no control. We reject this attempted distinction. As the Commission points out, appellees' argument would prevent the issuance of any preliminary injunction sought by the Commission, despite Section 13(b), on the ground that the administrative proceedings were likely to be protracted. As we observed at the outset of this discussion, the relevant statutory language in Section 13(b) is virtually identical to the language of other legislation that has been found to invoke the district court's general equitable jurisdiction. Appellees'

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<sup>5</sup> Two of appellees' arguments may be summarily disposed of. In support of its argument that Section 13(b) is not intended to grant the type of preliminary relief requested by the Commission in this case, appellees point to the failure of subsequent bills introduced in Congress to specifically grant the Commission the power in dispute in this case. As the Commission points out, however, it is not improper for an agency to seek explicit authorization for powers thought to be somewhat controversial, and any number of reasons for the failure of this subsequent legislation are possible. Courts typically refrain from drawing conclusions from subsequent legislative history for precisely these reasons. See Federal Trade Commission v. Dean Foods Co., 384 U.S. 597, 609, 86 S. Ct. 1738, 1745, 16 L. Ed. 2d 802 (1966); United States v. Philadelphia National Bank, 374 U.S. 321, 348-49, 83 S. Ct. 1715, 1733, 10 L. Ed. 2d 915 (1962).

At oral argument, counsel for appellees also suggested that a due process violation would result if the Commission determined, prior to the Section 5 administrative hearing, that it would also seek consumer redress under Section 19. But cf. Withrow v. Larkin, 421 U.S. 35, 46-59, 95 S. Ct. 1456, 1463-1470, 43 L. Ed. 2d 712 (1975). This contention was not addressed in the briefs, however, and now comes too late. See Harris v. Plastics Mfg. Co., 617 F.2d 438, 440 (5th Cir. 1980).

arguments in this context do not suggest the "clear and valid legislative command, ... or necessary and inescapable inference" required by Porter to negate the comprehensiveness of the Court's equitable jurisdiction. [\*\*23] 328 U.S. at 398, 66 S. Ct. at 1089. We also note that lack of continuing supervisory control over the administrative proceeding did not concern the Supreme Court when it authorized the Commission to seek preliminary relief under the All Writs Act, 28 U.S.C. § 1651(a) (1976), to enjoin a merger pending administrative proceedings. Federal Trade Commission v. Dean Foods Co., 384 U.S. 597, 604, 86 S. Ct. 1738, 1742, 16 L. Ed. 2d 802 (1966). While we have no indication here that the Commission's administrative proceedings will be unduly protracted, if such facts do arise, it remains within the discretion of the district court to tailor any preliminary injunction to minimize the harm to appellees' legitimate business activities, or to condition the granting of the injunction on adoption of an expedited hearing schedule. See Federal Trade Commission v. British Oxygen, (CCH) 1974 Trade Cas. P 75,003 (D.Del.1974), vacated, Federal Trade Commission v. British Oxygen, 529 F.2d 196 (3d Cir. 1976).

[\*\*24] Appellees' second argument is that any order of preliminary relief under Section 13(b), by the terms of the statute, has limited duration and only lasts "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final...." 15 U.S.C. § 53(b)(2) (1976). An order of the Commission becomes final upon the exhaustion of available review procedures, or expiration of time to seek such review. 15 U.S.C. § 45(g) (1976). Because of this limited duration, appellees argue, the preliminary injunctive relief section could not have been intended to be used in conjunction with Section 19, which comes into play only after a final cease and desist order. 15 U.S.C. § 57b(a)(2) (1976). While we agree with appellees' reading of the limited duration of a Section 13(b) preliminary order, this presumably signifies only that once the Commission has issued a cease and desist order it must then apply to whatever district court will consider a Section 19 proceeding for further relief. The [\*\*25] limited question facing a district court in these circumstances is whether, in light of the showing of likelihood of success, injunctive relief to preserve the status quo at this time is in the public interest.

We conclude that HN9<sup>[↑]</sup> the doctrine of inherent equitable jurisdiction is fully applicable where, as here, "Congress has utilized ... the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest." Porter, 328

U.S. at 403, 66 S. Ct. at 1091.<sup>6</sup>

In its opinion the district court cited Federal Trade Commission v. Turner, 609 F.2d 743 (5th Cir. 1980), in the apparent belief that [\*\*26] while the Commission acts in the public interest when proceeding under Section 13(b), this public interest role does not carry over to a Section 19 proceeding, which is brought to redress private injuries. Turner, however, concerned the power of the Commission itself to issue subpoenas in aid [\*\*722] of its Section 19 authority. Therefore we do not feel that case controls the question presented here, regarding the inherent equitable jurisdiction of the district court and the exercise of that jurisdiction under the statutory scheme of the Federal Trade Commission Act.

Because of our resolution of this issue we need not address the possible use of the All Writs Act, or the question of the Commission's own power to order consumer redress in a Section 5 cease and desist order.

#### B. The Standard for Issuing Ancillary Relief.

In its discussion of the ancillary relief requested, the district court stated:

Assuming, arguendo, that such an order is authorized under section 13, a court would be loathe to issue such an injunction in the absence of a strong showing of dissipation of assets. Under the evidence before me, I do not believe that this case warrants this drastic and unprecedented [\*\*27] relief.

Appellees contend that this statement was a finding of fact that precludes availability of the requested injunctive relief unless shown to be clearly erroneous. Whether or not this statement is intended to be a finding of fact, it is clear that the district court was applying a standard requiring a "strong showing" of the need for the particular relief requested. This standard appears to be excessively harsh, and on remand the district court should reexamine the evidence and determine whether the requested relief is "reasonably necessary" in order to preserve the possibility of complete and meaningful relief at the conclusion of litigation. See Commodity Futures Trading v. Muller, 570 F.2d at 1296, 1301 (5th Cir. 1978); cf. United States v. Coca-Cola Bottling Co. of L. A., 575 F.2d 222, 231 (9th Cir.), cert. denied, 439 U.S. 959, 99 S. Ct. 362, 58 L. Ed. 2d 351 (1978) ("reasonable probability" that merger would be anticompetitive). In view of the Commission's indications that any consumer redress sought in this case

would be through Section 19 and not other mechanisms, the district court should additionally inquire as to [\*\*28] the likelihood of the Commission's success on the question whether the acts and practices under scrutiny are ones that "a reasonable man would have known under the circumstances (were) dishonest or fraudulent." Section 19(a)(2), 15 U.S.C.A. § 57b(a)(2) (Supp.1981).

#### C. Compulsory Notification.

Although the Commission's complaint did not specifically mention compulsory notification to purchasers of the ongoing proceedings, the complaint did allege that the defendants were continuing to misrepresent and failing to disclose material facts to purchasers and sought an order compelling defendants to cease and desist such acts. The magistrate recommended that the defendants be enjoined from receiving and depositing further payments pursuant to purchase contracts until the purchasers are advised of the possibility of such misrepresentations and omissions. The district court rejected this recommendation, stating "A notification order suffers from the same defects as does creation of escrow accounts; each is solely referable to past alleged violations."

Once again we believe the district court took an unduly narrow view of its available jurisdiction under Section [\*\*29] 13(b). In a suit for permanent injunction under Section 13(b), the court in Federal Trade Commission v. Virginia Homes Mfg. Corp., 509 F. Supp. 51, 55 (D.Md.1981), aff'd, Federal Trade Commission v. Virginia Homes Mfg. Corp., No. 81-1187 (4th Cir., July 14, 1981) (unpublished), held that "compulsory notice is implicitly authorized by section 13(b) so long as such notice would be essential to the effective discharge of the court's responsibilities." See also Federal Trade Comm. v. Travel King, Inc., 1977-1 Trade Cas. (CCH) P 61,419 (W.D.Wash.1974). Because of our holding above that Section 13(b) invokes the inherent equitable jurisdiction of the district courts, we remand to allow the district court to reconsider whether notification to consumers is called for in this case. As in Virginia Homes, it is conceivable that consumers could be prevented from properly [\*\*723] asserting their possible legal rights absent notification of possible misrepresentations. We note that the case for notification was much more compelling in Virginia Homes, however; there, holders of warranties that were found to violate federal law in various respects would be unaware [\*\*30] of their newer more expansive warranty rights absent the notification. 509 F. Supp. at 56. See also FTC v. Travel-King, Inc., 1977-1 Trade Cas. (CCH) P 61,419 (W.D.Wash.1974) (notification regarding "psychic surgery" claims). Accordingly, in the exercise of its discretion the district court may conclude that the rights of purchasers would be adequately protected by other preliminary relief.

<sup>6</sup> The parties also contest the admissibility of various items of evidence produced by the Commission. Any such challenges not yet waived can be considered on remand.

### III. The Cross-Appeal

Appellees argue that there was no showing of any continuing or future violations of the Act that would justify the district court's injunction prohibiting further misrepresentations and omissions in connection with the sale of land. Appellees point to the magistrate's finding that there is no promotional or sales campaign presently carried on by appellees. This same finding, however, states that sales on-site are continuing; the magistrate's findings generally suggest that the appellees' business operations are still in place.

The district court acted well within its discretion in ordering appellees to cease and desist from further violations of the Act. This is particularly true when the evidence developed to date suggests a large-scale systematic **[\*\*31]** scheme tainted by fraudulent and deceptive practices, giving rise to a "fair inference of a reasonable expectation of continued violations" absent restraint. Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972).

Appellees' final attack on the injunction issued is that the terms of the injunction fail to comply with the requirement of specificity in Fed.R.Civ.P. 65 in two respects: the use of "catchall" phrases such as "misrepresentation" and "disclosure of material facts" is impermissibly vague; and the provisions of the court's order that adopt or refer to the magistrate's report violate Rule 65(d)'s prohibition of reference to other documents.

In its order, the district court reviews the magistrate's report adopting particular findings and modifying others and concludes by ordering appellees to "cease and desist from making misrepresentations and failing to disclose material facts to purchasers and prospective purchasers concerning investment potential and suitability of land in (appellees' subdivisions) regarding usability as homesites, farms, ranches or for commercial purchases." We find nothing impermissibly **[\*\*32]** vague about the use of the terms "misrepresentation" and "failure to disclose material facts" in the context of the district court's order, particularly because the order does expressly describe the difficulty in obtaining utility services for the property and the economic unfeasibility of the land for farming, ranching or commercial purposes in the small parcels made available. There seems to be little danger that appellees will misapprehend what misrepresentations and omissions are proscribed, or that appellees will be liable to contempt citations for activities not contemplated by this order.

However, several of the magistrate's findings adopted by reference deal with specific acts and practices the magistrate

and the district court consider to be material misrepresentations and omissions; for example, finding 23 regarding misrepresentation of the potential appreciation in value, and findings 24(b) and (c) concerning the failure to advise purchasers of the substantial sums of money required to make the land suitable for housing or farming. Incorporation of such findings by reference violates the prohibition in Rule 65(d) of "reference to the complaint or other document." This **[\*\*33]** no-reference requirement has been strictly construed in this circuit. See Meltzer v. Board of Public Instruction of Orange County, Florida, 480 F.2d 552, 554 (5th Cir. 1973) (provision of order referring to court's prior order violates Rule 65(d)); B. H. Bunn Co. v. AAA Replacement Parts Co., 451 F.2d 1254, 1269 (5th Cir. 1971) **[\*\*724]** (reference back to findings of fact may be insufficient to advise parties of permissible and prohibitive conduct). Accordingly, on remand the district court should explicate its references to the magistrate's order. The Commission protests that correction of this defect calls for the purely mechanical exercise of typing in the specific parts of the magistrate's report where indicated. This may indeed seem overly technical, but it would allow the parties to interpret the injunction "from the four corners of the order" as required by Rule 65(d). Sanders v. Airline Pilots Ass'n International, 473 F.2d 244, 247 (2d Cir. 1972).

### IV. Conclusion

In summary, we remand for the district court to reevaluate its denial of the Commission's requested preliminary injunctive relief in light of our discussion of the **[\*\*34]** availability of such measures under Section 13(b) of the Federal Trade Commission Act. We affirm the injunction issued by the district court insofar as it enjoins further violations of the Act, and direct that the district court amplify its references to the magistrate's report.

AFFIRMED in part; REVERSED and REMANDED in part.

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# EXHIBIT B



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As of: June 18, 2020 11:50 PM Z

## *FTC ex. rel. Yost v. Educare Ctr. Servs.*

United States District Court for the Western District of Texas, El Paso Division

January 14, 2020, Decided; January 14, 2020, Filed

EP-19-CV-196-KC

### Reporter

2020 U.S. Dist. LEXIS 5665 \*; 2020-1 Trade Cas. (CCH) P81,061; \_\_\_ F. Supp. 3d \_\_\_; 2020 WL 218519

Plaintiff: Erin B. Leahy, LEAD ATTORNEY, Office of the Attorney General, Columbus, OH USA.

FEDERAL TRADE COMMISSION, and, STATE OF OHIO  
ex rel. ATTORNEY GENERAL DAVE YOST, Plaintiff, v.  
EDUCARE CENTRE SERVICES, INC., et al., Defendants.

For Tripletel, Inc., a Delaware corporation, Wissam Abedel Jilal, individually and as an owner, officer, member, and/or manager of ProlinkVision, S.R.L., also known as, Sam Jilal, Defendants: Haroon Rafati, PRO HAC VICE, The Rafati Law Firm, PLLC, Katy, TX USA.

**Subsequent History:** Appeal filed, 02/19/2020

**Prior History:** [\*FTC ex rel. Yost v. Educare Ctr. Servs., 2019 U.S. Dist. LEXIS 185652 \(W.D. Tex., Oct. 22, 2019\)\*](#)

For Prolink Vision, S.R.L., a Dominican Republic limited liability company, Defendant: Aldo R. Lopez, LEAD ATTORNEY, Ray, McChristian & Jeans, P.C., El Paso, TX USA; Daniel H. Hernandez, LEAD ATTORNEY, Ray, Valdez, McChristian & Jeans, El Paso, TX USA; Genevieve C. Bradley, Gregory M. Caffas, LEAD ATTORNEY, Roth Jackson, Mclean, VA USA; Mitchell N. Roth, LEAD ATTORNEY, Roth Jackson Gibbons Condlin, PLC, Mclean, VA USA.

## Core Terms

injunctive, carrier, telecommunications, ongoing, exemption, format, conversion, temporary, protocol, Restraining, equitable, recurrent, Dissolve, consumer, threshold, ceased, enjoin

Sam Madi, individually and as an [\*2] owner, officer, member, and/or manager of Educare Centre Services, Inc., dba Credit Card Services, Card Services, Credit Card Financial Services, Care Net, Tripletel, Inc., Revit Educ Srv., L.L.Vision, CareValueServices, and CardValueServices, Defendant, Pro se, Laval, Qc Canada.

**Counsel:** [\*1] For Robb Evans & Associates Llc, Receiver: James Wesley Brewer, Shelly W. Rivas, LEAD ATTORNEYS, Kemp Smith LLP, El Paso, TX USA; Ken K. Slavin, LEAD ATTORNEY, Kemp Smith, P.C., El Paso, TX USA.

For Mohammad Souheil, individually and as an owner, officer, member, and/or manager of Prolink Vision, S.R.L., also known as, Mohammed Souheil, also known as, Mike Souheil, Defendant: Aldo R. Lopez, LEAD ATTORNEY, Ray, McChristian & Jeans, P.C., El Paso, TX USA; Daniel H. Hernandez, LEAD ATTORNEY, Ray, Valdez, McChristian & Jeans, El Paso, TX USA; Genevieve C. Bradley, Gregory M. Caffas, LEAD ATTORNEYS, Roth Jackson, Mclean, VA USA; Mitchell N. Roth, LEAD ATTORNEY, Roth Jackson Gibbons Condlin, PLC, Mclean, VA USA.

For Federal Trade Commission, Plaintiff: Christopher E. Brown, J. Ronald Brooke, Jr., LEAD ATTORNEYS, Federal Trade Commission, Washington, DC USA.

For State of Ohio EX Rel. Attorney General Dave Yost,



For Charles Kharouf, individually and as an owner, officer, member, and/or manager of ProLink Vision, S.R.L., Defendant: Daniel H. Hernandez, LEAD ATTORNEY, Ray, Valdez, McChristian & Jeans, El Paso, TX USA; Genevieve C. Bradley, LEAD ATTORNEY, Roth Jackson, Mclean, VA USA.

For Relief Defendant 9896988 Canada, Inc., Defendant: Aldo R. Lopez, LEAD ATTORNEY, Ray, McChristian & Jeans, P.C., El Paso, TX USA; Daniel [\*3] H. Hernandez, LEAD ATTORNEY, Ray, Valdez, McChristian & Jeans, El Paso, TX USA; Genevieve C. Bradley, LEAD ATTORNEY, Roth Jackson, Mclean, VA USA; Gregory M. Caffas, LEAD ATTORNEY, Roth Jackson, Mclean, VA USA; Mitchell N. Roth, LEAD ATTORNEY, Roth Jackson Gibbons Condlin, PLC, Mclean, VA USA.

For Globex Telecom, Inc., 9506276 Canada, Inc., Defendants: Benjamin Eliot New, Richard W. Epstein, LEAD ATTORNEYS, Greenspoon Marder LLP, Fort Lauderdale, FL USA; Jeffrey A. Backman, Roy Taub, LEAD ATTORNEY, Greenspoon Marder, P.A., Ft. Lauderdale, FL USA;

For F.I.T. Ventures Lending Inc., Defendant: Amiad Kushner, LEAD ATTORNEY, Seiden Law Group LLP, New York, NY USA; Stephen Harrison Nickey, LEAD ATTORNEY, The Law Offices of Stephen H. Nickey, P.C., El Paso, TX USA.

**Judges:** KATHLEEN CARDONE, UNITED STATES DISTRICT JUDGE.

**Opinion by:** KATHLEEN CARDONE

## Opinion

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### ORDER

On this day, the Court considered Defendants Mohammad Souheil, ProLink Vision, S.R.L., 9896988 Canada, Inc., and Sam Madi's ("Educare Defendants") Joint Opposition to

Plaintiffs' Application for Preliminary Injunction, ECF No. 94, and Defendants Globex Telecom, Inc. and 9506276 Canada, Inc.'s ("Globex Defendants") Opposition to Plaintiffs' Application for a Preliminary [\*4] Injunction and Motion to Dissolve the Ex Parte Temporary Restraining Order, ECF No. 115. For the reasons set forth below, the Court finds that entry of injunctive relief is appropriate in this case because (1) Plaintiffs are statutorily authorized to seek equitable remedies and (2) the Globex Defendants are not entitled to immunity under the common carrier exemption. *See* Preliminary Injunction Order as to Educare Defendants 4 ¶ J, ECF No. 124 ("The Court will issue a separate order addressing the issues raised by Defendants related to the Court's authority to enter this Preliminary Injunction."); Preliminary Injunction Order as to Globex Defendants 4 ¶ J, ECF No. 125 (same). Therefore, the Globex Defendants' Motion to Dissolve is **DENIED**, and all Defendants are **ORDERED** to comply with the Preliminary Injunctions and other remedies ordered in this case.

### I. BACKGROUND

On July 19, 2019, the Court issued a Temporary Restraining Order ("Educare TRO") granting Plaintiffs injunctive relief pursuant to [Section 13\(b\) of the Federal Trade Commission Act \("FTC Act"\), 15 U.S.C. § 53\(b\)](#), based on alleged violations of the [FTC Act, 15 U.S.C. § 5\(a\)](#), the [Telemarketing Sales Rule \("TSR"\), 16 C.F.R. Part 310](#), the [Telemarketing and Consumer Fraud and Abuse Prevention Act \("Telemarketing Act"\), 15 U.S.C. §§ 6101-6108](#), the [Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. § 1345.07](#) [\*5] (West 2017), and the [Ohio Telephone Solicitation Sales Act, Ohio Rev. Code Ann. § 4719.01 et seq.](#) (West 2018). Educare TRO, ECF No. 8. The Educare TRO enjoined the Educare Defendants from making misrepresentations to consumers, violating the TSR, and selling or otherwise releasing consumer data, and ordered an asset freeze, foreign asset repatriation, and appointment of a temporary receiver. *Id.* Plaintiffs and the Educare Defendants jointly agreed to extend the Educare TRO and continue the corresponding preliminary injunction hearing through December 16, 2019. ECF Nos. 43, 64.

On December 3, 2019, Plaintiffs filed their First Amended Complaint, ECF No. 81, and the Court issued a TRO against the Globex Defendants ("Globex TRO"), ECF No. 84. The Globex TRO granted Plaintiffs injunctive relief pursuant to [Section 13\(b\) of the FTC Act, 15 U.S.C. § 53\(b\)](#), based on the Globex Defendants' alleged liability for "assisting and facilitating" the Educare Defendants' aforementioned alleged violations pursuant to the "substantial assistance" provision of the [Telemarketing Sales Rule \("TSR"\), 16 C.F.R. § 310.3\(b\)](#).

*Id.* The Globex TRO enjoined the Globex Defendants from violating the TSR and ordered the same ancillary remedies as [\*6] ordered against the Educare Defendants. *See id.*

On December 9, 2019, the Educare Defendants filed a Motion for Partial Summary Judgment ("Educare Response"), ECF No. 93, laying out their opposition to injunctive relief in this case, and their Joint Opposition to Plaintiffs' Application for Preliminary Injunction, ECF No. 94, which fully incorporated the same arguments. On December 12, 2019, the Globex Defendants filed their Opposition to Plaintiffs' Application for a Preliminary Injunction and Motion to Dissolve the Ex Parte Temporary Restraining Order ("Globex Response"), ECF No. 115.

On December 13, 2019, Plaintiffs filed a Supplemental Brief in Support of Preliminary Injunction as to the Educare Defendants ("Plaintiffs' Educare Reply"), ECF No. 119, and a Supplemental Brief in Support of Preliminary Injunction as to the Globex Defendants ("Plaintiffs' Globex Reply"), ECF No. 118.

On December 16, 2019, the Court held a preliminary injunction hearing as to both the Educare Defendants and the Globex Defendants. ECF Nos. 129, 130. At the preliminary injunction hearing, the Court ruled from the bench on threshold issues, denying the Globex Defendants' motion to dissolve the temporary restraining [\*7] order and finding injunctive relief available as to all parties. *See* ECF No. 130 at 8:50. The Court indicated at that time that a written Order on those issues would be forthcoming. *See id.* at 1:51:30. On December 17, 2019, the Court granted Plaintiffs' motions for preliminary injunctions. This written Order is that order referred to at the preliminary injunction hearing. *See* Preliminary Injunction Order as to Educare Defendants 4 ¶ J; Preliminary Injunction Order as to Globex Defendants 4 ¶ J.

## II. DISCUSSION

Both the Educare Defendants and the Globex Defendants argue that injunctive relief in this case is improperly issued. First, the Educare Defendants and the Globex Defendants argue that equitable remedies are unavailable to the FTC under [§ 13\(b\) of the FTC Act](#) because any allegedly unlawful conduct was not ongoing when the action was filed. Educare Resp. 7-11; Globex Resp. 7-14. Second, the Globex Defendants argue further that, as "VoIP" (voice over Internet Protocol) providers, they are subject to the "common carrier" exemption to the FTC's jurisdiction and therefore excepted from liability under the TSR. Globex Resp. 14-16. The Court addresses each in turn.

### A. [§ 13\(b\)](#) authority as to the Educare Defendants [\*8] and the Globex Defendants

Plaintiffs allege that the Educare Defendants and the Globex Defendants are in violation of [§ 5 of the FTC Act, 15 U.S.C. § 45\(a\)](#), and the TSR, [16 C.F.R. § 310. Section 5 of the FTC Act](#) prohibits "[u]nfair methods of competition." [15 U.S.C. § 45\(a\)](#). That section authorizes the FTC to seek its own administrative remedies, *id.* [§ 45\(b\)](#), which is the agency's traditional enforcement mechanism. *See Gibson v. FTC*, [682 F.2d 554, 560 \(5th Cir. 1982\)](#); *Colonial Stores, Inc. v. FTC*, [450 F.2d 733, 739-40 \(5th Cir. 1971\)](#). [Section 13\(b\) of the FTC Act](#), codified as [15 U.S.C. § 53\(b\)](#), was added to the FTC Act to "improve the Commission's consumer protection powers" by enabling the FTC to seek preliminary relief from federal courts. *See FTC v. Sw. Sunsites, Inc.*, [665 F.2d 711, 719-20 \(5th Cir. 1982\)](#) (concluding from legislative history that the purpose of [§ 13\(b\)](#)'s addition "was to add significant new weapons to the Commission's enforcement arsenal in order to make more meaningful and complete consumer relief possible," such that the Act now "clearly makes the district court a vital enforcement arm of the statute").

[Section 13\(b\)](#), in relevant part, provides:

Whenever the Commission *has reason to believe*—

(1) that any person, partnership, or corporation is *violating, or is about to violate*, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the [\*9] court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . [and] in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

[15 U.S.C. § 53\(b\)](#) (emphasis added).

The Educare Defendants and the Globex Defendants argue that the phrase "is violating, or is about to violate" in [§ 13\(b\)\(1\)](#) requires the FTC to have knowledge of ongoing or imminent unlawful conduct in order for the FTC to seek, and

for a court to order, equitable remedies. Educare Resp. 7; Globex Resp. 7. Defendants contend that the conduct alleged in Plaintiffs' complaints ceased prior to Plaintiffs' filing of this action, and therefore [§ 13\(b\)](#) relief is unavailable. Educare Resp. 9-11; Globex Resp. 8-10. Thus, they conclude that the injunctive relief [\*10] ordered in this case—asset freezes, receiverships, temporary restraining orders, and now, preliminary injunctions—is improper and must be dissolved, leaving Plaintiffs to pursue relief under [§ 5](#)'s administrative pathway instead. Educare Resp. 8, 11; Globex Resp. 11-14.

The Educare and Globex Defendants both rely on a recent decision of the United States Court of Appeals for the Third Circuit, [FTC v. Shire Viropharma, Inc., 917 F.3d 147 \(3d Cir. 2019\)](#), as support for their reading of the threshold requirement in [§ 13\(b\)\(1\)](#). See Educare Resp. 7-11; Globex Resp. 7-14. In *Shire*, the Third Circuit concluded that the plain language of [§ 13\(b\)](#) requires that the FTC "have reason to believe" that it is seeking to enjoin "existing or impending conduct," not "long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation." [917 F.3d at 156](#). According to the *Shire* court, "[t]he provision was not designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur. . . . Nor was it meant to duplicate [Section 5](#), which already prohibits past conduct." *Id.* While the court declined to give a more specific definition of the phrase "is about to violate"—stating that "the plain language of [Section 13\(b\)](#) answers the question for us"—it found [\*11] that "something more than a past violation and a likelihood of recurrence" is necessary. [Id. at 156-58](#). Thus, the *Shire* court held that injunctive relief was unavailable because the FTC failed to show that the defendant's violations of law were ongoing or "about to" occur. [Id. at 160](#).

As explained below, this Court finds *Shire* unpersuasive in this case for two reasons: first, there is binding Fifth Circuit authority which takes a different approach from the *Shire* court to this issue; and second, even if the Court were to adopt the *Shire* court's reasoning, the facts of this case are distinguishable and counsel a different outcome.

### 1. The Fifth Circuit's application of [§ 13\(b\)](#)

In *FTC v. Southwest Sunsites, Inc. (Sunsites)*, the Fifth Circuit first analyzed the threshold availability of injunctive relief under [§ 13\(b\)](#). [665 F.2d at 714 & n.1, 723-24](#). The *Sunsites* court focused on the FTC's appeal from a district court order which had granted a [§ 13\(b\)](#) injunction but had denied the availability of certain forms of ancillary relief under [§ 13\(b\)](#). See [id. at 716-23](#). Along with this challenge, the court also had occasion to consider the appellees' argument on cross-

appeal that the district court's injunction was unauthorized by [§ 13\(b\)](#). [Id. at 723](#). Appellees argued that the unlawful conduct [\*12] at issue had ended and "there was no showing of any continuing or future violations of the Act." *Id.*

The Fifth Circuit rejected the appellee's argument. *Id.* The *Sunsites* court held that the district court "acted well within its discretion" in issuing an injunction under [§ 13\(b\)](#) because "the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a 'fair inference of a reasonable expectation of continued violations' absent restraint." *Id.* (quoting [SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100-01 \(2d Cir. 1972\)](#)). Thus, the Fifth Circuit read the phrases "reason to believe" and "about to violate" in [§ 13\(b\)](#) as covering situations where defendants claim that violations have ceased, but the FTC acts on evidence that supports a reasonable inference that violative conduct will continue absent injunctive restraint.<sup>1</sup> See *id.*

Courts in the Fifth Circuit, and elsewhere, have adhered to this approach in analyzing the availability of equitable relief under [13\(b\)](#). See [United States v. Cornerstone Wealth Corp., 549 F. Supp. 2d 811, 816 \(N.D. Tex. 2008\)](#) (finding injunctive relief available under [§ 13\(b\)](#) based on past violations due to reasonable likelihood of future violations, and collecting similar cases); [FTC v. Inv. Devs., Inc., CIV. A. No. 89-642, 1989 U.S. Dist. LEXIS 6502, 1989 WL 62564, at \\*5 \(E.D. La. June 7, 1989\)](#) (citing *Sunsites* on the availability of injunctive [\*13] remedies, and stating that relief is available under [§ 13\(b\)](#) "when there is a cognizable danger of recurrent violation"); [FTC v. Hughes, 710 F. Supp. 1524, 1531 \(N.D. Tex. 1989\)](#) (finding that relief is authorized by [§ 13\(b\)](#))

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<sup>1</sup>The Court notes that it is bound by the Fifth Circuit's holdings, though not by its dictum. See [Perez v. Abbott, 253 F. Supp. 3d 864, 977 \(W.D. Tex. 2017\)](#). "A statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law." [Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717, 721 \(5th Cir. 2004\)](#). In contrast, "[a] statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding." *Id.* ("[B]eing peripheral, [dictum] may not have received the full and careful consideration of the court that uttered it.") (internal quotation marks omitted). Here, the *Sunsites* court's application of [§ 13\(b\)](#)—finding the district court was authorized to issue [§ 13\(b\)](#) relief based on a fair inference of a reasonable expectation of continued violations—was necessary to the holding that the district court properly issued the injunction. See [665 F.2d at 723](#). Indeed, if this analysis were removed from the opinion, the Fifth Circuit could not have found the injunction proper. See *id.* Moreover, this is not dicta because it explains the governing law; that is, the conditions necessary for issuing a [§ 13\(b\)](#) injunction. See [Bray, 372 F.3d at 721](#). Therefore, the *Sunsites* court's [§ 13\(b\)](#) standard is not dictum, but is a holding that binds this Court. See *id.*

because "[t]here is a cognizable danger of recurrent violation in this case, as indicated by [the defendant's] past unlawful conduct"); see also *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087-88 (9th Cir. 1985) (adopting the rule that, while "past wrongs" alone are insufficient, § 13(b) may authorize injunctive relief when wrongs are "ongoing or likely to recur").

Here, Plaintiffs sufficiently establish that the FTC has reason to believe that Defendants' alleged violations are ongoing or likely to continue in the future absent restraint. Just as in *Sunsites*, Plaintiffs allege and produce evidence showing a wide-spread and organized fraudulent scheme based on deceptive business practices. See 665 F.2d at 723. When the appellees in *Sunsites* claimed the violations at issue had concluded, as Defendants claim in this case, the *Sunsites* court pointed out that "sales on-site are continuing" and "the appellees' business operations are still in place." *Id.* Likewise, here, Plaintiffs had evidence indicating the scheme could continue at the time the case was filed.

For example, Plaintiffs show the scheme's allegedly unlawful payment [\*14] processing was continuing in the months and weeks leading up to the original complaint's filing, and even into the days after. See Pl.'s Educare Reply 2-3. Further, corporate Defendants Educare and Prolink remained active corporations when Plaintiffs filed suit. *Id.* Educare and corporate Defendant 9896988 Canada maintained active bank accounts, and Plaintiffs possessed evidence that illegal proceeds continued to be processed and transferred among many of the Defendants. *Id.* And, the alleged ringleader of the scheme, Mohammad Souheil, remained in control of the Globex Defendants at the time the original complaint was filed.<sup>2</sup> See Pl.'s Globex Reply 4, 6-7. Thus, as in *Sunsites*, these facts support Plaintiffs' reasonable expectation that violations would continue absent restraint, despite Defendants' claimed cessation. See 665 F.2d at 723.

Just as in *Sunsites*, Plaintiffs had evidence of a large-scale fraudulent scheme with intact infrastructure at the initiation of the litigation. See *id.* Therefore, applying the Fifth Circuit's interpretation of § 13(b)'s threshold requirement, in this case the FTC's request for entry of a TRO and Preliminary Injunction, and the Court's entry of such, are proper. See

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<sup>2</sup>Souheil resigned this position between the filing of the original complaint and the naming of the Globex Defendants in the Amended Complaint. Plaintiffs argue, however, that the resignation was "largely inconsequential." Pl.'s Globex Reply 6-7. They allege that Souheil maintained control because the Globex Defendants are majority-owned by the Souheil Family Trust, of which Souheil is beneficiary. *Id.* They also allege that Souheil's family members remained in control of the company after his resignation. *Id.*

*id.* [\*15]

## 2. Other factors indicating a likelihood of continued violations

Aside from analyzing the facts at issue, the *Sunsites* court did not provide extensive guidance to district courts on applying § 13(b)'s threshold requirement. See *id.* Following *Sunsites*, when applying § 13(b), district courts have analyzed whether the surrounding circumstances—in addition to the past violations alleged—create a reasonable expectation that violations will continue. See, e.g., *Cornerstone Wealth Corp.*, 549 F. Supp. 2d at 816; *Hughes*, 710 F. Supp. at 1531; see also *FTC v. Adept Mgmt., I*:16-cv-00720-CL, 2019 U.S. Dist. LEXIS 66206, 2019 WL 1746581, at \*3 (D. Ore. Apr. 18, 2019) (citing *Sunsites* in analyzing circumstances).

Plaintiffs argue the Court should apply the factors used by the district court in *United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811 (N.D. Tex. 2008) to analyze whether the evidence here further supports a reasonable expectation of continuing violations. Pl.'s Educare Reply 4-7; Pl.'s Globex Reply 3-7. The *Cornerstone Wealth* court listed these nonexclusive factors for that analysis: "[The] egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities [\*16] for future violations." 549 F. Supp. 2d at 816 (internal quotation marks omitted).<sup>3</sup> Other district courts have used the same factors in conducting this analysis. See, e.g., *FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1014 (D. Nev. 2019); *Adept Mgmt., Inc.*, 2019 U.S. Dist. LEXIS 66206, 2019 WL 1746581, at \*3; *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ill. 2000); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 260-61 (E.D.N.Y. 1998).

The Court applies the factors it finds persuasive here. First, the alleged conduct was egregious, recurrent in nature, and required high degrees of scienter. The Educare and Globex Defendants allegedly carried out a systematic scheme that generated \$11.5 million in consumer harm. Pl.'s Educare Reply 5; Pl.'s Globex Reply 3. With components in Canada,

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<sup>3</sup>The *Cornerstone Wealth* court incorporated these factors from *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978). *Cornerstone Wealth*, 549 F. Supp. 2d at 816. In that case, in the SEC enforcement context, the Fifth Circuit instructed that "trial court[s] should consider several factors in deciding whether to issue an injunction in light of past violations." *Blatt*, 583 F.2d at 1334 & n.29.

the Dominican Republic, and the United States, the alleged scheme repeatedly defrauded consumers, illegally processed payments, and transferred the proceeds across individuals and entities. Pl.'s Educare Reply 5-6; Globex Reply 3-4. Scienter is apparent from the reliance on deceptive methods, failure to honor business guarantees, and use of shell companies and unlawful money processing methods to evade bank account closures. Pl.'s Educare Reply 5-6; Globex Reply 4.

Finally, at the time of the action's initiation, the Globex Defendants and individuals among the Educare Defendants remained in positions that presented opportunities for continued violations. See *Cornerstone Wealth*, 549 F. Supp. 2d at 816. Mohammad [\*17] Souheil allegedly continues to play a role in controlling the Globex Defendants, which sent millions of dollars to Canadian entities or accounts affiliated with Souheil, Pl.'s Globex Reply 3-4, such as Defendant 9896988 Canada, Inc., of which Souheil is owner and president. Sam Madi, who, like Souheil, has a background in telecommunications, also allegedly remains "associated with Globex." Pl.'s Educare Reply 6. Charles Kharouf, departing from his past telemarketing work, is now the president of a payday lending company also affiliated with Globex and operating out of the same building, along with 9896988 Canada, Inc. *Id.* And, the Globex Defendants, at the time the Amended Complaint was filed, continued to offer VoIP services. Pl.'s Globex Reply 4. Plaintiffs claim that, at that time, Globex's two largest clients were also connected to cases involving violations of the FTC Act. *Id.* at 4-5 (alleging that Globex "has a history of assisting and facilitating unlawful telemarketing schemes").

Ultimately, though finding Plaintiffs' showing sufficient for § 13(b) relief under *Sunsites* alone, the Court agrees with Plaintiffs that these factors further support such a finding in this case. See *Cornerstone Wealth Corp.*, 549 F. Supp. 2d at 816. Altogether, then, [\*18] Plaintiffs' allegations and evidence support that, at the time of filing, the FTC had reason to believe that the alleged conduct was ongoing or reasonably expected to continue in the future absent restraint. See *id.*; *Sunsites*, 665 F.2d at 723. Accordingly, the Court may properly order injunctive relief in this case.

### 3. *Shire* is distinguishable from the facts of this case

Furthermore, while finding that *Sunsites* controls this Court's application of § 13(b), the Court notes that Plaintiffs' case is sufficient even under the Third Circuit's reading of § 13(b) in *Shire*.

In *Shire*, the FTC alleged that the pharmaceutical manufacturer defendant had submitted unlawful sham

petitions to the FDA. *917 F.3d at 151-53*. Five years after the alleged conduct concluded, the FTC sought to obtain injunctive relief against the defendant under § 13(b). *Id. at 152, 160*. The Third Circuit held that the alleged misconduct was too far in the past to support the FTC's belief that the defendant was presently violating, or about to violate, the law. *Id. at 159-60*. Against this factual background, the court reasoned that something more than a past violation and some likelihood of recurrence is necessary under § 13(b) to show that a defendant is "about to" violate the law. *Id. at 159*. The *Shire* court also emphasized the factual [\*19] confines of its ruling, however: "Whatever the outer reach of 'about to violate' may be, the facts in this case do not approach it. We therefore leave for another day the exact confines of Section 13(b)'s 'about to violate' language." *Id. at 160* (emphasizing, also, the "paucity of allegations in the complaint").

The facts of this case are readily distinguishable. The defendant in *Shire* no longer owned the product at issue in its past violation, such that it was impossible for it to continue the same scheme. *Id.* Here, by contrast, the scheme's corporate entities remained active, some with open bank accounts or ongoing relationships with the individual Defendants. Where the conduct in *Shire* had ceased five years prior to the FTC seeking the injunctive relief, here Defendants claim only that operations were entirely stopped six months prior to the lawsuit's initiation.

Even more significantly, in *Shire*, whether violations had actually ceased was not a disputed fact. *Id.* ("The FTC does not contest that *Shire* is not currently violating the law."). Here, however, the FTC argues it had reason to believe violations were ongoing despite Defendants' claims to the contrary. While various Defendants stated that business [\*20] operations ceased prior to the suit's initiation, these statements—even fully credited—do not establish conclusively that no violations of law were occurring at the time. See Pl.'s Educare Reply 2-3, n.2, n.3 (summarizing Plaintiffs' documentary evidence of ongoing violations and disputing the veracity and reliability of Defendants' contrary statements). It is Plaintiffs' position in the original and first amended complaints, and also at the preliminary injunction hearing, that—in addition to their reasonable expectation that the scheme would continue in the future—violations were still ongoing. See *id.* at 3. Plaintiffs point to money transfers from the scheme's "rogue payment processor," Madera, to Educare's bank account in the months, weeks, and days before filing. *Id.* Subsequently, Sam Madi sent those illegally processed proceeds to Souheil or 9896988 Canada, Inc. during the same time period. *Id.*

Thus, not only are the circumstances and time period distinct from those in *Shire*, but the FTC's position is as well. Under

*Shire*, when the FTC "chooses to use [Section 13\(b\)](#), it must plead that a violation of the law 'is' occurring or 'is about to' occur." [917 F.3d at 159](#). The FTC did so in this case.

Therefore, Plaintiffs [\*21] sufficiently show they had reason to believe that violations were ongoing and reasonably expected to continue at the time the lawsuit was initiated. This showing makes equitable relief proper under both *Sunsites* and *Shire*. See [Sunsites, 665 F.2d at 723](#); [Shire, 917 F.3d at 159-60](#). Accordingly, the Court may properly enter the requested injunctive relief in this case.

## **B. The common carrier exception as to the Globex Defendants**

Next, the Globex Defendants argue they are immune from liability under the TSR because, as a VoIP provider, they should be granted "common carrier" status. Globex Resp. 14-16.

[Section 5\(a\)\(2\) of the FTC Act](#) exempts common carriers from the FTC's jurisdiction. [15 U.S.C. § 45\(a\)\(2\)](#). The same is true of the TSR. See [60 Fed. Reg. 43842, 43843 \(1995\)](#) (stating that the Rule does not cover activity beyond the jurisdiction of the FTC Act). Instead, regulation of common carriers generally falls under the Federal Communications Commission's jurisdiction. See generally [FTC v. AT&T Mobility LLC, 883 F.3d 848, 853-56 \(9th Cir. 2018\)](#). For purposes of the exemption, determining whether a given provider is a "common carrier" is an activity-based analysis, as opposed to a status-based one. [Id. at 850](#) (explaining that a purported common carrier can only claim immunity "to the extent that a common carrier is engaging in common-carrier services"). In other words, "courts must examine [\*22] the actual conduct of an entity to determine if it is a common carrier for purposes of the FTC Act exemption." [FTC v. Verity Int'l, Ltd., 443 F.3d 48, 60 \(2d Cir. 2006\)](#).

Looking to the activity of service providers, then, the FCC's regulatory framework sorts communications services into two categories: "telecommunications services" and "information services." See [47 U.S.C. § 153\(46\)](#); [47 U.S.C. § 153\(20\)](#). Telecommunications service means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." [47 U.S.C. 153\(53\)](#). Information services means providing "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." [47 U.S.C. § 153\(20\)](#). Information services are distinguished from telecommunications services, in part, by their inclusion of "protocol conversion"—the

"ability to communicate between networks that employ different data-transmission formats"—whereas telecommunications services only transmit without alteration. See [PAETEC Communs. v. CommPartners, LLC, No. 08-0397 \(JR\), 2010 U.S. Dist. LEXIS 51926, 2010 WL 1767193, at \\*2 \(D.D.C. Feb. 18, 2010\)](#) (quoting [Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-77, 125 S. Ct. 2688, 162 L. Ed. 2d 820 \(2005\)](#)). Telecommunications services are subject to the FCC's jurisdiction, whereas information services are not, and the categories are mutually exclusive. See [Brand X Internet Servs., 545 U.S. at 975-76](#); [Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 851 F.3d 1324, 1325, 428 U.S. App. D.C. 154 \(D.C. Cir. 2017\)](#).

The Globex [\*23] Defendants argue that, because they provide VoIP services, they are a common carrier under the activity-based analysis. Globex Resp. 15. They assert that VoIP providers are "telecommunications carriers" under the Communications Act. *Id.* Because telecommunications carriers are "common carriers" under the FCC's regulatory scheme, the Globex Defendants conclude that they are subject to the common carrier exemption to the FTC's jurisdiction. *Id.* (citing [47 U.S.C. § 153\(51\)](#)). However, the Globex Defendants' asserted, but unsupported, premise—that VoIP providers are "telecommunications carriers"—is a disputed issue here, and a long-contested one more broadly. See [PAETEC Comm'ns, Inc., 2010 U.S. Dist. LEXIS 51926, 2010 WL 1767193, at \\*3](#) (observing, in holding that VoIP provider was providing information—not telecommunication—services, that "[t]he telecommunications industry has been raging for years with debate about these arguments") (internal quotation omitted).

The FCC has abstained from taking a categorical classification position regarding VoIP services, see [Charter Advanced Servs. \(MN\), LLC v. Lange, 903 F.3d 715, 719 n.3 \(8th Cir. 2018\)](#), and it does not appear that the Fifth Circuit has reached the issue. The Globex Defendants point to a single Southern District of Texas case where the court found the defendant, a VoIP services provider, was exempt from [\*24] liability due to common carrier status under the [Telephone Consumer Protection Act](#) ("TCPA"). Globex Resp. 14-16 (citing [Clark v. Avatar Techs. Phl, Inc., No. CIV.A. H-13-2777, 2014 U.S. Dist. LEXIS 9988, 2014 WL 309079, at \\*3 \(S.D. Tex. Jan. 28, 2014\)](#)).

This Court does not find that opinion persuasive. First, *Clark* did not involve the FTCA, rather the TCPA. [2014 U.S. Dist. LEXIS 9988, 2014 WL 309079, at \\*3](#). More significantly, the *Clark* court did not provide any reasoning to support its finding that the call provider at issue was a common carrier. See *id.* It did not consider the legal distinction between telecommunications and information services, nor did it

consider the surrounding regulatory issues and case law. *See id.*

In contrast, the Eighth Circuit and several district courts have concluded, in thorough opinions, that VoIP services comparable to those of the Globex Defendants are best classified as "information services." *See Lange, 903 F.3d at 719-20; PAETEC Comm'ns, Inc., 2010 U.S. Dist. LEXIS 51926, 2010 WL 1767193, at \*3; Southwestern Bell Tel., L.P. v. Mo. PSC, 461 F. Supp. 2d 1055, 1079-83 (E.D. Mo. 2006); Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n, No. 04 CIV. 4306 (DFE), 2004 WL 3398572, at \*1 (S.D.N.Y. July 16, 2004); Vonage Holdings Corp. v. Minn. PUC, 290 F. Supp. 2d 993, 999 (D. Minn. 2003).* Those cases hold that the VoIP providers at issue offered information services because protocol conversion—a defining attribute of information services under *Brand X Internet Services, 545 U.S. at 975-77*—is a necessary feature of their VoIP services. *See, e.g., Lange, 903 F.3d at 720* ("Spectrum Voice's service is an information service because it makes available information via telecommunications by providing the capability to transform that [\*25] information through net protocol conversion.") (internal quotations and alteration omitted); *Sw. Bell Tel., L.P., 461 F. Supp. 2d at 1081* ("Net-protocol conversion is a determinative indicator of whether a service is an enhanced or information service."); *Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d at 999* ("[C]alls in the VoIP format must be transformed . . . before a [traditional] user can receive the call. For calls originating from a [traditional] user, the process . . . is reversed. The Court concludes that Vonage's activities fit within the definition of information services.").

In the absence of categorical guidance from the FCC, the Court finds the reasoning of these cases persuasive, that VoIP services like those of the Globex Defendants are information services. However, the Court is mindful that whether or not the Globex Defendants' VoIP services are telecommunications services—affording common carrier status—is a fact-dependent inquiry. *See Centurytel of Chatham, LLC v. Sprint Communs. Co., L.P., 861 F.3d 566, 579 & n.2 (5th Cir. 2017)* (Higginson, J., concurring in part and dissenting in part) ("Every other case or administrative decision . . . focused on the specifics of the VoIP service at issue to determine whether it was an information service or a telecommunication."); *Heydinger, 2016 U.S. Dist. LEXIS 86964, 2016 WL 3661136, at \*2* (describing the issue as "fact-driven and dependent on numerous factors").

Indeed, classifications [\*26] of services that involve VoIP technology have previously diverged because of technical specifics. *See, e.g., Fed.-State Joint Bd. on Universal Serv., 13 F.C.C. Rcd. 11501, 1998 WL 166178, at \*28 (¶¶ 86-90) (F.C.C. 1998)* (distinguishing between computer-to-computer

VoIP services and phone-to-phone VoIP services when analyzing the telecommunication versus information service distinction); *compare Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Servs. are Exempt from Access Charges (IP in the Middle), 19 F.C.C. Rcd. 7457, 7465 (¶¶ 10-14) (F.C.C. 2004)* (finding that AT&T's "IP in the middle" service, using VoIP technology to transmit circuit-switched calls to IP format and then back again, though without net protocol conversion, is *not* an information service), with *Petition for Declaratory Ruling (Pulver), 19 F.C.C. Rcd. 3307, 3314 (¶¶ 11-14) (F.C.C. 2004)* (finding that an entirely VoIP-based internet calling application is an information service and not a telecommunications service). Thus, the Fifth Circuit previously rejected a categorical rule—as to the distinct issue of access charges—that proposed classifying VoIP services as information services based on the use of net protocol conversion alone:

Sprint contends . . . that, when there is a "net protocol conversion" from Internet-protocol format (like VoIP) into another format (like traditional format), the service [\*27] is an "information service." . . . [But,] telephone calls originating in VoIP format can qualify as telecommunications services even if they terminate in a different format. Therefore, the net-protocol-conversion rule proposed by Sprint fails.

*See CenturyTel of Chatham, LLC, 861 F.3d at 574-76.*

Ultimately, here, the Globex Defendants have provided no arguments or details regarding technical features of their service, or otherwise, to support their claimed classification as a telecommunications service. *See* Globex Resp. 14-16. Therefore, the Globex Defendants have failed to distinguish their service from the facially comparable VoIP services held to be information services in the preponderance of cases and relevant FCC decisions. *See Lange, 903 F.3d at 719-20; PAETEC Comm'ns, Inc., 2010 U.S. Dist. LEXIS 51926, 2010 WL 1767193, at \*3; Sw. Bell Tel., L.P., 461 F. Supp. 2d at 1079-83; N.Y. State Pub. Serv. Comm'n, 2004 WL 3398572, at \*1; Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d at 999; Pulver, 19 F.C.C. Rcd. at 3314 (¶¶ 11-14).* And given that the FCC has declined to extend common carrier status to VoIP providers despite several opportunities to do so, *see Charter Advanced Servs. (MN), LLC, 903 F.3d at 719 n.3*, the Court declines, on this record, to make such a determination in their stead. *See Free Conferencing Corp. v. Comcast Corp., CV 15-4076 FMO (PJWx), 2016 U.S. Dist. LEXIS 187802, 2016 WL 7637664, at \*4 (C.D. Cal. May 31, 2016)* (noting that the FCC has opted not to extend VoIP providers common carrier status, and declining to do so because "it would likely disrupt the detailed and comprehensive regulatory scheme that has, and continues to be, [\*28] established and implemented by

the FCC").

For these reasons, the Court finds the Globex Defendants are not immune from liability under the TSR pursuant to the common carrier exemption.

### III. CONCLUSION

For the foregoing reasons, the Court finds Plaintiffs are statutorily authorized to seek injunctive relief and other equitable remedies in this case as to the Educare Defendants and the Globex Defendants. Furthermore, the Court finds that the Globex Defendants do not have immunity pursuant to the common carrier exemption. As a result, the Court's entry of injunctive relief in this case is proper. Accordingly, the Globex Defendants' Motion to Dissolve, ECF No. 115, is **DENIED**, and all Defendants are hereby **ORDERED** to comply with the terms of the Court's Preliminary Injunctions.

**SO ORDERED.**

**SIGNED this 14th day of January, 2020.**

/s/ Kathleen Cardone

KATHLEEN CARDONE

UNITED STATES DISTRICT JUDGE

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End of Document



goods or services, are temporarily restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication, any material fact, including, but not limited to:

- A. that consumers are receiving official government information, including, but not limited to, COVID-19 stimulus relief;
  - B. that the consumer is receiving financial assistance or relief from the government;
- and
- C. any affiliation, association with, endorsement, sponsorship, or approval by any government.

**II. PROHIBITION ON RELEASE OF CUSTOMER INFORMATION**

**IT IS FURTHER ORDERED** that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are hereby temporarily restrained and enjoined from:

- A. Selling, transferring, or otherwise disclosing the name, address, birth date, telephone number, email address, credit card number, bank account number, Social Security number, or other financial or identifying information of any person or business that any Defendant obtained in connection with any activity that pertains to the subject matter of this Order; and

- B. Benefitting from or using the name, address, birth date, telephone number, email address, credit card number, bank account number, Social Security number, or other financial or identifying information of any person or business that any Defendant obtained in connection with any activity that pertains to the subject matter of this Order.

*Provided further, however,* that Defendants must disclose such identifying information to a law enforcement agency, to their attorneys as required for their defense, as required by any law, regulation, or court order, or in any filings, pleadings or discovery in this action in the manner required by the Federal Rules of Civil Procedure and by any protective order in the case.

### **III. PRESERVATION OF RECORDS**

**IT IS FURTHER ORDERED** that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are hereby temporarily restrained and enjoined from:

A. Destroying, erasing, falsifying, writing over, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, Documents that relate to: (1) the business, business practices, assets, or business or personal finances of any Defendant that relate in any way to the activities alleged in the complaint; (2) the business practices or finances of entities directly or indirectly under the control of any Defendant that relate in any way to the activities alleged in the complaint; (3) the business practices or finances of entities directly or indirectly under common control with any other Defendant that relate in any way to the activities alleged in the complaint.

### **IV. REPORT OF NEW BUSINESS ACTIVITY**

**IT IS FURTHER ORDERED** that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are hereby temporarily restrained and enjoined from creating, operating, or exercising any control over any business entity, whether newly formed or previously inactive, including any partnership, limited partnership, joint venture, sole proprietorship, or corporation, without first providing Plaintiff's

counsel with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of the business entity's officers, directors, principals, managers, and employees; and (4) a detailed description of the business entity's intended activities.

**V. DISTRIBUTION OF ORDER BY DEFENDANTS**

**IT IS FURTHER ORDERED** that Defendants shall immediately provide a copy of this Order to Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, and shall, within ten (10) days from the date of entry of this Order, provide Plaintiff with a sworn statement that this provision of the Order has been satisfied, which statement shall include the names, physical addresses, phone number, and email addresses of each such person or entity who received a copy of the Order.

**VI. SERVICE OF THIS ORDER**

**IT IS FURTHER ORDERED** that copies of this Order may be served by any means, including facsimile transmission, electronic mail or other electronic messaging, personal or overnight delivery, U.S. Mail or FedEx, by agents and employees of the FTC, by any law enforcement agency, or by private process server, upon any person or entity that may be subject to any provision of this Order pursuant to Rule 65(d)(2) of the Federal Rules of Civil Procedure. For purposes of this Section, service upon any branch, subsidiary, affiliate or office of any entity shall effect service upon the entire entity.

**VII. PRELIMINARY INJUNCTION HEARING**

**IT IS FURTHER ORDERED** that, pursuant to Fed. R. Civ. P. 65(b), Defendants shall appear before this Court on the \_\_\_\_\_ day of \_\_\_\_\_, 2020, at \_\_\_\_\_m, to show cause, if there is any, why this Court should not enter a preliminary injunction, pending

final ruling on the Complaint against Defendants, enjoining the violations of the law alleged in the Complaint, and imposing such additional relief as may be appropriate.

**VIII. DURATION OF THE ORDER**

**IT IS FURTHER ORDERED** that this Order shall expire fourteen (14) days from the date of entry noted below, unless within such time, the Order is extended for an additional period pursuant to Fed. R. Civ. P. 65(b)(2).

**IX. RETENTION OF JURISDICTION**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2020, at \_\_\_\_\_m.

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**Hon. Wendy B. Vitter**  
**United States District Judge**

# EXHIBIT C

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
company, and

DAVID J. JEANSONNE II, individually and as an  
officer of TRAFFIC JAM EVENTS, LLC,

Defendants.

**Civil Action No. 2:20-cv-1740**

**Judge: Wendy B. Vitter**

**Magistrate: Dana Douglas**

**[PROPOSED] TEMPORARY RESTRAINING ORDER, AND OTHER EQUITABLE  
RELIEF, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION  
SHOULD NOT ISSUE**

Plaintiff, the Federal Trade Commission, has filed its Complaint for Permanent Injunction and Other Equitable Relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and has moved, pursuant to Fed. R. Civ. P. 65(b), for a temporary restraining order with other equitable relief, and an order to show cause why a preliminary injunction should not issue against Traffic Jam Events, LLC and David Jeansonne II (“Defendants”).

**FINDINGS**

The Court, having considered the Complaint, the Motion for a Temporary Restraining Order, certification, declarations, supporting attachments and exhibits, and the memorandum of points and authorities filed in support thereof, and being otherwise advised, finds that:

A. This Court has jurisdiction over the subject matter of this case, and there is good cause to believe that it will have jurisdiction over all parties hereto and that venue in this district is proper.

B. There is good cause to believe that Defendants Traffic Jam Events, LLC and David J. Jeansonne II have engaged in and are likely to engage in acts or practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). As demonstrated by the declaration and additional documents filed by the FTC, the FTC has established a likelihood of success in showing that Defendants have misrepresented that (i) its mailers concern official COVID-19 stimulus information, (ii) consumers will receive stimulus relief, including checks, by visiting a designated site, and (iii) the mailers involve a stimulus program associated with, or approved by, the government.

C. There is good cause to believe that immediate and irreparable harm will result from Defendants' ongoing violations of Section 5(a) of the FTC Act unless Defendants are restrained and enjoined by order of this Court.

D. Weighing the equities and considering Plaintiff's likelihood of ultimate success on the merits, a temporary restraining order, and other equitable relief is in the public interest.

E. This Court has authority to issue this Order pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); Federal Rule of Civil Procedure 65; and the All Writs Act, 28 U.S.C. § 1651.

F. No security is required of any agency of the United States for issuance of a preliminary injunction. Fed. R. Civ. P. 65(c).

## **DEFINITIONS**

For the purpose of this Order, the following definitions shall apply:

A. **“Corporate Defendant”** means Traffic Jam Events, LLC, a Louisiana limited liability company, and each of their subsidiaries, affiliates, successors, and assigns.

B. **“Defendant(s)”** means Corporate Defendant and David J. Jeansonne II, individually and as an officer of Traffic Jam Events, LLC, individually, collectively, or in any combination.

C. **“Document”** is synonymous in meaning and equal in scope to the usage of “document” and “electronically stored information” in Federal Rule of Civil Procedure 34(a), Fed. R. Civ. P. 34(a), and includes writings, drawings, graphs, charts, photographs, sound and video recordings, images, Internet sites, web pages, websites, electronic correspondence, including e-mail and instant messages, contracts, accounting data, advertisements, FTP Logs, Server Access Logs, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, computer records, customer or sales databases and any other electronically stored information, including Documents located on remote servers or cloud computing systems, and other data or data compilations from which information can be obtained directly or, if necessary, after translation into a reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

D. **“Individual Defendant”** means David J. Jeansonne II.

## **ORDER**

### **I. PROHIBITION ON MISREPRESENTATIONS**

**IT IS THEREFORE ORDERED** that Defendants, Defendants’ officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any



**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
company, and

DAVID J. JEANSONNE II, individually and as an  
officer of TRAFFIC JAM EVENTS, LLC,

Defendants.

**Civil Action No. 2:20-cv-1740**

**Judge: Wendy B. Vitter**

**Magistrate: Dana Douglas**

**MOTION TO SUBSTITUTE EXHIBIT C OF “EXHIBIT A-C” (REC. DOC. NO. 10)  
FILED ON JUNE 22, 2020 FOR ATTACHED AMENDED EXHIBIT C**

The Federal Trade Commission (“FTC”) respectfully moves this Court to substitute the attached Amended Exhibit C for Exhibit C (R. Doc. 10). It has come to the Plaintiff’s attention that the Amended [Proposed] Temporary Restraining Order, attached as Exhibit C, included a provision the FTC intended to withdraw. The Amended Exhibit C would strike Section IV of the Proposed Order requesting Defendants to report new business activity.

Dated: June 23, 2020

Respectfully submitted,

/s/ Sanya Shahrabi  
SANYA SHAHRASBI (D.C. Bar No. 1671001)  
THOMAS J. WIDOR (D.C. Bar No. 490184)  
FEDERAL TRADE COMMISSION  
600 Pennsylvania Ave., NW, CC-10232  
Washington, DC 20580  
(202) 326-2709 (Shahrabi)  
(202) 326-3039 (Widor)  
sshahrabi@ftc.gov  
twidor@ftc.gov  
Fax: 202-326-3768

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

Respectfully submitted,

/s/ Sanya Shahrabi  
SANYA SHAHRASBI

# EXHIBIT C

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
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**Civil Action No. 2:20-cv-1740**

**Judge: Wendy B. Vitter**

**Magistrate: Dana Douglas**

**[PROPOSED] TEMPORARY RESTRAINING ORDER, AND OTHER EQUITABLE  
RELIEF, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION  
SHOULD NOT ISSUE**

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**FINDINGS**

The Court, having considered the Complaint, the Motion for a Temporary Restraining Order, certification, declarations, supporting attachments and exhibits, and the memorandum of points and authorities filed in support thereof, and being otherwise advised, finds that:

A. This Court has jurisdiction over the subject matter of this case, and there is good cause to believe that it will have jurisdiction over all parties hereto and that venue in this district is proper.

B. There is good cause to believe that Defendants Traffic Jam Events, LLC and David J. Jeansonne II have engaged in and are likely to engage in acts or practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). As demonstrated by the declaration and additional documents filed by the FTC, the FTC has established a likelihood of success in showing that Defendants have misrepresented that (i) its mailers concern official COVID-19 stimulus information, (ii) consumers will receive stimulus relief, including checks, by visiting a designated site, and (iii) the mailers involve a stimulus program associated with, or approved by, the government.

C. There is good cause to believe that immediate and irreparable harm will result from Defendants' ongoing violations of Section 5(a) of the FTC Act unless Defendants are restrained and enjoined by order of this Court.

D. Weighing the equities and considering Plaintiff's likelihood of ultimate success on the merits, a temporary restraining order, and other equitable relief is in the public interest.

E. This Court has authority to issue this Order pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); Federal Rule of Civil Procedure 65; and the All Writs Act, 28 U.S.C. § 1651.

F. No security is required of any agency of the United States for issuance of a preliminary injunction. Fed. R. Civ. P. 65(c).

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D. “**Individual Defendant**” means David J. Jeansonne II.

## **ORDER**

### **I. PROHIBITION ON MISREPRESENTATIONS**

**IT IS THEREFORE ORDERED** that Defendants, Defendants’ officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any

goods or services, are temporarily restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication, any material fact, including, but not limited to:

- A. that consumers are receiving official government information, including, but not limited to, COVID-19 stimulus relief;
  - B. that the consumer is receiving financial assistance or relief from the government;
- and
- C. any affiliation, association with, endorsement, sponsorship, or approval by any government.

**II. PROHIBITION ON RELEASE OF CUSTOMER INFORMATION**

**IT IS FURTHER ORDERED** that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are hereby temporarily restrained and enjoined from:

- A. Selling, transferring, or otherwise disclosing the name, address, birth date, telephone number, email address, credit card number, bank account number, Social Security number, or other financial or identifying information of any person or business that any Defendant obtained in connection with any activity that pertains to the subject matter of this Order; and

- B. Benefitting from or using the name, address, birth date, telephone number, email address, credit card number, bank account number, Social Security number, or other financial or identifying information of any person or business that any Defendant obtained in connection with any activity that pertains to the subject matter of this Order.

*Provided further, however,* that Defendants must disclose such identifying information to a law enforcement agency, to their attorneys as required for their defense, as required by any law, regulation, or court order, or in any filings, pleadings or discovery in this action in the manner required by the Federal Rules of Civil Procedure and by any protective order in the case.

### **III. PRESERVATION OF RECORDS**

**IT IS FURTHER ORDERED** that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are hereby temporarily restrained and enjoined from destroying, erasing, falsifying, writing over, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, Documents that relate to: (1) the business, business practices, assets, or business or personal finances of any Defendant that relate in any way to the activities alleged in the complaint; (2) the business practices or finances of entities directly or indirectly under the control of any Defendant that relate in any way to the activities alleged in the complaint; (3) the business practices or finances of entities directly or indirectly under common control with any other Defendant that relate in any way to the activities alleged in the complaint.

### **IV. DISTRIBUTION OF ORDER BY DEFENDANTS**

**IT IS FURTHER ORDERED** that Defendants shall immediately provide a copy of this Order to Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, and shall, within ten (10) days from the date of entry of this Order, provide Plaintiff with a sworn statement that this provision of the Order has been satisfied, which statement shall include the names, physical addresses, phone number, and email addresses of each such person or entity who received a copy of the Order.



**V. SERVICE OF THIS ORDER**

**IT IS FURTHER ORDERED** that copies of this Order may be served by any means, including facsimile transmission, electronic mail or other electronic messaging, personal or overnight delivery, U.S. Mail or FedEx, by agents and employees of the FTC, by any law enforcement agency, or by private process server, upon any person or entity that may be subject to any provision of this Order pursuant to Rule 65(d)(2) of the Federal Rules of Civil Procedure. For purposes of this Section, service upon any branch, subsidiary, affiliate or office of any entity shall effect service upon the entire entity.

**VI. PRELIMINARY INJUNCTION HEARING**

**IT IS FURTHER ORDERED** that, pursuant to Fed. R. Civ. P. 65(b), Defendants shall appear before this Court on the \_\_\_\_\_ day of \_\_\_\_\_, 2020, at \_\_\_\_\_ .m, to show cause, if there is any, why this Court should not enter a preliminary injunction, pending final ruling on the Complaint against Defendants, enjoining the violations of the law alleged in the Complaint, and imposing such additional relief as may be appropriate.

**VII. DURATION OF THE ORDER**

**IT IS FURTHER ORDERED** that this Order shall expire fourteen (14) days from the date of entry noted below, unless within such time, the Order is extended for an additional period pursuant to Fed. R. Civ. P. 65(b)(2).

**VIII. RETENTION OF JURISDICTION**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2020, at \_\_\_\_\_m.

---

**Hon. Wendy B. Vitter**  
**United States District Judge**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
company, and

DAVID J. JEANSONNE II, individually and as an  
officer of TRAFFIC JAM EVENTS, LLC,

Defendants.

**Civil Action No. 2:20-cv-1740**

**Judge: Wendy B. Vitter**

**Magistrate: Dana Douglas**

**ORDER**

Considering the foregoing Motion to Substitute Exhibit C of “Exhibit A-C” (Rec. Doc. No. 10) Filed on June 22, 2020 For Attached Amended Exhibit C, IT IS ORDERED that Plaintiffs’ Motion is hereby GRANTED.

SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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Hon. Wendy B. Vitter  
United States District Judge

MINUTE ENTRY  
VITTER, J.  
JUNE 25, 2020  
JS10 - 01:40

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION

CIVIL DOCKET

VERSUS

NO. 20-1740

TRAFFIC JAM EVENTS, LLC ET AL

SECTION: D (3)

**VIDEOCONFERENCE MOTION HEARING**

COURTROOM DEPUTY: Melissa Verdun  
COURT REPORTER: Nichelle Wheeler  
LAW CLERK: Frances Montegut

APPEARANCES: Sanya Shahrasbi and Thomas Widor, Counsel for plaintiff  
Lauren Mastio and Etienne Balart, Counsel for defendants  
David Jeansonne, II, defendant

Court begins at 10:13 a.m.

Case called; all present and ready.

All parties consent to proceed by video conference for these proceedings on the Motion for Temporary Restraining Order, rec doc. 3.

Plaintiff argues Motion for Temporary Restraining Order, rec. doc. 3.

Defendant argues Motion for Temporary Restraining Order, rec. doc. 3.

Defendant, David Jeansonne, II, with permission of counsel, is sworn in and questioned by the Court.

Defendant continues arguing Motion for Temporary Restraining Order, rec. doc. 3.

Plaintiff's closing arguments.

Plaintiff's Motion for Temporary Restraining Order, rec. doc. 3, is taken under advisement.

Court ends at 11:53 a.m.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

\*\*\*\*\*

FEDERAL TRADE COMMISSION,

Plaintiff,

VS.

Civil Action No. 20-1740  
Section "D"  
New Orleans, Louisiana  
June 25, 2020

TRAFFIC JAM EVENTS, LLC,  
AND DAVID J. JEANSONNE, II,

Defendants.

\*\*\*\*\*

TRANSCRIPT OF MOTION HEARING VIA TELECONFERENCE  
HEARD BEFORE THE HONORABLE WENDY B. VITTER  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

Thomas Widor  
Sanya Shahrabi  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20508

FOR THE DEFENDANTS:

Lauren Courtney Mastio  
Etienne Balart  
Jones Walker  
Place St. Charles  
201 St. Charles Avenue  
Suite 5100  
New Orleans, LA 70170

Official Court Reporter:

Nichelle N. Drake, RPR, CRR  
500 Poydras Street, B-275  
New Orleans, Louisiana 70130  
(504) 589-7775

Proceedings recorded by mechanical stenography,  
transcript produced via computer.

1

P R O C E E D I N G S

10:12:23AM

2

(Call to order of the court.)

10:12:23AM

3

THE COURT: Good morning, everyone.

10:12:52AM

4

If you could give me a couple of minutes, I need a

10:12:57AM

5

couple of minutes before we begin.

10:13:58AM

6

All right. Good morning, again. We're here on

10:14:04AM

7

*Federal Trade Commission versus Traffic Jam Events, LLC, and*

10:14:10AM

8

*David J. Jeansonne, II, as an officer of Traffic Jam Events,*

10:14:18AM

9

on a hearing of the Federal Trade Commission's motion for a

10:14:22AM

10

temporary restraining order and other equitable relief.

10:14:27AM

11

Will counsel please make your appearances?

10:14:30AM

12

Counsel for the Federal Trade Commission?

10:14:32AM

13

MR. WIDOR: Good morning, Your Honor, Tom Widor. I'm

10:14:37AM

14

here with my colleague, Sanya Shahrasbi, representing the

10:14:37AM

15

Federal Trade Commission.

10:14:41AM

16

MS. SHAHRASBI: Good morning, Your Honor.

10:14:41AM

17

THE COURT: Good morning.

10:14:42AM

18

And on behalf of the defendants?

10:14:44AM

19

MS. MASTIO: Good morning, Your Honor, Lauren Mastio

10:14:46AM

20

and Etienne Balart on behalf of Traffic Jam Events, LLC, and

10:14:54AM

21

David Jeansonne, II. Also present on this Zoom is

10:15:00AM

22

Mr. Jeansonne.

10:15:01AM

23

MR. BALART: Good morning, Judge.

10:15:01AM

24

MR. JEANSONNE: Good morning.

10:15:01AM

25

THE COURT: Good morning, Mr. Jeansonne.

10:15:04AM 1 MR. JEANSONNE: Good morning.

10:15:05AM 2 THE COURT: All right. Is there anyone else that is  
10:15:08AM 3 present or attending this that I have not recognized?

10:15:14AM 4 (No responses.)

10:15:14AM 5 Nope. All right.

10:15:17AM 6 Obviously, we have a court reporter, a case manager,  
10:15:22AM 7 and my law clerk, although I don't see the court reporter.

10:15:22AM 8 She is --

10:15:22AM 9 THE CASE MANAGER: Her video is off.

10:15:40AM 10 THE COURT: Her video is off, but she is present.

10:15:42AM 11 Since we are proceeding by Zoom video conference, I  
10:15:47AM 12 would ask that we take special efforts not to speak over each  
10:15:52AM 13 other and to stop and let one person speak at a time so that  
10:15:58AM 14 the court reporter can take an accurate transcription.

10:16:06AM 15 MS. MASTIO: And, Your Honor --

10:16:06AM 16 THE COURT: I believe --

10:16:07AM 17 MS. MASTIO: -- I'm not sure if this is intentional,  
10:16:09AM 18 but we are unable to see the Court.

10:16:11AM 19 THE COURT: Okay. Who is unable?

10:16:13AM 20 MS. MASTIO: This is Lauren Mastio. We see just a  
10:17:11AM 21 telephone symbol, so no video.

22 MR. JEANSONNE: And this is David Jeansonne. I have  
23 the same thing.

24 MR. WIDOR: Your Honor, that's the same for the FTC.

25 THE COURT REPORTER: I noticed that if you go to the

1 top right corner, everyone, you can change the view so you  
2 can see everyone instead of just the telephone. There's a  
3 square, and then next to the square, there's an option to  
4 change your view.

5 MR. WIDOR: We're on now, Judge.

6 THE COURT REPORTER: Did that work for everyone?

7 MR. WIDOR: Yes.

10:17:12AM 8 THE COURT REPORTER: I'm the court reporter and IT.

10:17:12AM 9 THE COURT: Can you see me now? Any IT problems?

10:17:17AM 10 (No responses.)

10:17:17AM 11 All right. Thank you, Ms. Mastio, for mentioning  
10:17:21AM 12 that so we can straighten that out.

10:17:24AM 13 We had previously spoken by phone and indicated that  
10:17:29AM 14 I would allow 15 minutes per side for argument in this  
10:17:32AM 15 matter, and unless any side wants something different, I  
10:17:36AM 16 think we're going to proceed in that manner, with 15 minutes  
10:17:40AM 17 per side. Is that acceptable?

10:17:43AM 18 MS. MASTIO: Yes. Thank you, Your Honor.

10:17:46AM 19 MR. WIDOR: Yes, Your Honor.

10:17:46AM 20 THE COURT: And if I appear to turn my head, either  
10:17:50AM 21 it's because I'm looking at documents on my left side and my  
10:17:56AM 22 computer on the right side with the same, similar documents,  
10:18:01AM 23 but I will certainly attempt to be watching you as much as I  
10:18:05AM 24 can. But I want you to know I am certainly working on this  
10:18:09AM 25 case at all times.



10:18:11AM 1 One moment because I wanted to put something else in  
10:18:17AM 2 front of me.

10:18:26AM 3 All right. Who will begin for the Federal Trade  
10:18:31AM 4 Commission? Ms. Shahrabi or Mr. Widor?

10:18:35AM 5 MR. WIDOR: Good morning, Your Honor. I'm going to  
10:18:37AM 6 take the lead on behalf of the Federal Trade Commission.

10:18:39AM 7 THE COURT: All right. Before I begin with you,  
10:18:43AM 8 Mr. Widor, was there any other preliminary matters that we  
10:18:46AM 9 need to go over before Mr. Widor begins?

10:18:50AM 10 MR. WIDOR: No, I don't believe so, Your Honor.

10:18:52AM 11 THE COURT: All right. Mr. Widor -- Melissa, can you  
10:18:55AM 12 time him?

10:18:56AM 13 THE CASE MANAGER: Yes, ma'am.

10:18:57AM 14 THE COURT: Do you want to give some kind of notice  
10:19:00AM 15 beforehand?

10:19:02AM 16 THE CASE MANAGER: Sure.

10:19:02AM 17 THE COURT: Would you like a warning a few minutes  
10:19:05AM 18 before your 15 minutes?

10:19:07AM 19 MR. WIDOR: Sure. A two-minute warning would be  
10:19:10AM 20 great.

10:19:12AM 21 THE COURT: All right. Will do.

10:19:14AM 22 All right. Go ahead, Mr. Widor. Begin.

10:19:16AM 23 MR. WIDOR: Thank you, Your Honor.

10:19:17AM 24 And may it please the Court, my name is Tom Widor.

10:19:21AM 25 I'm here with my colleague, Sanya Shahrabi, representing the

10:19:26AM 1 FTC on the Federal Trade Commission's motion for a temporary  
10:19:29AM 2 restraining order.

10:19:30AM 3 First, I want to walk the Court through why the FTC  
10:19:34AM 4 meets the public interest test for granting the temporary  
10:19:38AM 5 restraining order in order to show cause why a preliminary  
10:19:41AM 6 injunction should not issue. I will also then walk through  
10:19:43AM 7 why the relief the Commission has requested is warranted.

10:19:47AM 8 The Federal Trade Commission has filed a complaint  
10:19:49AM 9 and a motion for a temporary restraining order asking the  
10:19:53AM 10 Court to enjoin Defendants Traffic Jam Events and David  
10:19:56AM 11 Jeansonne, II, from engaging in deceptive advertising in  
10:20:00AM 12 violation of the FTC Act. Some of defendants' recent  
10:20:03AM 13 advertising tactics have involved deceptive mailers claiming  
10:20:08AM 14 to offer government relief, namely COVID-19 stimulus  
10:20:13AM 15 payments, and misrepresenting that they are coming from or  
10:20:15AM 16 affiliated with the government, all to lure consumers to a  
10:20:19AM 17 used car sale event. In fact, the defendants' advertisements  
10:20:23AM 18 are not providing official COVID-19 stimulus information or  
10:20:26AM 19 stimulus relief and are not approved by or otherwise  
10:20:28AM 20 associated with the government.

10:20:29AM 21 In disseminating these advertisements, defendants  
10:20:32AM 22 have violated Section 5 of the FTC Act. The Commission in  
10:20:39AM 23 their extraordinary reliefs for requesting and what makes the  
10:20:41AM 24 preliminary relief including the TRO important and warranted  
10:20:44AM 25 now is that defendants have employed deceptive advertising to

10:20:48AM 1 take advantage of assistance provided during a pandemic. And  
10:20:53AM 2 to the extent they have stopped, they did so because of  
10:20:56AM 3 another law enforcement action. Indeed, the defendants have  
10:21:00AM 4 had a long history of law enforcement actions for allegedly  
10:21:04AM 5 violating consumer protection statutes with deceptive  
10:21:09AM 6 advertisements.

10:21:10AM 7 THE COURT: Mr. Widor, I'm going to interrupt you --

10:21:10AM 8 MR. WIDOR: Yes, Your Honor.

10:21:13AM 9 THE COURT: -- because it is -- makes sense for me to  
10:21:17AM 10 interrupt and ask questions as you state something, and I  
10:21:20AM 11 will give you more time as needed. And I indicated during  
10:21:25AM 12 our telephone conference that I would be asking questions of  
10:21:30AM 13 all counsel.

10:21:31AM 14 So you just stated to the Court, to the extent that  
10:21:33AM 15 the defendants have stopped the activity, they did so because  
10:21:38AM 16 there was law enforcement action involved. Am I misquoting  
10:21:41AM 17 you?

10:21:43AM 18 MR. WIDOR: That's correct.

10:21:46AM 19 THE COURT: Is it your position that the defendants  
10:21:49AM 20 have stopped the activity?

10:21:52AM 21 MR. WIDOR: Your Honor, we don't necessarily have all  
10:21:55AM 22 the evidence to take a complete position on that, but to the  
10:22:00AM 23 extent that, you know, they have stopped, it is not a claim  
10:22:04AM 24 of voluntary cessation. And the Supreme Court has said that  
10:22:07AM 25 it's important for "courts to beware of efforts to defeat

10:22:13AM 1 injunctive relief by protestations of repentance or reform  
10:22:14AM 2 especially when abandonment seems timed to anticipate suit  
10:22:17AM 3 and there's a probability of resumption." And to meet the  
10:22:21AM 4 heavy burden, they must demonstrate that there is no  
10:22:25AM 5 reasonable expectation that the wrong would be repeated, and  
10:22:28AM 6 Your Honor, in this case, that kind of showing cannot be met  
10:22:30AM 7 by defendants. There is continued public discussion about  
10:22:32AM 8 additional relief, so there continues to be opportunities for  
10:22:36AM 9 this type of deceptive concept to occur.

10:22:41AM 10 THE COURT: Mr. Widor, I'm going to interrupt again.  
10:22:41AM 11 Number one, I'm going to ask you to please speak a little  
10:22:46AM 12 slower --

10:22:46AM 13 MR. WIDOR: Yes, Your Honor.

10:22:47AM 14 THE COURT: -- and I'll give you additional time if  
10:22:49AM 15 you need to, but I think it would -- I know it would help me  
10:22:53AM 16 and I think it would help the court reporter if you could  
10:22:57AM 17 speak slower.

10:22:58AM 18 And then, number two, I have another question. Do  
10:23:02AM 19 you have any evidence -- do you have any evidence to present  
10:23:06AM 20 to the Court that there is ongoing activity from the  
10:23:11AM 21 defendant?

10:23:13AM 22 MR. WIDOR: So, Your Honor, our primary position is  
10:23:16AM 23 that under *Southwest Sunsites* and as discussed most recently  
10:23:41AM 24 in *Educare*, we don't need to show that the same exact --

25 THE COURT REPORTER: Mr. Widor, could you please

1 start over and repeat where you stated the case.

2 And thank you, Your Honor, for bringing that up. He  
3 is speaking a little fast.

4 MR. WIDOR: Sorry. I'll try to go slower.

10:23:15AM 5 Our primary position is that under *Southwest Sunsites*  
10:23:41AM 6 and as discussed most recently in *Educare*, we do not need to  
10:23:42AM 7 show the same exact conduct is ongoing, but rather that  
10:23:45AM 8 defendants' actions give rise to a fair inference of a  
10:23:48AM 9 reasonable expectation of continued violations.

10:23:50AM 10 We filed this case based on evidence that defendants  
10:23:52AM 11 were using COVID-related deceptive advertising, not only in  
10:23:58AM 12 Florida, but also Alabama, which Florida has no jurisdiction  
10:24:02AM 13 over. The evidence also indicates that they were planning to  
10:24:04AM 14 use additional COVID-related marketing for additional sales  
10:24:11AM 15 events as evidenced in Mr. Kastrenakes' declaration and as  
10:24:15AM 16 attached to Exhibit 2. We do not currently have evidence of  
10:24:17AM 17 other COVID-specific mailers that have since gone out since  
10:24:20AM 18 the Florida investigation. We do have additional evidence  
10:24:24AM 19 that suggests they may be continuing other deceptive  
10:24:28AM 20 advertising.

10:24:29AM 21 THE COURT: One aside for the court reporter because  
10:24:34AM 22 I think these cases will be mentioned several times. One of  
10:24:37AM 23 the cases is *Southwest Sunsites*, S-u-n-s-i-t-e-s, that I  
10:24:44AM 24 believe all the parties will be mentioning, and the other  
10:24:47AM 25 case that that Mr. Widor just mentioned is *ex rel Yost*,

10:24:59AM 1 *Y-o-s-t, versus Educare, E-d-u-c-a-r-e.* So it might be  
10:25:06AM 2 helpful for the court reporter to have those two cases.

10:25:10AM 3 Mr. Widor, would you like to share with the Court any  
10:25:15AM 4 information that you have about ongoing fraudulent or  
10:25:21AM 5 misleading activity that the defendants are currently engaged  
10:25:24AM 6 in?

10:25:25AM 7 MR. WIDOR: Yes, Your Honor. We can share some  
10:25:28AM 8 additional information.

10:25:28AM 9 So as we pointed out in the complaint as well as the  
10:25:31AM 10 TRO memo, the record shows that defendants have promoted  
10:25:36AM 11 deceptive mailers in other states and have been subject to  
10:25:39AM 12 law enforcement action and appear to then move from one state  
10:25:42AM 13 to the next after generating that law enforcement action. We  
10:25:45AM 14 have found at least one complaint now involving one other  
10:25:47AM 15 mailer for events that took place as recently as June 3rd  
10:25:50AM 16 that resemble the same mailers that resulted in law  
10:25:54AM 17 enforcement action in Kansas.

10:25:55AM 18 If the Court would like to --

10:25:57AM 19 THE COURT: Mr. Widor, excuse me. You broke up.

10:26:05AM 20 You have identified an action that occurred June 3,  
10:26:10AM 21 2020, that involved a mailer; is that what I heard?

10:26:13AM 22 MR. WIDOR: This is a sales event that involves a  
10:26:17AM 23 mailer similar to those that were the subject of the Kansas  
10:26:22AM 24 and Indiana law enforcement action.

10:26:24AM 25 THE COURT: Did this involve representations about

10:26:28AM 1 COVID-19 stimulus relief or any such representations as are  
10:26:36AM 2 in the case before me?

10:26:39AM 3 MR. WIDOR: No, Your Honor, but these do show  
10:26:45AM 4 additional potential deceptive representations that  
10:26:47AM 5 potentially violate the FTC Act.

10:26:52AM 6 THE COURT: And where is this taking place?

10:26:54AM 7 MR. WIDOR: So we're in the process of trying to  
10:26:59AM 8 track down additional information, but we believe at least  
10:27:02AM 9 Alabama and potentially Tennessee.

10:27:06AM 10 THE COURT: And are you telling me that the  
10:27:13AM 11 defendants, either Mr. Jeansonne or Traffic Jam Events, are  
10:27:19AM 12 involved in these mailings?

10:27:22AM 13 MR. WIDOR: Based on the mailers, they do appear to  
10:27:26AM 14 indicate that they are from Traffic Jam Events. They have a  
10:27:30AM 15 mailer stamp in the far right corner that specifically says  
10:27:34AM 16 "Traffic Jam Events".

10:27:51AM 17 THE COURT: Okay. And you're saying, I'm sorry, it  
10:27:52AM 18 does or does not involve COVID-19 stimulus relief or  
10:27:56AM 19 references such as that?

10:27:57AM 20 MR. WIDOR: Your Honor, it does not -- it does not  
10:28:00AM 21 involve specific COVID claims as I indicated. It is still,  
10:28:04AM 22 we think, relevant because it still leads to deceptive  
10:28:08AM 23 advertising that's potentially in violation of the FTC Act.

10:28:11AM 24 THE COURT: And what is the deceptive advertising?

10:28:14AM 25 MR. WIDOR: Misrepresenting that prizes are available

10:28:17AM 1 or that consumers have won prizes when, in fact, they have  
10:28:22AM 2 not, they may potentially win an opportunity to be entered  
10:28:26AM 3 into a drawing for the prize. This was alleged as well in  
10:28:35AM 4 Kansas and Indiana.

10:28:40AM 5 THE COURT: Okay. Proceed.

10:28:40AM 6 MR. WIDOR: Thank you, Your Honor.

10:28:41AM 7 So because of these prior law enforcement actions,  
10:28:44AM 8 because of defendants' current activity and the possibility  
10:28:48AM 9 that there is additional stimulus relief or funds that may be  
10:28:52AM 10 made available to consumers, the FTC has reason to believe  
10:28:55AM 11 that defendants are likely to violate the law again, and for  
10:28:59AM 12 those reasons, Your Honor, the Court should grant the FTC's  
10:29:03AM 13 request for a temporary restraining order.

10:29:05AM 14 Under Section 13(b) of the FTC Act, the Court is  
10:29:07AM 15 authorized to issue temporary preliminary and permanent  
10:29:11AM 16 injunctions when the FTC seeks preliminary relief. Courts  
10:29:15AM 17 can exercise the full breadth of equitable powers, not just  
10:29:19AM 18 to preserve the status quo, but also to assure the  
10:29:23AM 19 possibility of complete relief. And as the Fifth Circuit  
10:29:25AM 20 said in *Southwest Sunsites*, this (inaudible) our title  
10:29:27AM 21 enforcement (inaudible) under the FTC Act. In this context,  
10:29:32AM 22 the FTC proceeds not as an ordinary litigant, but as a  
10:29:35AM 23 statutory guardian in charge with safeguarding public  
10:29:37AM 24 interest and enforcing consumer protection laws. When  
10:29:41AM 25 assessing preliminary relief, courts apply the public



10:29:44AM 1 interest test and the FTC need only show a likelihood of  
10:29:48AM 2 success on the merits and that the equities tip in favor of  
10:29:53AM 3 the injunctive relief. Those two --

10:29:54AM 4 THE COURT: Let me interrupt you for a moment. I'm  
10:29:56AM 5 going to interrupt you, Mr. Widor.

10:30:03AM 6 Do you have your memorandum in support of the motion  
10:30:07AM 7 for temporary restraining order in front of you?

10:30:12AM 8 MR. WIDOR: Yes, Your Honor.

10:30:13AM 9 THE COURT: Can you go to page 8?

10:30:20AM 10 MR. WIDOR: Yes, Your Honor, I'm there.

10:30:22AM 11 THE COURT: I want you to read the second to last  
10:30:25AM 12 sentence. It starts the Fifth Circuit has stated "that when  
10:30:27AM 13 an injunction is expressly authorized by statute." Can you  
10:30:31AM 14 read that until the next page where that sentence ends on the  
10:30:36AM 15 next page.

10:30:38AM 16 MR. WIDOR: The Fifth Circuit has stated that "when  
10:30:40AM 17 an injunction is expressly authorized by statute and the  
10:30:44AM 18 statutory conditions are satisfied, the movant need not  
10:30:46AM 19 establish specific irreparable injury to obtain a preliminary  
10:30:50AM 20 injunction."

10:30:52AM 21 Would you like me to read the next sentence?

10:30:55AM 22 THE COURT: Yes.

10:30:56AM 23 MR. WIDOR: "As set forth below, a TRO should issue  
10:30:59AM 24 because the FTC is likely to prevail on the merits of the  
10:31:03AM 25 case and the balance of equities favors issuance of an

10:31:06AM 1 injunction."

10:31:07AM 2 THE COURT: All right. Now, your argument that you  
10:31:09AM 3 were just about to make and had started making was regarding  
10:31:16AM 4 that the FTC is likely to prevail on the merits of the case  
10:31:20AM 5 and the balance of equities favors issuance of an injunction;  
10:31:23AM 6 is that correct?

10:31:24AM 7 MR. WIDOR: Yes, Your Honor.

10:31:25AM 8 THE COURT: The issue that I have, Mr. Widor, is the  
10:31:34AM 9 language that you quote in the Fifth Circuit, in that case,  
10:31:37AM 10 which I believe is exactly on point and I want to draw your  
10:31:41AM 11 attention to it and go back to that --

10:31:44AM 12 MR. WIDOR: Okay.

10:31:44AM 13 THE COURT: -- this is in your brief where you say  
10:31:46AM 14 "the Fifth Circuit has stated that when an injunction is  
10:31:48AM 15 expressly authorized by statute and the statutory conditions  
10:31:53AM 16 are satisfied, the movant need not establish specific  
10:32:00AM 17 irreparable injury."

10:32:01AM 18 The threshold inquiry that I am going to ask you to  
10:32:07AM 19 address here is, have the statutory conditions been  
10:32:12AM 20 satisfied?

10:32:16AM 21 The statutory conditions, my reading of them, these  
10:32:19AM 22 are the statutory conditions: Whenever the Commission has  
10:32:22AM 23 reason to believe and in this case that the defendants are  
10:32:28AM 24 violating or are about to violate any provision of law  
10:32:32AM 25 enforced by the FTC and that the enjoining thereof pending

10:32:36AM 1 the issuance of a complaint by the Commission and until such  
10:32:41AM 2 complaint is dismissed by the Commission or set aside by the  
10:32:46AM 3 court on review or until order of the Commission made thereof  
10:32:46AM 4 has become final. The Commission may bring suit in District  
10:32:51AM 5 Court of the United States to enjoin any such act or  
10:32:55AM 6 practice, period.

10:32:56AM 7 Then it goes on: Upon a proper showing that weighing  
10:33:01AM 8 the equities and considering the Commission's likelihood of  
10:33:08AM 9 ultimate success, going on.

10:33:11AM 10 My reading of this is that you're moving forward too  
10:33:15AM 11 quickly and jumping the gun by talking about the Commission's  
10:33:20AM 12 likelihood of ultimate success because the preliminary  
10:33:26AM 13 threshold matter is Roman numeral -- the first thing, when  
10:33:30AM 14 the Commission has reason to believe that any entity, in this  
10:33:37AM 15 case, Traffic Jam Events or Mr. Jeansonne, is violating or is  
10:33:43AM 16 about to violate any provision of law enforced by the Federal  
10:33:47AM 17 Trade Commission.

10:33:47AM 18 So I'd like you to speak to that threshold  
10:33:51AM 19 requirement before moving forward with the rest of the  
10:33:55AM 20 analysis.

10:33:59AM 21 MR. WIDOR: Yes, Your Honor. Thank you.

10:34:01AM 22 So, Your Honor, I think that gets directly to the  
10:34:03AM 23 issue of *Southwest Sunsites* and defendants' reliance on an  
10:34:07AM 24 out-of-circuit decision in *Shire*. We assert that *Southwest*  
10:34:13AM 25 *Sunsites* is controlling in the Fifth Circuit. *Southwest*

10:34:15AM 1 *Sunsites* explicitly rejected the argument that the FTC needed  
10:34:18AM 2 to show continuing or future violations to proceed in federal  
10:34:21AM 3 court, and very recently *Educare* rejected *Shire* as  
10:34:26AM 4 unpersuasive in light of *Southwest Sunsites*. The key point  
10:34:29AM 5 that the court, the district court excised there is that it  
10:34:32AM 6 is important to read that "is violating" or "about to  
10:34:35AM 7 violate" in connection with the preamble, tying it to the  
10:34:39AM 8 FTC's reason to believe. It is the F -- the FTC may file an  
10:34:42AM 9 action in federal court if it has reason to believe a person  
10:34:46AM 10 is violating or is about to violate. That -- defendants have  
10:34:51AM 11 sought to weed out the reason to believe, but courts have  
10:34:55AM 12 recognized that the FTC's enforcement discretion to determine  
10:35:00AM 13 whether it has a reason to believe and have refused to  
10:35:02AM 14 second-guess in absence of bad faith or illegality. Here --  
10:35:06AM 15 for the reasons I previously enumerated -- I can go through  
10:35:10AM 16 them again -- we do believe that defendants were violating or  
10:35:14AM 17 were about to violate the FTC Act.

10:35:22AM 18 THE COURT: So do you have legal authority for saying  
10:35:25AM 19 that the FTC is entitled to injunctive relief if an entity  
10:35:33AM 20 has violated the FTC Act?

10:35:41AM 21 MR. WIDOR: Your Honor, I probably need to go back to  
10:35:43AM 22 look specifically at what courts may have held that. I know  
10:35:47AM 23 that we are entitled to certainly a permanent injunction if  
10:35:52AM 24 courts -- if a defendant has violated the FTC Act. And in  
10:35:56AM 25 *FTC v. Evans Products*, which is a Ninth Circuit case, I don't

10:36:02AM 1 want to -- since I haven't focused on other cases or -- out  
10:36:06AM 2 of circuit, I don't want to completely misstate the law  
10:36:10AM 3 there, but I believe that *FTC v. Evans* said that even if a  
10:36:16AM 4 defendant has violated in the past, if there is a -- it's  
10:36:18AM 5 possible to recur, the FTC does have the authority to proceed  
10:36:21AM 6 under Section 13(b). But, Your Honor, I'm just -- I'm saying  
10:36:26AM 7 that essentially off the top of my head, and so if Your Honor  
10:36:28AM 8 would like, we could add an additional submission on that  
10:36:34AM 9 point.

10:37:00AM 10 THE COURT: Do you understand the question? And I  
10:37:02AM 11 think you addressed it. The question that I'm trying to  
10:37:04AM 12 drill down on is whether the FTC is addressing past  
10:37:12AM 13 violations or whether the FTC is addressing something that is  
10:37:19AM 14 occurring or is about to occur as a violation.

10:37:25AM 15 MR. WIDOR: I do understand, Your Honor, and I was  
10:37:27AM 16 trying to focus on the language that you quoted from Section  
10:37:32AM 17 13(b), namely, that the FTC at the time it filed had reason  
10:37:36AM 18 to believe defendants were violating or were about to violate  
10:37:39AM 19 the statute. At the time and as provided in the TRO memo, we  
10:37:43AM 20 were aware of the Florida advertisements. We also knew that  
10:37:47AM 21 there was an Alabama mailer, and we also knew that defendants  
10:37:50AM 22 had been promoting additional campaigns or were planning to  
10:37:56AM 23 promote additional COVID-related-19 campaigns.

10:37:56AM 24 In addition, as we've indicated, the standard really  
10:38:02AM 25 is whether there's still a possibility to recur given the

10:38:04AM 1 current situation where, even today, in reading the news,  
10:38:07AM 2 there is continued public debate about whether additional  
10:38:12AM 3 public stimulus funds or assistance will be made available,  
10:38:15AM 4 there is certainly a real possibility or reasonable  
10:38:16AM 5 possibility that this conduct could occur.

10:38:19AM 6 THE COURT: What is your legal authority for saying  
10:38:21AM 7 the standard is whether it's possible to recur?

10:38:32AM 8 MR. WIDOR: I apologize, Your Honor. Bear with me  
10:38:46AM 9 one moment, please.

10:38:48AM 10 THE COURT: Of course.

10:39:01AM 11 MR. WIDOR: I misplaced the additional briefing.

10:39:10AM 12 THE COURT: And I will let you know I'm going to be  
10:39:15AM 13 somewhat flexible here or very flexible if Ms. Shahrabi has  
10:39:20AM 14 any authority to weigh in on this and to say that there's a  
10:39:24AM 15 standard or legal standard that says a possibility of  
10:39:26AM 16 reoccurrence is the standard for issuing a TRO. I would like  
10:39:31AM 17 to -- please feel free to share it.

10:39:36AM 18 MR. WIDOR: Again, Your Honor, our position is that  
10:39:39AM 19 the standard for issuing a preliminary relief under *Southwest*  
10:39:45AM 20 *Sunsites* is the public interest standard, whether there is  
10:39:49AM 21 likelihood of success on the merits and whether it's in the  
10:39:51AM 22 public interest.

10:39:52AM 23 THE COURT: And you see, Mr. Widor, that's where I  
10:39:55AM 24 think we're having a disagreement, because my reading of  
10:40:03AM 25 *Southwest Sunsites* is that you don't get to that analysis

10:40:06AM 1 until you meet the statutory requirements and that's why I  
10:40:11AM 2 had you go back and read that -- your memorandum and your  
10:40:18AM 3 quote of the Fifth Circuit case because the Fifth Circuit  
10:40:26AM 4 says when an injunction is expressly authorized by statute  
10:40:29AM 5 and the statutory conditions are satisfied, then you go on.

10:40:33AM 6 So the preliminary question is the one I posed  
10:40:37AM 7 earlier: Have the statutory conditions been satisfied in  
10:40:40AM 8 this case? And the statutory conditions, just to be clear,  
10:40:47AM 9 Mr. Widor, that I'm speaking about, are has the FTC proven  
10:40:52AM 10 that they have reason to believe that Traffic Jam has  
10:40:59AM 11 violated -- I mean, I'm sorry -- is violating or is about to  
10:41:04AM 12 violate any provision of law enforcement by the FTC?

10:41:07AM 13 MR. WIDOR: Thank you, Your Honor, for -- and I  
10:41:10AM 14 apologize. Thank you for bearing with me.

10:41:12AM 15 So as I had mentioned earlier, *FTC v. Evans Products*,  
10:41:16AM 16 which is a Ninth Circuit decision, addressed the "is about  
10:41:20AM 17 to" language in Section 13(b) --

10:41:23AM 18 THE COURT: Excuse me one moment. Excuse me one  
10:41:26AM 19 moment. Say that case again and give me the citation for  
10:41:31AM 20 that. FTC, which one?

10:41:32AM 21 MR. WIDOR: Yes, Your Honor, I will. And there's  
10:41:33AM 22 some additional Fifth Circuit cases. I'll slowly go through  
10:41:37AM 23 each case. *FTC v. Evans Products*, 772 F.2d 1084 at  
10:41:48AM 24 page 1087, Ninth Circuit decision from 1985.

10:41:57AM 25 MS. MASTIO: And if I could just say it's actually

10:42:00AM 1 775. I believe that the 772 is a typo, just so that the  
10:42:08AM 2 Court has the appropriate citation.

10:42:11AM 3 MR. WIDOR: Thank you.

10:42:12AM 4 THE COURT: Thank you.

10:42:12AM 5 MR. WIDOR: Your Honor, if I may?

10:42:13AM 6 THE COURT: Yes.

10:42:13AM 7 MR. WIDOR: So in that case, the Ninth Circuit  
10:42:19AM 8 addressed the "is about to" language and concluded that the  
10:42:21AM 9 language merely requires the FTC to establish that the  
10:42:23AM 10 unlawful conduct is likely to recur, the likelihood of  
10:42:28AM 11 recurrence standard is the same one that we must meet to  
10:42:30AM 12 obtain permanent injunctive relief. And the Second Circuit  
10:42:34AM 13 -- Second and Fifth Circuits have endorsed the likelihood of  
10:42:40AM 14 recurrence standard in the context of similar SEC statutes  
10:42:41AM 15 that contain similar "about to" language.

10:42:44AM 16 I would point you, Your Honor, to *SEC versus First*  
10:42:48AM 17 *Financial Group of Texas*, 645 F.2d 429 at page 434. And in  
10:43:05AM 18 the Second Circuit -- I'm sorry, Your Honor. Do you have a  
10:43:09AM 19 question?

10:43:10AM 20 THE COURT: No.

10:43:11AM 21 MR. WIDOR: And then in the Second Circuit, *SEC v.*  
10:43:14AM 22 *Commonwealth Chemical*, 574 F.2d 90 at page 99.

10:43:27AM 23 And I believe we could -- if it is beneficial, we  
10:43:30AM 24 would be able to submit additional briefing with additional  
10:43:35AM 25 cases.



10:43:35AM 1 THE COURT: No. Okay. Proceed.

10:43:38AM 2 MR. WIDOR: Thank you, Your Honor.

10:43:43AM 3 THE COURT: What do you base your argument that -- so  
10:43:47AM 4 you're relying on the possibility of reoccurrence; is that  
10:43:51AM 5 correct?

10:43:53AM 6 MR. WIDOR: Well, at the -- Your Honor, we believe  
10:43:56AM 7 we've met the jurisdiction -- the statutory requirements that  
10:43:59AM 8 the FTC had reason -- has reason to believe that defendants  
10:44:03AM 9 are violating or about to violate at the time we filed the  
10:44:08AM 10 complaints. That, as I've mentioned, is a judgment that is  
10:44:13AM 11 not in the discretion of the FTC, and there's no question  
10:44:16AM 12 that we did not file this complaint based on that belief  
10:44:21AM 13 either in bad faith or otherwise.

10:44:25AM 14 THE COURT: Well, when you filed -- you filed the  
10:44:27AM 15 complaint in June 2020; is that correct?

10:44:29AM 16 MR. WIDOR: Yes, Your Honor.

10:44:30AM 17 THE COURT: And the activity which you base the  
10:44:40AM 18 filing of the complaint on was when?

10:44:42AM 19 MR. WIDOR: We had evidence of the Florida action,  
10:44:46AM 20 which we understood was a mailer that -- or an advertising  
10:44:51AM 21 campaign that lasted about 10 days from March until April.  
10:44:56AM 22 We also had understanding that there was at least one other  
10:45:00AM 23 campaign ongoing at the time or planned for Alabama, and we  
10:45:05AM 24 also, as we submitted in support of the TRO memo, have  
10:45:08AM 25 evidence that defendants were continuing to promote

10:45:11AM 1 COVID-related campaigns to dealerships. Look at Exhibit C.  
10:45:18AM 2 That's the reason we had a basis to believe that this conduct  
10:45:23AM 3 was continuing. And given that --

10:45:25AM 4 THE COURT: Do you have any reason -- do you have any  
10:45:28AM 5 reason to dispute that the mailer for Florida and Alabama was  
10:45:34AM 6 part of one mailing campaign?

10:45:37AM 7 MR. WIDOR: And that's going to one of defendant's  
10:45:51AM 8 assertions in his declaration, Your Honor.

10:45:53AM 9 THE COURT: Correct.

10:45:54AM 10 MR. WIDOR: I mean, at a threshold level, we do  
10:46:01AM 11 dispute that Mr. Jeansonne's declaration is even relevant at  
10:46:05AM 12 all in the sense that under the FTC Act it's -- it doesn't  
10:46:12AM 13 really matter whether it's one violation or multiple  
10:46:15AM 14 violations. And the other important point to remember is  
10:46:42AM 15 that whether or not it was part of a one-time mailer, the  
10:46:44AM 16 only reason we understand it stopped is because of an active  
10:46:49AM 17 state investigation. But for that, this conduct could be  
10:46:52AM 18 ongoing. And that, again, Your Honor, as the Supreme Court  
10:46:58AM 19 counsels, is not a basis to essentially moot a law  
10:47:02AM 20 enforcement action.

10:47:09AM 21 THE COURT: I just want to be clear that I heard the  
10:47:11AM 22 answer to my question because I'm not sure I did, and if you  
10:47:13AM 23 said it, I apologize. Do you have any evidence for this  
10:47:18AM 24 Court that the -- to dispute what is in Mr. Jeansonne's  
10:47:25AM 25 declaration, that the Florida and Alabama tent sales were the

10:47:31AM 1 result of one mailing?

10:47:40AM 2 MR. WIDOR: I would point Your Honor to the  
10:47:43AM 3 declaration of Mr. Kastrenakes. He pointed to another  
10:47:47AM 4 advertising campaign relating to COVID that Mr. Jeansonne had  
10:47:51AM 5 promoted to him in early April, and so we do have basis to  
10:47:56AM 6 dispute it.

10:48:05AM 7 THE COURT: And do you have reason to believe that  
10:48:07AM 8 that was not related to this mailing?

10:48:16AM 9 MR. WIDOR: Based on -- I'm not quite sure why --  
10:48:18AM 10 that sale, as I understand, had already concluded and that  
10:48:23AM 11 advertisement had gone out. This was a different type of  
10:48:27AM 12 advertisement that defendants had sent to Mr. Kastrenakes and  
10:48:30AM 13 New Wave Auto Sales. So I would consider it a separate  
10:48:34AM 14 advertising campaign.

10:48:38AM 15 THE COURT: Mr. Widor, where is Mr. -- and help me  
10:48:40AM 16 with his last name, Mr. Kastrenakes. Is it  
10:48:46AM 17 K-a-s-t-r-e-n-a-k-e-s?

10:48:47AM 18 MR. WIDOR: Yes, Your Honor.

10:48:48AM 19 THE COURT: Point me to his affidavit, please.

10:48:51AM 20 MR. WIDOR: Yes. It's attached as Plaintiff's  
10:48:53AM 21 Exhibit 2, PX 2.

10:49:01AM 22 THE COURT: To R-Doc 3, the Motion for Temporary  
10:49:05AM 23 Restraining Order?

10:49:07AM 24 MR. WIDOR: R-Doc 3-4.

10:49:13AM 25 THE COURT: Excuse me one moment while I pull that

10:49:15AM 1 up.

10:50:11AM 2 I'm still only seeing Ms. Saunders' affidavit.

10:50:18AM 3 MR. WIDOR: It should be --

10:50:22AM 4 MS. MASTIO: It's Attachment 4.

10:50:24AM 5 MR. WIDOR: 3-4.

10:50:39AM 6 THE COURT: Where is it?

10:50:43AM 7 THE CASE MANAGER: Document 3, Attachment 4.

10:50:47AM 8 THE COURT: Document 3, Attachment 4?

10:50:57AM 9 THE CASE MANAGER: Yes.

10:50:57AM 10 THE COURT: Okay. Now I have it in front of me

10:50:59AM 11 again.

10:51:00AM 12 MR. WIDOR: Paragraph 15.

10:51:28AM 13 THE COURT: That was the question I had. Just to

10:51:30AM 14 make sure I'm clear, do we know if that was part or intended

10:51:34AM 15 to be part of the same mailing that was used in Florida and

10:51:37AM 16 Alabama, the one that he referenced that he -- that

10:51:43AM 17 Mr. Jeansonne provided to him in early April?

10:51:54AM 18 MR. WIDOR: Your Honor, in paragraph 15, Mr.

10:51:56AM 19 Kastrenakes indicates that this was sent as two draft mailers

10:52:00AM 20 to be sent to consumers for an upcoming sale. So my

10:52:05AM 21 understanding in reading is that this is a different mailer,

10:52:10AM 22 different advertisement. And it is different in form from

10:52:15AM 23 the -- from what was Exhibit A to his declaration.

10:52:21AM 24 THE COURT: Okay. Okay. You can proceed. Anything

10:52:33AM 25 further?

10:52:34AM 1 MR. WIDOR: I mean, Your Honor, if it would be  
10:52:36AM 2 beneficial, I would like to discuss the likelihood of success  
10:52:39AM 3 on the merits and why the equities favor the relief.

10:52:44AM 4 THE COURT: Go ahead.

10:52:46AM 5 MR. WIDOR: So to prevail on the first prong, Your  
10:52:48AM 6 Honor, the FTC need only present evidence that it would  
10:52:50AM 7 likely prevail, not that it would necessarily justify a final  
10:52:54AM 8 determination on the merits. Under the FTC Act, the FTC must  
10:52:58AM 9 show that there was a representation or omission that is  
10:53:00AM 10 material, likelihood to mislead consumers acting reasonably  
10:53:04AM 11 under the circumstances. Because the purpose of the FTC Act  
10:53:07AM 12 is to protect consumers, the FTC Act requires neither proof  
10:53:11AM 13 of intent to deceive nor evidence that a consumer actually  
10:53:15AM 14 has been deceived. Here on the face of the advertisements,  
10:53:19AM 15 there are express false claims that the courts readily see  
10:53:23AM 16 that violate the FTC Act.

10:53:25AM 17 If I were to point you, Your Honor, to the -- and I  
10:53:28AM 18 apologize for the print quality from my home printer -- the  
10:53:32AM 19 envelope itself has COVID-19 stimulus documents. The notices  
10:53:42AM 20 claim to be from the COVID-19 economic automotive stimulus  
10:53:48AM 21 program both at the top in the header as well as in the body.  
10:53:51AM 22 The notice also repeatedly references relief headquarters and  
10:53:57AM 23 designated temporary sites. And then, Your Honor, there's  
10:54:00AM 24 the fake check that claims to be from the stimulus relief  
10:54:04AM 25 program.

10:54:05AM 1 In addition to the expressly false claims, the court  
10:54:07AM 2 can also look at the impression conveyed by the  
10:54:14AM 3 advertisement, the combination of the envelope, notice, and  
10:54:15AM 4 check. There's likeness of the great seal of the United  
10:54:18AM 5 States on the notice, barcodes and notice numbers that make  
10:54:21AM 6 it look like this is official information from the government  
10:54:23AM 7 that qualifies the individual for relief. When considered  
10:54:27AM 8 together with the express representations, the advertisements  
10:54:31AM 9 create the misleading impression that they're providing  
10:54:34AM 10 official COVID-19 stimulus information for stimulus relief  
10:54:37AM 11 and are approved or otherwise associated with the government.  
10:54:40AM 12 These are material claims, not only because they're  
10:54:42AM 13 expressed, but also because of the promises of COVID-19  
10:54:46AM 14 stimulus relief are likely to affect consumers' decisions on  
10:54:50AM 15 whether to visit the site. When it comes to money or  
10:54:51AM 16 assistance, financial assistance, there's no question the  
10:54:54AM 17 availability of funds are going to be important. And they  
10:54:57AM 18 are likely to mislead consumers acting reasonably under the  
10:55:01AM 19 circumstances.

10:55:01AM 20 Here, Your Honor, it's important to remember the  
10:55:04AM 21 audience. It's not necessarily trained lawyers. It's not  
10:55:07AM 22 necessarily you or me. It's a typical consumer acting  
10:55:12AM 23 reasonably under the circumstances.

10:55:12AM 24 THE CASE MANAGER: Two minutes, Attorney Widor.

10:55:14AM 25 MR. WIDOR: It's deceptive marketing, especially

10:55:17AM 1 troubling, that seeks to take advantage of people's potential  
10:55:19AM 2 financial distress or people that just need stimulus relief.

10:55:26AM 3 THE COURT: Let me interrupt you, Mr. Widor --

10:55:27AM 4 MR. WIDOR: Yes.

10:55:29AM 5 THE COURT: -- to go to the consumers. What  
10:55:31AM 6 information or evidence do you have about how many customers  
10:55:37AM 7 appeared at any of these tent sales?

10:55:43AM 8 MR. WIDOR: I don't recall now whether -- our  
10:55:44AM 9 understanding is that at least 40 consumers attended the  
10:55:49AM 10 event, but the appropriate standard is whether it's likely or  
10:55:53AM 11 has a tendency to mislead.

10:55:56AM 12 Your Honor, I point you to a Second Circuit case  
10:56:02AM 13 called *Gelb v. FTC*, *Gelb v. FTC*, *G-e-l-b*, and I apologize I  
10:56:04AM 14 don't have the case citation. But in that case, the court  
10:56:06AM 15 upheld that representation regarding hair coloring being  
10:56:12AM 16 permanent was deceptive or likely to mislead based only on  
10:56:17AM 17 one consumer who simply said while she didn't think it was  
10:56:20AM 18 misleading, that she could see how it was misleading.

10:56:24AM 19 THE COURT: All right. So your information, evidence  
10:56:28AM 20 is that 40 customers appeared at each site or in total  
10:56:35AM 21 combined to Florida and Alabama?

10:56:38AM 22 MR. WIDOR: Your Honor, we don't -- we do not have  
10:56:40AM 23 any evidence of our own. We believe that was asserted in  
10:56:45AM 24 Mr. Jeanson's declaration.

10:56:51AM 25 THE COURT: Do you have any reason to dispute that

10:56:53AM 1 assertion?

10:56:54AM 2 MR. WIDOR: Well, we don't have any evidence to  
10:56:57AM 3 either dispute it or deny it.

10:57:01AM 4 THE COURT: Does the FTC have any information  
10:57:03AM 5 regarding the money, if any, that was received as a result of  
10:57:10AM 6 this mailing?

10:57:16AM 7 MR. WIDOR: We currently do not, Your Honor, but,  
10:57:18AM 8 again, we don't think that those are relevant to the  
10:57:21AM 9 likelihood of success on the merits. Those are really a  
10:57:25AM 10 question of whether -- if there is final injunctive relief,  
10:57:28AM 11 whether as a remedy, consumer restitution or disbursement is  
10:57:35AM 12 appropriate. There is no requirement of showing injury to  
10:57:37AM 13 prevail under the FTC Act.

10:57:39AM 14 THE COURT: What is the status of the Florida  
10:57:41AM 15 litigation instituted by the Florida Attorney General?

10:57:44AM 16 MR. WIDOR: Defendants are probably in a better  
10:57:48AM 17 position to know. Your Honor, I understand that the TRO is  
10:57:52AM 18 pending, and as -- I think, as indicated in Mr. Balart's  
10:57:58AM 19 declaration earlier on in the case, that they were in  
10:58:04AM 20 negotiation.

10:58:04AM 21 THE COURT: And what do you mean "a TRO is pending"?  
10:58:08AM 22 A TRO is issued or has been moved for a TRO?

10:58:12AM 23 MR. WIDOR: That Florida Attorney General moved for a  
10:58:15AM 24 TRO.

10:58:16AM 25 THE COURT: But you don't have any further



10:58:18AM 1 information regarding the proceedings?

10:58:20AM 2 MR. WIDOR: No, Your Honor.

10:58:21AM 3 THE COURT: Where is the information that you stated  
10:58:42AM 4 regarding possible sales in June or discussions of mailers in  
10:58:54AM 5 June of this year?

10:58:56AM 6 MR. WIDOR: So, Your Honor, that was what I was  
10:58:59AM 7 discussing earlier, other potentially deceptive conduct in  
10:59:05AM 8 violation of the FTC Act. We are happy to make that  
10:59:09AM 9 available to the court. We have just identified it as of  
10:59:12AM 10 yesterday.

10:59:13AM 11 THE COURT: So that is not in evidence right now?

10:59:16AM 12 MR. WIDOR: No, this was done in response to the  
10:59:18AM 13 questions that you had posed to the parties on Tuesday. As I  
10:59:28AM 14 mentioned earlier, we are still trying to collect  
10:59:30AM 15 information, but it would certainly be information in  
10:59:34AM 16 defendant's possession.

10:59:49AM 17 THE COURT: Why don't I hear from the defendants,  
10:59:52AM 18 Mr. Widor, and I will allow you to come back and make a  
10:59:56AM 19 couple comments after I hear from them. Would that be okay  
10:59:59AM 20 with you?

10:59:59AM 21 MR. WIDOR: Of course, Your Honor.

11:00:01AM 22 THE COURT: All right. I'll give you the last word.

11:00:04AM 23 MR. WIDOR: Thank you.

11:00:05AM 24 THE COURT: All right. Ms. Mastio?

11:00:11AM 25 MS. MASTIO: Thank you, Your Honor.

11:00:12AM 1 I want to start by pointing out that we chose to  
11:00:15AM 2 focus on the threshold issue of is violating or about to  
11:00:18AM 3 violate because it seems very clear to us that that  
11:00:20AM 4 requirement has not been met here. But even for a TRO to  
11:00:26AM 5 issue under 13(b), the FTC still has the burden of  
11:00:32AM 6 establishing that the issuance of the TRO is, one, in a  
11:00:34AM 7 public interest and, two, a likelihood of success on the  
11:00:38AM 8 merits. So we strongly believe that the FTC has not and  
11:00:42AM 9 cannot meet either of those elements in addition, but my  
11:00:47AM 10 argument today is going to focus on that threshold  
11:00:51AM 11 requirement.

11:00:52AM 12 This is clearly a scenario where the FTC is trying to  
11:00:56AM 13 overreach and expand its authority beyond that allowed by the  
11:01:00AM 14 statute or any jurisprudence. If a TRO were to issue, this  
11:01:03AM 15 would be by far the most expansive interpretation of law in  
11:01:08AM 16 this area. The plain language of the statute requires that a  
11:01:12AM 17 party is violating or is about to violate the FTC law. All  
11:01:16AM 18 of the cases cited by the FTC involve ongoing conduct that's  
11:01:21AM 19 particularly egregious. And in those cases --

11:01:24AM 20 THE COURT: Ms. Mastio, I'm going to interrupt you  
11:01:26AM 21 right now. Do you dispute that if the FTC proves that  
11:01:35AM 22 Traffic Jam or that the Commission is reasonably -- that  
11:01:39AM 23 Traffic Jam is violating or is about to violate any provision  
11:01:41AM 24 of law enforced by the FTC, that this Court has jurisdiction  
11:01:46AM 25 to provide whatever equitable relief, including a temporary

11:01:52AM 1 restraining order?

11:01:53AM 2 MS. MASTIO: I do not dispute that, Your Honor. In  
11:01:56AM 3 the *Southwest Sunsites* case, the district court had enjoined  
11:01:59AM 4 the appellees from future misrepresentations and omissions in  
11:02:04AM 5 connection with the sales in question, but had declined to  
11:02:09AM 6 order the ancillary relief requested, namely, escrowing  
11:02:11AM 7 certain assets of the appellees and requiring them to notify  
11:02:16AM 8 consumers who had purchased land and were continuing to make  
11:02:19AM 9 payments under the belief that 13(b) didn't authorize that  
11:02:24AM 10 relief. So the *Southwest Sunsites* case addressed two  
11:02:27AM 11 separate appeals, one dealing with whether the preliminary  
11:02:30AM 12 relief was even warranted under 13(b) in the first place, and  
11:02:35AM 13 then the other appeal dealing with the scope of the  
11:02:39AM 14 preliminary relief, which is the equitable issue. So once  
11:02:43AM 15 you get past the threshold question of whether preliminary  
11:02:48AM 16 relief is even appropriate, then, yes, I do believe that the  
11:02:51AM 17 court absolutely has the authority to grant equitable relief  
11:02:55AM 18 that it deems appropriate and tailored to the ongoing or  
11:02:55AM 19 potential harm at issue.

11:02:59AM 20 THE COURT: All right. Proceed.

11:03:02AM 21 MS. MASTIO: Your Honor, of those cases that do  
11:03:06AM 22 consider prior conduct in conjunction with the ongoing  
11:03:09AM 23 conduct, the prior conduct is part of the very same scheme  
11:03:13AM 24 that the FTC was seeking to enjoin. And in most of those  
11:03:19AM 25 cases, there had already been a finding of contempt in

11:03:23AM 1 violation of prior orders relating to that same scheme. So  
11:03:27AM 2 no amount of lawyering or argument can change the express  
11:03:34AM 3 statutory language.

11:03:35AM 4 In *Shire*, the Third Circuit case that's directly on  
11:03:38AM 5 point is plainly not inconsistent with Fifth Circuit law  
11:03:40AM 6 which does recognize that clear statutory language. The FTC  
11:03:46AM 7 has completely sought to read out the express statutory  
11:03:50AM 8 language and tries to justify that based on the unreported  
11:03:53AM 9 Texas District Court decision, *Educare*, but the FTC fails to  
11:04:01AM 10 cite the "is violating" or "about to violate" language in  
11:04:05AM 11 their motion at all. And then they completely misstate the  
11:04:07AM 12 holding of *Southwest Sunsites*.

11:04:10AM 13 The FTC claims that under *Southwest Sunsites*, there's  
11:04:14AM 14 no need -- and I'm going to quote -- "to show continuing or  
11:04:18AM 15 future violations." Nowhere does the *Southwest Sunsites* case  
11:04:22AM 16 say the FTC doesn't have to meet the threshold requirement  
11:04:26AM 17 from an evidentiary standpoint. And in that case, there was  
11:04:30AM 18 ongoing activity. The sales that were part of the large  
11:04:33AM 19 scale scheme were still occurring onsite. Similarly, *Educare*  
11:04:39AM 20 shouldn't control and it's completely distinguishable anyway.  
11:04:42AM 21 It's an unreported case where the FTC's entire argument is  
11:04:46AM 22 predicated on the Texas District Court judge's interpretation  
11:04:49AM 23 of what the Fifth Circuit said in *Southwest Sunsites*, but  
11:04:53AM 24 *Southwest Sunsites* never squarely addressed the question, can  
11:04:57AM 25 the FTC rely exclusively on prior unrelated violations to

11:05:03AM 1 prove the potential for future violations, especially where  
11:05:06AM 2 the record reflects that the activity has not been taken in  
11:05:10AM 3 more than two months and is based on an isolated event. And  
11:05:15AM 4 even *Educare* recognized that -- and I am going to quote. I  
11:05:20AM 5 believe this is page 16 of the *Educare* decision, the court  
11:05:22AM 6 recognized "aside from analyzing the facts at issue, the  
11:05:26AM 7 *Sunsites* court did not provide extensive guidance to district  
11:05:30AM 8 courts on applying Section 13(b)'s threshold requirement."

11:05:34AM 9           So that begs the question, how can that case be  
11:05:38AM 10 controlling? You must go back to the express statutory  
11:05:41AM 11 language and it's aschematic (phonetic) that where the  
11:05:45AM 12 language is clear and unambiguous, there's no reason to look  
11:05:50AM 13 beyond the plain text.

11:05:51AM 14           You know, separate and apart from that, the facts in  
11:05:55AM 15 *Educare* are completely distinguishable. You had ongoing  
11:06:00AM 16 activity. Plaintiffs had evidence of a large scale  
11:06:03AM 17 fraudulent scheme with intact infrastructure at the  
11:06:07AM 18 initiation of the litigation including the use of Shell  
11:06:10AM 19 companies and unlawful money processing methods to evade bank  
11:06:14AM 20 closures. Additionally, the plaintiffs presented documentary  
11:06:17AM 21 evidence of ongoing violations and disputed the veracity and  
11:06:21AM 22 reliability of this defendant's contrary statements. That is  
11:06:25AM 23 nothing like what we have here.

11:06:26AM 24           And I'm also a bit perplexed by the FTC's citation to  
11:06:32AM 25 the *Evans* case because the *Evans* case, which was just

11:06:40AM 1 discussed, in that case, the Court denied plaintiff's motion  
11:06:45AM 2 for a preliminary injunction and then the appellate court  
11:06:49AM 3 found that the district court did not abuse its discretion.  
11:06:53AM 4 And I would actually like to quote from that decision because  
11:06:56AM 5 the court very clearly states, the Ninth Circuit very clearly  
11:07:00AM 6 states, that *Evans'* view, that Section 13(b) cannot be used  
11:07:05AM 7 to remedy past violations, is supported by the statutory  
11:07:08AM 8 language. The FTC may only seek a temporary restraining  
11:07:12AM 9 order or a preliminary injunction when it believes the person  
11:07:15AM 10 is violating or is about to violate any law enforced by the  
11:07:19AM 11 FTC. The statute does not mention past violations. The  
11:07:24AM 12 sparse legislative history also indicates that Congress only  
11:07:30AM 13 contemplated ongoing or future violations which required the  
11:07:33AM 14 quick handling that an injunction could provide.

11:07:37AM 15 Your Honor, neither the FTC's complaint nor its  
11:07:43AM 16 motion alleges facts sufficient to establish that there's any  
11:07:46AM 17 ongoing activity. In fact --

11:07:48AM 18 THE COURT: How do you explain -- how do you explain  
11:07:51AM 19 Mr. Kastrenakes -- how do you say his name?

11:07:55AM 20 MS. MASTIO: Kastrenakes, I believe?

11:07:56AM 21 THE COURT: Kastrenakes. How do you explain Mr.  
11:08:03AM 22 Kastrenakes' affidavit and specifically that he had  
11:08:05AM 23 conversations with Mr. Jeansonne in late March of this year  
11:08:16AM 24 regarding a mailer that would include language regarding  
11:08:25AM 25 COVID-19 or stimulus incentives?

11:08:31AM 1 MS. MASTIO: Your Honor, first of all, I would like  
11:08:32AM 2 to set the context because Mr. Kastrenakes' declaration was  
11:08:36AM 3 offered in connection with a deal that he cut with the  
11:08:38AM 4 Florida AG's Office. I would also like to point out that the  
11:08:44AM 5 e-mail transmitting this flyer that you see in Record Doc 3-4  
11:08:53AM 6 was not included.

11:08:55AM 7 But in any event, this draft flyer was materially  
11:09:01AM 8 different from the mailer at issue in the complaint. Nowhere  
11:09:05AM 9 does it mention COVID. In fact, it was nothing like the  
11:09:08AM 10 mailers at issue in the complaint. No reference to COVID,  
11:09:13AM 11 clearly not likely to deceive the public. I mean, if you  
11:09:16AM 12 look at this, these things are clearly ads and they're legal  
11:09:20AM 13 ads at that.

11:09:22AM 14 I also want to point out the fact that it was before  
11:09:29AM 15 Traffic Jam Events became aware of any consumer or AG  
11:09:34AM 16 complaints about the COVID mailer, that it had clearly  
11:09:36AM 17 abandoned the mailers at issue in this lawsuit. Clearly,  
11:09:41AM 18 Traffic Jam Events had changed their behavior for the better  
11:09:44AM 19 and nowhere in this complaint is the FTC alleging that  
11:09:47AM 20 anything in these proposed conceptual advertisements is  
11:09:52AM 21 violative of the law. So, obviously --

11:09:53AM 22 THE COURT: What is the extent -- what is the extent  
11:09:56AM 23 of Traffic Jam's business currently?

11:10:02AM 24 MS. MASTIO: Traffic Jam Events is an advertisement  
11:10:04AM 25 company, so, of course, Your Honor, they are regularly

11:10:11AM 1 distributing advertisements. However, none of those  
11:10:16AM 2 advertisements -- I mean, this is their -- this is their  
11:10:19AM 3 bread and butter. This is what they do, is advertisements,  
11:10:23AM 4 and no other advertisements have been complained of or the  
11:10:28AM 5 subject of the FTC complaint. Clearly, what they're doing is  
11:10:32AM 6 legal.

11:10:33AM 7 And so what is concerning to us is that -- what issue  
11:10:39AM 8 does the FTC have with these potential flyers that they're  
11:10:44AM 9 trying to use now against us. That's exactly why the  
11:10:47AM 10 defendants had an issue with the FTC's overbroad language in  
11:10:51AM 11 the proposed order.

11:10:52AM 12 So, Your Honor, not only did these flyers never go  
11:10:57AM 13 out, but they were nothing like the mailers at issue in the  
11:11:01AM 14 complaint. There was nothing illegal about them at all.  
11:11:05AM 15 And, again, even if those draft flyers were created, you  
11:11:09AM 16 know, at the end of March, beginning of April, that was  
11:11:12AM 17 months ago, and there has been no activity or contemplation  
11:11:19AM 18 of activity since then.

11:11:21AM 19 You know, I think it's very telling that if the FTC  
11:11:24AM 20 believed that these ads were illegal, they would have been  
11:11:31AM 21 wrapped into the complaint at issue in this case, but there  
11:11:35AM 22 is zero reference to these at issue in this -- there is zero  
11:11:40AM 23 reference to these in the complaint at issue in this case.  
11:11:42AM 24 So I think that the proof is sort of in the pudding there.

11:11:47AM 25 And the FTC's efforts to link defendants' prior



11:11:51AM 1 unrelated conduct to the mailers that are the subject of this  
11:11:55AM 2 action are likewise unavailing. First, there's no  
11:12:00AM 3 relationship between the prior prize mailings and COVID  
11:12:04AM 4 mailings, and the FTC offers no legal authority to support  
11:12:07AM 5 its efforts to bootstrap these unrelated activities, which,  
11:12:10AM 6 again, the FTC never took action on and hasn't taken action  
11:12:15AM 7 on. All of the cases relied upon by the FTC go to past  
11:12:20AM 8 conduct related to the activity that's sought to be enjoined.  
11:12:23AM 9 That's not the case here. And, again, in each of those  
11:12:26AM 10 cases, there was some form of ongoing activity or continuing  
11:12:30AM 11 harm that was truly egregious.

11:12:34AM 12 Second, the consent judgments, because I know Your  
11:12:37AM 13 Honor had a question about those --

11:12:39AM 14 THE COURT: Before you go to the consent judgments --

11:12:42AM 15 MS. MASTIO: Sure.

11:12:42AM 16 THE COURT: -- do you believe the mailers in question  
11:12:51AM 17 with the information or language about COVID-19 stimulus and  
11:12:55AM 18 all the language included, do you believe that's egregious?

11:13:00AM 19 MS. MASTIO: Your Honor, I don't and I believe that  
11:13:02AM 20 what has been presented to the Court is not the complete  
11:13:11AM 21 information. I mean, the -- this is not a check. You can't  
11:13:18AM 22 see that in the complaint that was filed by the FTC. There  
11:13:25AM 23 are numerous other issues related to the mailers that are not  
11:13:30AM 24 violative of law.

11:13:32AM 25 Yes, Your Honor, there is -- you know, there are

11:13:36AM 1 references to COVID in the mailer, and -- but they're legal  
11:13:42AM 2 references, and that's what we intend to establish at the  
11:13:46AM 3 appropriate time.

11:13:51AM 4 THE COURT: Does Traffic Jam Enterprises (sic) have  
11:13:53AM 5 anything to do with the US government or any arm of the  
11:13:57AM 6 government?

11:14:02AM 7 MS. MASTIO: No.

11:14:02AM 8 THE COURT: Was Mr. Jeansonne aware of the content of  
11:14:05AM 9 the mailer?

11:14:06AM 10 MS. MASTIO: Yes.

11:14:07AM 11 THE COURT: How many people appeared for the event  
11:14:13AM 12 either in Florida or Alabama? How many consumers?

11:14:18AM 13 MS. MASTIO: I believe that that is reflected in  
11:14:20AM 14 Mr. Jeansonne's declaration, and there he indicated that  
11:14:24AM 15 collectively between the Alabama and the Florida sales less  
11:14:30AM 16 than 40 attendees appeared. And that would be paragraph 11  
11:14:34AM 17 of Record Doc 11-11.

11:14:38AM 18 THE COURT: What, if any, personal information was  
11:14:40AM 19 obtained from anyone who appeared at the tent sale?

11:14:45AM 20 MS. MASTIO: So Traffic Jam Events is not or  
11:14:56AM 21 Mr. Jeansonne, neither are in possession of any information  
11:14:58AM 22 collected at the sale. So I can't tell you what information  
11:15:01AM 23 was actually collected from how many attendees, but,  
11:15:05AM 24 essentially, what was titled a market survey was distributed  
11:15:09AM 25 to attendees, and anyone who wanted to see what vehicles they

11:15:13AM 1 may be qualified for could fill out the survey. And the  
11:15:15AM 2 survey included information related to a person's current  
11:15:19AM 3 vehicle, their name and contact information, the new vehicle  
11:15:21AM 4 that they desired, and then the information required to run  
11:15:26AM 5 their credit including date of birth, employer, time on their  
11:15:31AM 6 job, monthly income, and Social Security number.

11:15:35AM 7           The form also included an authorization for their  
11:15:39AM 8 credit to be run through the dealer though. Traffic Jam  
11:15:42AM 9 Events doesn't even have the ability to run credit. And then  
11:15:46AM 10 the dealership got the signed forms along with the credit  
11:15:50AM 11 bureaus at the conclusion of each sale. So I have confirmed  
11:15:56AM 12 that no copies were made or kept by Traffic Jam Events or  
11:16:00AM 13 Traffic -- or Mr. Jeansonne, and so Traffic Jam Events is not  
11:16:02AM 14 in possession of any personal information.

11:16:28AM 15           THE COURT: Do you have any information for the Court  
11:16:30AM 16 or any evidence regarding the financial success of the  
11:16:33AM 17 mailer?

11:16:33AM 18           MS. MASTIO: I think it was a bit of a dud, Your  
11:16:37AM 19 Honor. I don't have the exact figures, but I do know that it  
11:16:42AM 20 was not a profitable endeavor.

11:16:52AM 21           THE COURT: Were cars sold?

11:16:54AM 22           MS. MASTIO: I know that Mr. Jeansonne is on the  
11:16:57AM 23 line, so if you would like him to answer that, I'm happy to  
11:17:01AM 24 allow him to speak to that.

11:17:09AM 25           THE COURT: All right. Why don't we do that. I'm

11:17:13AM 1 going to have Mr. Jeansonne sworn in.

11:17:15AM 2 Mr. Jeansonne, raise your right hand, please.

11:17:19AM 3 (Defendant administered oath.)

11:17:28AM 4 THE COURT: All right. Mr. Jeansonne, your attorney  
11:17:32AM 5 has already answered a few questions, but I'm going to ask  
11:17:35AM 6 you. You were aware of the contents of the mailer that's in  
11:17:38AM 7 question here?

11:17:39AM 8 MR. JEANSONNE: Yes, ma'am.

11:17:40AM 9 THE COURT: Was it your idea?

11:17:42AM 10 MR. JEANSONNE: Partly, yes, ma'am.

11:17:44AM 11 THE COURT: What is your role currently with Traffic  
11:17:56AM 12 Jam Events?

11:17:56AM 13 MR. JEANSONNE: President and owner.

11:17:58AM 14 THE COURT: And you've been in that role for how  
11:18:00AM 15 long?

11:18:01AM 16 MR. JEANSONNE: 16 years, 17 years. But with Traffic  
11:18:15AM 17 Jam, I'm sorry, ma'am, I think it's 14 years.

11:18:19AM 18 THE COURT: So what information do you have for the  
11:18:21AM 19 court about how many people showed up either at the Florida  
11:18:25AM 20 or Alabama events?

11:18:29AM 21 MR. JEANSONNE: Alabama, we believe it was less than  
11:18:32AM 22 10. Florida, it was around 30, around 9 or 10 vehicles. I  
11:18:39AM 23 don't have that exact number with me, but I can certainly get  
11:18:43AM 24 it. I believe it was -- let's call it 10 vehicles that were  
11:18:46AM 25 sold.

11:18:53AM 1 THE COURT: Ten vehicles sold? Alabama, Florida, or  
11:18:56AM 2 combined?

11:18:57AM 3 MR. JEANSONNE: No, ma'am, just Florida; none were  
11:19:00AM 4 sold in Alabama.

11:19:00AM 5 THE COURT: So none in Alabama and 10 in Florida?

11:19:03AM 6 MR. JEANSONNE: Yes, ma'am.

11:19:03AM 7 THE COURT: Is that correct?

11:19:04AM 8 MR. JEANSONNE: Yes, ma'am, at the most.

11:19:13AM 9 And those 10, I know this isn't the direct question,  
11:19:18AM 10 but those 10 were not sold from the mailers. We were set up  
11:19:20AM 11 -- we set up right across from Walmart, and you get a lot of  
11:19:23AM 12 foot traffic. So I know that's not what we're hearing today,  
11:19:28AM 13 but the 40 people we saw were not from the mailer. They were  
11:19:31AM 14 simply people passing by looking at the blows, the blown up  
11:19:33AM 15 gorilla and the 60-foot tent. And I know that's not the  
11:19:37AM 16 question, but we didn't get -- we had way less than that from  
11:19:39AM 17 the mailer. So the cars sold were not in retrospect from the  
11:19:43AM 18 mailer people coming in.

11:19:44AM 19 And I know that's not the direct question, but I do  
11:19:47AM 20 feel like I want to put that in there.

11:19:56AM 21 THE COURT: Can you determine from the sales made  
11:19:59AM 22 which sales were made from the foot traffic, the people  
11:20:03AM 23 seeing these tent sales versus which sales were made as a  
11:20:07AM 24 result of people having received the mailing?

11:20:09AM 25 MR. JEANSONNE: I absolutely can. I don't have that

11:20:11AM 1 with me, but I absolutely can get that to my lawyers today.  
11:20:16AM 2 I have a log that I believe -- yes, ma'am. We may need to go  
11:20:21AM 3 with New Wave to get that information because we don't always  
11:20:26AM 4 have that information because they have it. But just based  
11:20:29AM 5 on simple logs and testimony from my manager team, yes, I  
11:20:35AM 6 believe I can get that information.

11:20:37AM 7 MS. MASTIO: And, Your Honor, New Wave is the dealer.

11:20:37AM 8 THE COURT REPORTER: Ms. Mastio, I didn't hear you.  
11:20:37AM 9 Can you repeat what you just said?

11:20:52AM 10 MS. MASTIO: Oh, yes, I was just saying New Wave is  
11:20:52AM 11 the dealer.

11:20:54AM 12 MR. JEANSONNE: That's Mike Kastrenakes.

11:21:02AM 13 THE COURT: Do you have any mailings, any discussions  
11:21:09AM 14 of mailings, any ideas to move forward with any mailings that  
11:21:15AM 15 reference COVID-19 stimulus payments or similar language to  
11:21:23AM 16 what we are discussing here today?

11:21:26AM 17 MR. JEANSONNE: No, ma'am.

11:21:32AM 18 THE COURT: Why should the Court believe that you're  
11:21:34AM 19 sincere when you answer "no" about possibly engaging in  
11:21:40AM 20 misleading advertising given your history of prior consent  
11:21:48AM 21 judge -- agreements?

11:21:50AM 22 MR. JEANSONNE: I think that from my actions -- this  
11:21:54AM 23 was two months ago. We discussed it. No, I'm not putting  
11:21:57AM 24 blame. I'ma take full-hearted responsibility, but me and  
11:22:00AM 25 Mike Kastrenakes discussed it. We needed to motivate people

11:22:03AM 1 to come out because times were tough. We obviously used a  
11:22:06AM 2 bad choice of words, but still believe that it was not  
11:22:10AM 3 illegal. We certainly -- you know, I do have a history, but  
11:22:15AM 4 I think with a 21-year tenure in my position with a 14-year  
11:22:19AM 5 tenure as the president of Traffic Jam Events, I had a  
11:22:24AM 6 control of it for 11 years that basically coerced me into  
11:22:30AM 7 accepting.

11:22:30AM 8           You'll see that in Kansas and Indiana, which is my  
11:22:36AM 9 history that nether one of them went to trial. I basically  
11:22:38AM 10 gave in and said, "Okay, I don't want any trouble. It's the  
11:22:43AM 11 government. It's like police. I'm scared. What do I do?"

11:22:44AM 12           She said, "Well, we're going to write Kansas a  
11:22:46AM 13 \$25,000 check." I fought that and my lawyer said, "Look, we  
11:22:50AM 14 can go drag it out. We don't think that you did anything  
11:22:53AM 15 that was illegal."

11:22:54AM 16           So not knowing that, right? I didn't know that was  
11:22:58AM 17 going to follow me because Kansas actually had a decree that  
11:23:00AM 18 says it'll be under a gag order so it wouldn't public.  
11:23:04AM 19 Because if you Google me -- I'm clean as a whistle. Never  
11:23:08AM 20 had cuffs on my hands. I have a great business. Not now.  
11:23:11AM 21 If you Google me now, my business is almost -- I'm almost out  
11:23:14AM 22 of business at this point because of this and the news  
11:23:17AM 23 stations. I'm at about 12 percent of what I was in January.  
11:23:20AM 24 So that's neither here nor there, but Indiana was the same  
11:23:26AM 25 situation.

11:23:26AM 1 It was brought against 51 agencies, 51, so it  
11:23:30AM 2 wasn't -- it was a blanket coverage. It wasn't just coming  
11:23:34AM 3 after me. And out of 51, I decided, again, like Kansas, I  
11:23:38AM 4 didn't want to be that guy that was going to fight it. So I  
11:23:42AM 5 gave into that. I paid it. I even made payments. I think  
11:23:47AM 6 that was like 58,000. And the guys, there's many of them  
11:23:49AM 7 that are fighting it, they're that deep in legal battles and  
11:23:52AM 8 they stand to win those cases. But, again, you have to make  
11:23:56AM 9 that business decision. So those are the only two complaints  
11:24:00AM 10 against me in 21 years that I've ever had.

11:24:02AM 11 And this complaint, we still felt like it was -- not  
11:24:05AM 12 only was it -- was it legal, it was so watered down by me  
11:24:13AM 13 with my design team, it was a flop. We lost \$52,000 because  
11:24:18AM 14 Mr. Kastrenakes makes me put up all the money. So this was  
11:24:22AM 15 beyond a flop. Alabama was beyond a flop. So whether -- and  
11:24:25AM 16 this all came because of one single person, a gentleman  
11:24:29AM 17 that's disabled, called the news and said this is it. The  
11:24:34AM 18 news called the AG. He didn't call the AG. He didn't  
11:24:39AM 19 complain about us. He didn't come to the sale. He didn't  
11:24:41AM 20 ask for money.

11:24:42AM 21 So I still stand behind that. My record is pretty  
11:24:46AM 22 squeaky clean considering that I've done over 195,000,000  
11:24:49AM 23 pieces of mail in my career that I do stand behind that.

11:24:53AM 24 But the answer to the direct question, the reason I  
11:24:57AM 25 won't do it, even if it was -- if it was legal by your eyes



11:25:03AM 1 and everybody else -- I'm so sorry. My battery's dying. My  
11:25:05AM 2 charger's not working, so I apologize. If I do die, I'll  
11:25:09AM 3 dial in from my phone. I apologize.

11:25:11AM 4 So even if we did have any complaints against us, we  
11:25:14AM 5 still would not be doing this. As you can see from the  
11:25:16AM 6 mailer, I don't think they put it in their complaint  
11:25:19AM 7 conveniently, but the mailer that we have after that fail,  
11:25:22AM 8 Mr. Kastrenakes said, "Let's do one at my dealership. Let's  
11:25:26AM 9 not do it off site. Let's do it here because I'm struggling  
11:25:32AM 10 for business."

11:25:34AM 11 And the reason we had to stop doing tent events is  
11:25:37AM 12 because he went out of trust with both banks and they repoed  
11:25:40AM 13 all the cars. So that's another reason that that was a  
11:25:43AM 14 failure. So we had to go to his dealership because he ran  
11:25:44AM 15 out of inventory. When we did that, that's when the mailer  
11:25:47AM 16 that my -- Lauren has, Ms. Mastio, I think she showed you, we  
11:25:52AM 17 totally changed it. Didn't even say the word "COVID".

11:25:55AM 18 But, you know, when I was on the news, they said  
11:25:58AM 19 here's the check that he's saying is the check. Not only had  
11:26:02AM 20 the bill not been passed, the amount wasn't even close to the  
11:26:05AM 21 same and it's a voucher. It's not a check. On the back it  
11:26:08AM 22 says big as day, big font in the print: This is not a check.  
11:26:13AM 23 But they didn't put that in the complaint.

11:26:15AM 24 And, again, nobody came to the tent complaining.  
11:26:18AM 25 Nobody said -- if I was really savvy and I was really trying

11:26:21AM 1 to do, you know, illegal mailers, they would have a lot of --  
11:26:24AM 2 35,000 people saying, "Hey, where's my check?" Because we  
11:26:28AM 3 were all waiting on stimulus money at that point. Not one  
11:26:28AM 4 person came and said, "Where's my money? Where's my stuff?"  
11:26:34AM 5 But, no, ma'am, I would not do that and that's why.  
11:26:36AM 6 After 195,000,000 mailers and the two isolated instances in  
11:26:42AM 7 Kansas -- neither were against me directly. It was a blanket  
11:26:47AM 8 AG attack on many people that shows a couple words that we  
11:26:54AM 9 used. Sorry for the long answer.

11:26:56AM 10 THE COURT: Mr. Jeansonne, I'm not going to ask you  
11:26:59AM 11 to comment on whether you believe the mailer was illegal, but  
11:27:04AM 12 I am going to ask you, do you believe the mailer preyed on  
11:27:11AM 13 people's vulnerabilities during this pandemic?

11:27:15AM 14 MR. JEANSONNE: I absolutely do not. I think it was  
11:27:19AM 15 a catch word. I absolutely do not believe that, ma'am.

11:27:27AM 16 And if I could give you an example --

11:27:29AM 17 THE COURT: What was your intent in the mailer? What  
11:27:32AM 18 was your intent?

11:27:33AM 19 MR. JEANSONNE: To get people's attention. Right now  
11:27:36AM 20 in our space in automotive, the largest dealer in Louisiana  
11:27:40AM 21 Premier Automotive Group is running a blast advertisement on  
11:27:46AM 22 the radio, automotive stimulus funds at Mike's dealerships  
11:27:48AM 23 right now. He sits on the board of the Louisiana Motor  
11:27:54AM 24 Vehicle Commission. Why did he do that? To try to deceive  
11:27:57AM 25 people? Not at all. It's a catch phrase. It's trying to

11:28:00AM 1 get people's attention.

11:28:01AM 2 THE COURT: Are you sorry you did it?

11:28:04AM 3 MR. JEANSONNE: Absolutely, only because of the  
11:28:07AM 4 financial loss that I'm getting. Not because I feel like I  
11:28:12AM 5 tricked nobody because I didn't. Nobody came. But because  
11:28:15AM 6 of the scrutiny that I'm under right now -- and if you Google  
11:28:18AM 7 my name, I mean, the amount of business that I've lost and my  
11:28:23AM 8 reputation, I mean, I was motivational speaker, I've got  
11:28:25AM 9 accolades across the board, clean record.

11:28:27AM 10 So he said my past history, but it was two isolated  
11:28:31AM 11 instances in 21 years in this space that neither were even  
11:28:33AM 12 tried or true. I just -- I just paid them. They said you  
11:28:36AM 13 pay me, we'll go away. So I still stand behind my record.  
11:28:39AM 14 But, yes, I'm very sorry just because of the millions of  
11:28:43AM 15 dollars it's cost my firm and their families.

11:28:46AM 16 THE COURT: Where have you been a motivational  
11:28:48AM 17 speaker?

11:28:50AM 18 MR. JEANSONNE: American Express and owned dealership  
11:28:55AM 19 before that. I was 2014 entrepreneur of the year with  
11:29:00AM 20 American Express, centurion holder.

11:29:18AM 21 THE COURT: In Mr. Kastrenakes' declaration, he  
11:29:21AM 22 indicates that you had a discussion with him and it appears  
11:29:25AM 23 following this mailing. Can you describe that?

11:29:29AM 24 MR. JEANSONNE: Yes, ma'am. We had -- we went  
11:29:32AM 25 there -- I never got any complaints from anybody. The one

11:29:37AM 1 special gentleman called the news and said, "I want to let  
11:29:40AM 2 y'all know they trying to give us a fake check." The news --  
11:29:47AM 3 and we have that. The news cut and pasted only the check and  
11:29:49AM 4 said, "This is a check that these people are trying to scam  
11:29:51AM 5 you. They're scum bags, and they're trying to get you to  
11:29:54AM 6 come down and get this check."

11:29:56AM 7 One single gentleman called the news. She then --  
11:30:02AM 8 Victoria Price was a Fox News reporter. She then called the  
11:30:03AM 9 AG and said -- it says on the news, we are calling the AG.  
11:30:06AM 10 We are going to make the AG do something about this.

11:30:13AM 11 Victoria Price called the AG and said, "What are you  
11:30:16AM 12 going to do?" On the news, it said, what are you going to do  
11:30:18AM 13 about this deceptive advertising, et cetera, et cetera?

11:30:21AM 14 After that, I said, "Obviously, we got the news on  
11:30:24AM 15 us." We're not going to put COVID, but I changed the piece  
11:30:28AM 16 and stopped using that word before it was even brought to my  
11:30:32AM 17 attention that it was illegal or that she believed, the AG  
11:30:36AM 18 believed, that it was an illegal deceptive practice. And I  
11:30:40AM 19 did it because I got some Fox 8, Fox News girl that just had  
11:30:43AM 20 nothing else to do but come after us for one single complaint  
11:30:48AM 21 as if she had a bunch. And that's when he said we got to  
11:30:49AM 22 keep -- because if it was that bad and I was that illegal,  
11:30:53AM 23 you think he would have said I'm not doing business with you,  
11:30:56AM 24 right? He did. He said, "Let's get busy."

11:31:00AM 25 We failed on this one -- because he didn't lose any

11:31:01AM 1 money. I do all the upfront advertising. So he said, "Let's  
11:31:04AM 2 do another one." So that's how bad I did that he was  
11:31:07AM 3 willing, ready, and able to do another one. And that's when  
11:31:10AM 4 I, not him, I changed it up, and then he conveniently said we  
11:31:15AM 5 kept doing -- we kept trying to do it.

11:31:16AM 6 And then when the AG -- the only reason we didn't do  
11:31:18AM 7 business, the AG knocked on his door and said, "Hey, if you  
11:31:21AM 8 tell us more about him, we'll do it." He gave them 11,000.  
11:31:25AM 9 He shorted my check, which I have the e-mails proving that.  
11:31:31AM 10 He shorted my check 11,000, so I funded his fight, and then  
11:31:33AM 11 said, "I'll give y'all whatever you want."

11:31:36AM 12 He said, "David, I can't do business with you anymore  
11:31:39AM 13 because I had to tell the AG that you're the one doing the  
11:31:42AM 14 mailers to get myself out" because he does have a pretty bad  
11:31:42AM 15 record. We're not here to talk about him, but -- so that's  
11:31:48AM 16 why he, I guess, rolled over on me or whatever, however you  
11:31:52AM 17 want to phrase that.

11:31:56AM 18 THE COURT: So do you have any -- let me rephrase  
11:32:05AM 19 that. Since this mailing, since this mailing that we're  
11:32:09AM 20 talking about, have you contemplated or had any discussions  
11:32:13AM 21 with anyone about any other mailing including such language  
11:32:20AM 22 as COVID-19, stimulus, and stimulus recovery program?

11:32:27AM 23 MR. JEANSONNE: Absolutely not. And the June 3rd,  
11:32:30AM 24 I'm aware of those and I'm -- you'll see those documents.  
11:32:33AM 25 Since this one isolated incident, I've never used even the

11:32:38AM 1 word, much less any type of factual information, never and  
11:32:44AM 2 never will.

11:33:00AM 3 THE COURT: So whose brainchild was the mailer?

11:33:33AM 4 MR. JEANSONNE: Mine. I'll take that. Mine.

11:33:35AM 5 Excuse me, Your Honor. I'm at three percent, and if  
11:33:39AM 6 I drop, I'm going to dial in.

11:33:43AM 7 THE COURT: I'm going to let your attorney continue.

11:33:48AM 8 Ms. Mastio?

11:33:49AM 9 MS. MASTIO: Your Honor, I believe where we had left  
11:33:49AM 10 off, we were talking about the consent judgments and  
11:33:49AM 11 Mr. Jeansonne actually addressed those, but I would also like  
11:33:53AM 12 to touch on the legal aspect of that, because Your Honor had  
11:33:59AM 13 hit the nail on the head the other day, because these prior  
11:34:03AM 14 consent judgments expressly contain statements that they are  
11:34:07AM 15 not to be construed as admissions of liability and that our  
11:34:12AM 16 client did not want to continue to incur legal fees for  
11:34:18AM 17 business reasons has no relevance to an unrelated subsequent  
11:34:23AM 18 mailer in a different locale.

11:34:25AM 19 I could refer the Court generally to the Fifth  
11:34:27AM 20 Circuit law regarding prior uncharged crimes where evidence  
11:34:30AM 21 must be sufficient to support a finding by a preponderance of  
11:34:34AM 22 the evidence that the prior crime actually occurred or refer  
11:34:37AM 23 the Court to *Buckhead Theatre Company versus Atlanta*  
11:34:41AM 24 *Entertainers*, and that's 327 F.2d 365 where the Fifth Circuit  
11:34:50AM 25 found no authority that suggests that defendant's prior

11:34:55AM 1 antitrust decrees could be introduced for the purpose of  
11:34:59AM 2 establishing the existence of a conspiracy at a later date  
11:35:02AM 3 and further noting that the Clayton Act does not authorize  
11:35:04AM 4 the introduction of a prior government decree merely for its  
11:35:11AM 5 aura of guilt or to imply new wrongdoing from past  
11:35:13AM 6 wrongdoing.

11:35:13AM 7 But I think even more important for purposes of the  
11:35:17AM 8 instant case is the fact that there's no relationship between  
11:35:20AM 9 the prize mailings that were the issue in Kansas and Indiana  
11:35:28AM 10 and the COVID mailings at issue here.

11:35:30AM 11 THE COURT: Ms. Mastio, you're asking the Court to  
11:35:34AM 12 completely disregard the consent judgments?

11:35:39AM 13 MS. MASTIO: I am asking the Court to not allow the  
11:35:41AM 14 FTC to bootstrap those prior consent judgments in an effort  
11:35:50AM 15 to meet their threshold requirement under 13(b), Your Honor,  
11:35:54AM 16 so, yes. The FTC offers no legal authority to support its  
11:35:59AM 17 efforts to bootstrap these unrelated activities, which the  
11:36:03AM 18 FTC never took action on and hasn't taken action on. All of  
11:36:08AM 19 the cases --

11:36:09AM 20 THE COURT: Don't you think it's relevant, misleading  
11:36:14AM 21 advertisement in one form or another is relevant to  
11:36:17AM 22 misleading advertisement in another form?

11:36:25AM 23 MS. MASTIO: I don't think that it has been proven  
11:36:26AM 24 that the prior advertisements were misleading, so I think  
11:36:30AM 25 that that is sort of putting the cart before the horse.

11:36:34AM 1 There was no finding that that conduct was illegal. It was  
11:36:38AM 2 merely a business decision not to sort of fight that fight.

11:36:49AM 3 THE COURT: Well, there were certainly allegations  
11:36:51AM 4 that it was either misleading or violative of either Kansas'  
11:36:57AM 5 or Indiana's laws.

11:37:01AM 6 MS. MASTIO: Right. And I don't dispute that, Your  
11:37:03AM 7 Honor. I dispute that there is any law supporting the  
11:37:07AM 8 bootstrapping of those prior unrelated activities to this  
11:37:12AM 9 prior conduct. And, again, I come back to the fact that  
11:37:14AM 10 everything we are talking about is in the past. There's no  
11:37:20AM 11 ongoing activity, which is the applicable standard. We're  
11:37:24AM 12 talking about a single mailing event that happened back in  
11:37:28AM 13 March, and that has not been repeated since. And defendants  
11:37:32AM 14 have provided genuine assurances that they will not be  
11:37:35AM 15 repeated.

11:37:37AM 16 I think that the FTC is trying to expand its  
11:37:41AM 17 authority under 13(b) well-beyond that intended by Congress  
11:37:45AM 18 or allowed by any courts to date. While *Sunsites* notes the  
11:37:55AM 19 broad power of equitable relief where preliminary relief is  
11:37:58AM 20 warranted, that doesn't relieve the FTC of some showing of  
11:38:02AM 21 actual or threatened violation above and beyond past  
11:38:06AM 22 unrelated conduct. So for those reasons, I -- you know, in  
11:38:11AM 23 summary, the FTC can't point to a single Fifth Circuit case  
11:38:17AM 24 that dispenses with the evidentiary requirement that the  
11:38:21AM 25 defendant is violating or is about to violate the law.



11:38:23AM 1 Furthermore, the FTC --

11:38:23AM 2 THE COURT: What is the status of the Florida

11:38:25AM 3 litigation?

11:38:28AM 4 MS. MASTIO: Mr. Balart is welcome to address it.

11:38:31AM 5 But I'm happy to and you can kind of fill in if you

11:38:34AM 6 want.

11:38:34AM 7 MR. BALART: Sure.

11:38:35AM 8 MS. MASTIO: But we had a call the other day with the

11:38:37AM 9 Florida Attorney General's Office. I understand that

11:38:39AM 10 actually -- so they never did pursue a TRO. I want to be

11:38:44AM 11 very clear about that. She tried to explain it to us over

11:38:48AM 12 the phone, but, essentially, in Florida, it is some sort of a

11:38:52AM 13 procedure. It's called something different, but it is not --

11:38:55AM 14 because when we told her we were coming before this court in

11:38:58AM 15 connection with a TRO, she said it is not analogous to a TRO

11:39:05AM 16 under Rule 65 of the Federal Rules or 13(b).

11:39:08AM 17 THE COURT: Who is this she you're referencing?

11:39:14AM 18 MS. MASTIO: Jennifer --

11:39:14AM 19 MR. BALART: Your Honor, Jennifer Pender is the

11:39:20AM 20 Deputy Attorney General with the Florida Attorney General's

11:39:22AM 21 Office that is handling it, and I believe we -- I believe

11:39:25AM 22 I've covered most aspects about a month -- in my declaration,

11:39:30AM 23 Judge, about a month and a half ago, if memory serves and in

11:39:34AM 24 response to the complaint, we proffered to the Florida AG a

11:39:40AM 25 similar -- at least in terms of conduct. We did not offer

11:39:43AM 1 monetary restitution. They analyzed and considered that  
11:39:48AM 2 offer for the last four weeks I think or whatever period of  
11:39:53AM 3 time it was from when we gave it to them, Judge, which is in  
11:39:59AM 4 my declaration versus Tuesday morning -- yes, Tuesday  
11:40:03AM 5 morning. Tuesday morning was the first time that we received  
11:40:12AM 6 any response from the Florida AG's Office on our offer  
11:40:15AM 7 regarding ongoing and future conduct.

11:40:18AM 8 And in that conference, the Florida AG has made a  
11:40:22AM 9 monetary demand on our client that we have not yet responded  
11:40:26AM 10 to, and I think we -- they have agreed to another extension  
11:40:34AM 11 on responsive pleadings, and they have no intention, at least  
11:40:37AM 12 as of our conference Tuesday, to proceed with any sort of  
11:40:44AM 13 extraordinary injunctive, preliminary injunctive relief.

11:40:48AM 14 And as Your Honor will note, that case has now been  
11:40:51AM 15 pending for roughly -- I believe it was filed in April, so  
11:40:57AM 16 roughly two and a half months.

11:41:00AM 17 And if the Court has any other questions --

11:41:02AM 18 THE COURT: That's why I asked.

11:41:08AM 19 Okay. Ms. Mastio, I interrupted your closing.

11:41:11AM 20 MS. MASTIO: No, I -- Your Honor, in closing, I just  
11:41:13AM 21 want to point out that the FTC cannot point to a single Fifth  
11:41:17AM 22 Circuit case that dispenses what the evidentiary requirement  
11:41:20AM 23 that the defendant is violating or is about to violate the  
11:41:23AM 24 law. Furthermore, the FTC can cite to no cases granting this  
11:41:28AM 25 drastic relief without evidence of ongoing violations. Their

11:41:32AM 1 evidence is completely barren of ongoing violations, and we  
11:41:36AM 2 have genuine assurances in the record that Traffic Jam Events  
11:41:41AM 3 and Mr. Jeansonne will not engage in the activity complained  
11:41:45AM 4 of. For these reasons, Your Honor, we respectfully request  
11:41:49AM 5 that the Motion for a Temporary Restraining Order be denied.

11:41:54AM 6 THE COURT: All right. Thank you.

11:42:05AM 7 Before you begin or have the final say, Mr. Widor,  
11:42:07AM 8 let me just look at my notes to see if there's anything  
11:42:10AM 9 further I wanted to ask of defense counsel.

11:42:46AM 10 All right. Mr. Widor, would you like to conclude?

11:42:49AM 11 MR. WIDOR: Thank you, Your Honor. I'll briefly  
11:42:52AM 12 conclude and hit on a few points raised by defendants.

11:42:56AM 13 Initially, as you pointed out, misleading advertising  
11:43:04AM 14 is relevant to misleading -- other misleading advertising.  
11:43:07AM 15 As a general matter, in the context of a TRO or PI, courts  
11:43:10AM 16 may consider inadmissible or hearsay evidence. But in  
11:43:13AM 17 addition to that, even if Rule 404(b) were to apply in these  
11:43:18AM 18 proceedings, it does allow the introduction of things like  
11:43:22AM 19 consent orders to show intent, plan, and knowledge, and these  
11:43:26AM 20 past mailers do show that defendants have planned deceptive  
11:43:30AM 21 marketing campaigns, acknowledge what constitutes deceptive  
11:43:34AM 22 marketing, and that they've also had a disregard for the law  
11:43:36AM 23 as evidenced by the fact that Kansas had to take repeated  
11:43:40AM 24 action that resulted in them being banned entirely from  
11:43:44AM 25 conducting business in the state.

11:43:46AM 1 Briefly on the issue of intent and consumer injury,  
11:43:50AM 2 again, I will submit to you that that is not relevant to the  
11:43:54AM 3 inquiry, whether there's the likelihood of success on the  
11:43:58AM 4 merits as to whether an FTC violation has been established.  
11:44:02AM 5 To the extent that they are relevant at all, they go to  
11:44:07AM 6 whatever final relief a court may decide is necessary.

11:44:11AM 7 And the final point I'll just conclude on is the  
11:44:14AM 8 about to -- is violating or about to standard. The FTC at  
11:44:20AM 9 the time of filing has reason to believe defendants were  
11:44:23AM 10 violating or violating -- or about to violate the law for the  
11:44:27AM 11 reasons I previously discussed. To the extent *Shire* is at  
11:44:32AM 12 all relevant, it is very easily distinguishable. The conduct  
11:44:37AM 13 in *Shire* ceased five years ago. The defendants no longer  
11:44:42AM 14 owned the product. Fifth Circuit even counseled whatever the  
11:44:45AM 15 outer bounds of about to violate is, that conduct wasn't even  
11:44:48AM 16 close.

11:44:49AM 17 In *Educare*, the courts -- the defendants there  
11:44:51AM 18 similarly claimed that they had stopped their operations  
11:44:55AM 19 entirely six months prior, but the court did not find that  
11:44:58AM 20 convincing and agree that the FTC sufficiently showed to have  
11:45:03AM 21 reason to believe that the defendants were violating or about  
11:45:06AM 22 to violate the law. Similarly, we allege here this conduct  
11:45:10AM 23 commenced in March and continued until at least early April.  
11:45:14AM 24 Traffic Jam Events continues in operation, and as  
11:45:17AM 25 Mr. Jeanson's affidavit even admits, in paragraph 16 and

11:45:21AM 1 18, it appears that this marketing was ceased because of  
11:45:27AM 2 Florida's investigation.

11:45:30AM 3 This is an instance where defendants are trying to  
11:45:35AM 4 create voluntary cessation to prevent the Court from  
11:45:38AM 5 adjudicating the merits of a law enforcement action, which is  
11:45:41AM 6 certainly in the public interest to understand what is lawful  
11:45:44AM 7 or not. As I mentioned earlier, under the Supreme Court  
11:45:47AM 8 standard, defendants have an extremely high burden to show  
11:45:51AM 9 that not just -- not just with self-declarations that this  
11:45:57AM 10 conduct cease, but that there is no reasonable expectation  
11:46:01AM 11 that it is likely to occur.

11:46:04AM 12 Fifth Circuit repeated that in *Texas v. EEOC* 933 F.3d  
11:46:13AM 13 433, defendant must show that subsequent events made it  
11:46:14AM 14 absolutely clear that the allegedly wrongful behavior could  
11:46:16AM 15 not reasonably be expected of.

11:46:19AM 16 THE COURT: Give me that citation again. I'm sorry  
11:46:23AM 17 Mr. Widor, 933 F.3d what?

11:46:26AM 18 MR. WIDOR: 433 at page 449.

11:46:32AM 19 THE COURT: And read to me what the Fifth Circuit  
11:46:34AM 20 said exactly --

11:46:34AM 21 MR. WIDOR: Defendants show --

11:46:39AM 22 THE COURT: -- about activity reoccurring.

11:46:40AM 23 MR. WIDOR: And I quote, "subsequent events made it  
11:46:43AM 24 absolutely clear that the allegedly wrongful behavior could  
11:46:46AM 25 not reasonably be expected to occur -- to recur."

11:46:51AM 1 THE COURT: At the time of the filing, which was two  
11:46:56AM 2 weeks ago, did you have any evidence about anything that had  
11:47:04AM 3 occurred since March or early April?

11:47:09AM 4 MR. WIDOR: Your Honor, we pointed to the evidence  
11:47:13AM 5 that we had. I think the mailers that were -- that were  
11:47:18AM 6 discussed as Exhibit C were in early April.

11:47:22AM 7 THE COURT: Okay. So, again, my question was, at the  
11:47:26AM 8 time of filing, did you have any evidence of anything that  
11:47:29AM 9 had occurred since that time, since early April?

11:47:35AM 10 MR. WIDOR: No, we do not have additional evidence  
11:47:41AM 11 since that time.

11:47:41AM 12 THE COURT: Okay. Go ahead and conclude, sir.

11:47:44AM 13 MR. WIDOR: Thank you.

11:47:45AM 14 To conclude, the relevant standard is reason to  
11:47:49AM 15 believe that persons are violating or are about to violate  
11:47:52AM 16 the law, and in this case, we are well-past the outer bounds  
11:47:58AM 17 of that kind of language where the cessation is voluntary --  
11:48:02AM 18 not voluntary and as a result of government enforcement  
11:48:06AM 19 action and is well closer in time to the filing of this  
11:48:11AM 20 complaint. For all the reasons we discussed --

11:48:14AM 21 THE COURT: I'm sorry. Excuse me. You broke up.  
11:48:16AM 22 You broke up your last sentence, so I didn't hear it. You  
11:48:18AM 23 said the cessation was not voluntary and were well-past the  
11:48:23AM 24 time --

11:48:23AM 25 MR. WIDOR: It is nowhere close to the type of time

11:48:26AM 1 that *Shire* found did not constitute about to violate. It's  
11:48:35AM 2 well-beyond the outer bound that the Third Circuit even  
11:48:39AM 3 contemplated. And so to allow -- in this case, Your Honor,  
11:48:40AM 4 we have -- FTC has satisfied its obligation to show the  
11:48:47AM 5 likelihood of success on the merits and that weighing the  
11:48:50AM 6 equities, the Commission is entitled to the requested relief.

11:48:54AM 7 Thank you, Your Honor.

11:48:54AM 8 THE COURT: All right. Thank you, everybody.

11:49:01AM 9 Can you hold for one moment? I'm going to mute you  
11:49:05AM 10 for a moment. One moment.

11:50:18AM 11 THE CASE MANAGER: Mr. Jeansonne, is that you that  
11:50:19AM 12 came in on an iPhone?

11:50:22AM 13 MS. MASTIO: Yes, that is Mr. Jeansonne. His --

11:50:26AM 14 THE CASE MANAGER: Just wanted to make sure. Thank  
11:50:29AM 15 you.

11:51:12AM 16 THE COURT: Sorry, I'm back.

11:52:25AM 17 I was trying to determine when I could issue a ruling  
11:52:31AM 18 in this case, and I was hoping it would be -- it would be  
11:52:35AM 19 sooner rather than later, but I was hoping it could be very  
11:52:39AM 20 soon, and that's what I was trying to consult with my law  
11:52:42AM 21 clerk about. And I was hoping to do it orally from the  
11:52:47AM 22 bench, but you provided a lot of information and a lot of  
11:52:51AM 23 testimony that I would like to review. So I'm going to take  
11:52:54AM 24 it under advisement and we'll issue an order in this case.

11:52:59AM 25 MS. MASTIO: Thank you, Your Honor.

11:52:59AM

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MR. WIDOR: All right. Thank you very much, Your

11:53:03AM

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Honor.

11:53:04AM

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THE COURT: So the matter is taken advisement and the

11:53:08AM

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court stands in recess. Thank you everybody.

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(WHEREUPON, the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

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I, Nichelle N. Drake, RPR, CRR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

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/s/ Nichelle N. Drake  
Official Court Reporter

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION

CIVIL ACTION

VERSUS

NO. 20-1740-WBV-DMD

TRAFFIC JAM EVENTS, LLC, ET AL.

SECTION: D (3)

**ORDER AND REASONS**

Before the Court is the Federal Trade Commission's Motion for A Temporary Restraining Order, and Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue against defendants, David J. Jeansonne, II (hereinafter, "Mr. Jeansonne"), individually and as an officer of Traffic Jam Events, LLC, and Traffic Jam Events, LLC (collectively, "Defendants").<sup>1</sup> Defendants oppose the Motion.<sup>2</sup>

The Court held an initial hearing on June 23, 2020, to determine whether the Federal Trade Commission (hereinafter, "FTC" or "the Commission") is entitled to a temporary restraining order. At the request of counsel, that initial hearing was converted to a status conference with the Court. A follow-up hearing was held on June 25, 2020. After careful consideration of the Motion, the testimony and arguments presented during the hearing, the record and the applicable law, the Motion is **DENIED**.

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<sup>1</sup> R. Doc. 3.

<sup>2</sup> R. Doc. 11.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. The Complaint

On June 16, 2020, the FTC, an independent agency of the United States government, filed suit under Section 13(b) of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 53(b), against Defendants.<sup>3</sup> In the Complaint, the FTC alleges that Traffic Jam Events, LLC “offers direct mail marketing services and staffed tent sales events to automotive dealerships.”<sup>4</sup> The FTC further alleges that David Jeansonne, II is the owner, managing member, and president of Traffic Jam Events, LLC<sup>5</sup> and that, “Since at least March 2020, Defendants have mailed or caused to be mailed deceptive advertisements purporting to provide COVID-19 stimulus relief to consumers.”<sup>6</sup> The FTC asserts that Traffic Jam Events, LLC used the deceptive ads to “lure individuals and families to auto sales events under the guise that valuable stimulus relief was available at designated locations for a short period of time.”<sup>7</sup>

The FTC claims that the mailing included statements such as, “URGENT:COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS,”<sup>8</sup> and repeatedly described the location as, “your designated temporary 10-day site,” “designated local headquarters,” and “relief headquarters.”<sup>9</sup> The FTC further alleges that the mailing represented that consumers “must claim these stimulus incentives at your designated temporary 10-day

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<sup>3</sup> R. Doc. 1.

<sup>4</sup> *Id.* at ¶ 6.

<sup>5</sup> *Id.* at ¶ 7.

<sup>6</sup> *Id.* at ¶ 9.

<sup>7</sup> *Id.* at ¶ 12.

<sup>8</sup> *Id.* at ¶ 14.

<sup>9</sup> *Id.* at ¶ 16.

site: 5925 SW 20<sup>th</sup> Street, Bushnell, FL 33513.”<sup>10</sup> A check allegedly issued by the “Stimulus Relief Program” was included in the mailing.<sup>11</sup> The Complaint further alleges that, “The Florida Attorney General also sued Defendants on April 23, 2020 over the Florida mailers, yet Defendants continue to provide advertising and marketing services to the automotive industry nationwide.”<sup>12</sup> The FTC points out that Defendants have been the subject of prior law enforcement actions allegedly based on misleading advertising, two from Kansas (2010 and 2012) and one from Indiana (2018).<sup>13</sup>

Based on the foregoing facts, the FTC alleges that Defendants are violating or are about to violate laws enforced by the Commission, including unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).<sup>14</sup> Pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the FTC seeks the following relief:

- preliminary injunctive and ancillary relief, including a temporary and preliminary injunction, to prevent consumer injury during the pendency of this action;
- a permanent injunction to prevent future violations of the FTC Act;
- such relief that the Court finds necessary to redress injury to consumers, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and
- litigation costs incurred by the FTC in bringing the action.<sup>15</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 18.

<sup>12</sup> *Id.* at ¶ 20.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶¶ 21 & 26.

<sup>15</sup> *Id.* at pp. 8-9.

## B. The Motion for Temporary Restraining Order

On the same day it filed the Complaint, June 16, 2020, the FTC filed the instant Motion for a Temporary Restraining Order, and Other Equitable Relief, and Order to Show Cause by a Preliminary Injunction Should Not Issue (the “Motion”).<sup>16</sup> The FTC asserts that, “through its advertising in direct-mail marketing, Defendants have been misrepresenting that (i) their mailers concern official COVID-19 stimulus information, (ii) consumers will receive stimulus relief, including checks, by visiting a designated site, and (iii) the mailers involve a stimulus program associated with, or approved by, the government.”<sup>17</sup> The FTC asserts that Defendants are not providing official COVID-19 stimulus information or relief and are not affiliated, or approved by, the United States government or any government agency.<sup>18</sup> The FTC argues that Defendants’ acts and practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).<sup>19</sup>

The FTC asserts that this Court has jurisdiction to enjoin violations of the FTC Act and to provide appropriate equitable relief, including restitution and disgorgement, according to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (hereafter, “Section 13(b)").<sup>20</sup> The grounds asserted by the FTC in its Motion track the language of its Complaint, namely that Defendants “since at least March 2020 . . . have mailed or caused to be mailed deceptive advertisements purporting to provide COVID-19 stimulus relief to consumers.”<sup>21</sup> The description of the mailer is identical to the

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<sup>16</sup> R. Doc. 3.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at p. 2.

<sup>19</sup> *Id.*

<sup>20</sup> R. Doc. 3-1 at p. 2.

<sup>21</sup> *Id.* at p. 3; *See* R. Doc. 1 at ¶ 9.

description provided in the Complaint, including that the mailer contained statements indicating that it contained “Important COVID-19 economic stimulus documents,” with the notice stating, “URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE.”<sup>22</sup> The mailers also included a mock check issued by the “Stimulus Relief Program.”<sup>23</sup>

The FTC asserts that none of the information provided in the mailer is supported or authorized by the United States government or any governmental agency. Quoting the Fifth Circuit in *EEOC v. Cosmair, Inc.*, the FTC argues that, “[w]hen an injunction is expressly authorized by statute and the statutory conditions are satisfied, the movant need not establish specific irreparable injury to obtain a preliminary injunction.”<sup>24</sup> The FTC then provides a detailed analysis of why it believes it is likely to succeed on the merits of its underlying claim that Defendants’ actions violate Section 5(a) of the FTC Act, asserting that this Court need only find “some chance of probable success on the merits” to grant an injunction.<sup>25</sup> The FTC also argues that Mr. Jeansonne is individually liable because the FTC has proven “he either participated in the unlawful activities or had some control over those activities.”<sup>26</sup> In support of this argument, the FTC alleges that Mr. Jeansonne possesses the authority to control Traffic Jam Event, LLC’s operations and organizes Traffic Jam Events, LLC as its owner, president and manager.<sup>27</sup> The FTC also

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<sup>22</sup> R. Doc. 3-1 at p.p. 3-4; R. Doc. 1 at ¶¶ 13-14.

<sup>23</sup> R. Doc. 3-1 at p. 5.

<sup>24</sup> *Id.* at p. 8 (quoting *Cosmair, Inc.*, 821 F.2d 1085,1090 (5th Cir. 1987)) (internal quotation marks omitted).

<sup>25</sup> R. Doc. 3-1 at p. 9 (citing cases).

<sup>26</sup> *Id.* at p. 11 (quotation and quotation marks omitted).

<sup>27</sup> *Id.* at p. 12.

mentions that Traffic Jam Events, LLC has been subject to at least three prior enforcement actions in Indiana and Kansas dating back to 2010, for using deceptive advertising campaigns promising incentives and prizes to lure consumers to auto sales events.<sup>28</sup> The FTC argues that it would likely succeed on the merits because Mr. Jeansonne signed three prior consent judgments on behalf of Traffic Jam Events, LLC, as a result of those prior proceedings.<sup>29</sup> The FTC then balances the equities between the public and private interests in granting the requested injunctive relief, and argues that the public interest in halting Defendants' unlawful conduct outweighs any interest Defendants may have in continuing their unlawful marketing services.<sup>30</sup>

The following day, June 17, 2020, the Court set a telephone status conference for June 19, 2020, to discuss the Motion.<sup>31</sup> On June 18, 2020, Defendants filed into the record Defendants' Memorandum Submitted in Advance of June 19, 2020 Status Conference, seeking to "address gross misrepresentations and omissions of fact and law" contained in the FTC's Complaint and Motion.<sup>32</sup> During the June 19<sup>th</sup> telephone status conference, the Court discussed with counsel the status of the case and the pending Motion, and set the matter for a hearing on June 23, 2020.<sup>33</sup>

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<sup>28</sup> *Id.* at p. 2 (*citing* R. Doc. 3-2 at ¶¶ 11-16; R. Doc. 3-3).

<sup>29</sup> R. Doc. 3-1 at p. 13.

<sup>30</sup> *Id.* at pp. 14-15.

<sup>31</sup> R. Doc. 6.

<sup>32</sup> R. Doc. 8.

<sup>33</sup> R. Doc. 9.

Thereafter, on June 22, 2020, Plaintiffs filed a Motion For Leave to File Supplemental Authority and Amended Proposed Temporary Restraining Order,<sup>34</sup> which the Court granted.<sup>35</sup>

That same day, June 22, 2020, Defendants filed an Opposition to the FTC's Motion for Temporary Restraining Order, asserting that the relief sought by the FTC is "extreme, unnecessary, and not justified by the law or the facts."<sup>36</sup> Attached to the Opposition brief is a Declaration from Mr. Jeansonne, which Defendants assert "is submitted in lieu of live testimony upon agreement of the parties and the Court during the June 19, 2020 Status Conference."<sup>37</sup> Defendants assert that Mr. Jeansonne's Declaration "makes clear that the Mailer at issue was past conduct that has not been repeated and will not be repeated in the future, and importantly, is the subject of a pending action in Florida state court."<sup>38</sup> Defendants further assert that, since this involves "past conduct that has not been repeated and will not be repeated in the future" this case does not satisfy the express statutory requirement of Section 13(b) of the FTC Act that the Commission has reason to believe that an entity is violating or is about to violate any provision of the law.<sup>39</sup> Defendants point out that the purpose of Section 13(b) was to address the need to quickly enjoin ongoing or imminent illegal conduct.<sup>40</sup>

Defendants also assert that the issuance of a temporary restraining order will not serve the public interest, as required by Section 13(b), because there is no continuing or

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<sup>34</sup> R. Doc. 10.

<sup>35</sup> R. Doc. 18.

<sup>36</sup> R. Doc. 11 at p. 2.

<sup>37</sup> *Id.* at pp. 1-2.

<sup>38</sup> *Id.* at p. 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at p. 3.

future harm.<sup>41</sup> Relying on Mr. Jeansonne’s Declaration, Defendants assert that the mailer was part of a single mailing event distributed in two locales (Florida and Alabama), and that the sales associated with the mailer were one-time tent sales (one in Florida and one in Alabama) that took place over a single week.<sup>42</sup> Defendants claim that, since these one-time sales, “no subsequent advertising programs of a similar nature have been used and Defendants have not distributed any other solicitation in substantially the same form as the Mailer.”<sup>43</sup> Defendants argue that this was an “isolated event” that “occurred in the past,” and, therefore, does not justify a temporary restraining order.<sup>44</sup> Regarding the previous consent judgments mentioned in the FTC’s Motion, Defendants argue that those matters were completely distinct and unrelated to the COVID mailer at issue in the present suit.<sup>45</sup> Defendants further argue that the Fifth Circuit’s decision in *Southwest Sunsites* is distinguishable from this case and should not be interpreted to read out the express language of Section 13(b) that requires a continuing violation.<sup>46</sup> Defendants point out that *Southwest Sunsites* involved a large-scale systematic scheme, which the Fifth Circuit found gave rise to a “fair inference of a reasonable expectation of continued violations absent restraint.”<sup>47</sup>

The Court held a hearing on the Motion for Temporary Restraining Order on June 25, 2020. With the consent of all parties, the FTC introduced copies of the mailer into

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at pp. 3-4.

<sup>44</sup> *Id.* at p. 4.

<sup>45</sup> *Id.* at p. 6.

<sup>46</sup> *Id.* at p. 4 (citing *Federal Trade Com. v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982)).

<sup>47</sup> R. Doc. 11 at pp. 4-5 (quoting *Southwest Sunsites, Inc.*, 665 F.2d at 723) (quotation marks omitted).



evidence, and Defendants introduced Mr. Jeansonne's Declaration into evidence in lieu of live testimony. At the request of the Court, Mr. Jeansonne testified during the hearing.

## II. LEGAL STANDARD

Both the FTC and Defendants cite *Federal Trade Commission v. Southwest Sunsites, Inc.*,<sup>48</sup> as the leading authority on the issues raised in the FTC's Motion for Temporary Restraining Order. The Court finds that case controlling and instructive on a number of issues. First, the Court notes that *Southwest Sunsites* makes clear that the Commission can seek, and this Court has the authority to order, equitable relief, including injunctive relief, under Section 13(b) of the FTC Act. This Court adheres to that binding precedent and initially finds that it has the authority to enter an order of equitable relief in this matter.

This Court's analysis then proceeds to determine whether the FTC has satisfied the requirements set forth in Section 13(b) of the FTC Act to support the issuance of a temporary restraining order. Section 13(b) provides, in pertinent part, the following:

Whenever the Commission has reason to believe,

- (1) That any person, partnership, or corporation is violating or is about to violate, any provision of law enforced by the Federal Trade Commission, and
- (2) That the enjoining thereof pending the issuance of the complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the Court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public - -

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<sup>48</sup> 665 F.2d 711 (5th Cir. 1982).

the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond... and in proper cases the Commission may seek, and after proper proof, the Court may issue a permanent injunction.<sup>49</sup>

The threshold analysis for a temporary restraining order under Section 13(b), therefore, is whether the Commission has reason to believe that Defendants are violating or about to violate any provision of law enforced by the Federal Trade Commission. One of the issues before the Fifth Circuit in *Southwest Sunsites* was whether there was a continuing violation of the FTC Act to support the district court’s issuance of injunctive relief under Section 13(b).<sup>50</sup> Although the Magistrate Judge in that case found that there was no promotional or sales campaign currently in place, the Fifth Circuit affirmed the district court’s granting of a temporary restraining order. In doing so, the Fifth Circuit reasoned that, “the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a ‘fair inference of a reasonable expectation of continued violations’ absent restraint.”<sup>51</sup>

As recognized by our sister court, however, “the *Sunsite* court did not provide extensive guidance to district courts on applying § 13(b)’s threshold requirement,”

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<sup>49</sup> 15 U.S.C. § 53(b).

<sup>50</sup> *Southwest Sunsites, Inc.*, 665 F.2d at 723-724.

<sup>51</sup> *Id.* at 723 (quoting *Securities and Exchange Commission v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1100-01 (2d Cir. 1972)).

namely, a finding of Section 13(b) statutory compliance.<sup>52</sup> Thus, “Following *Sunsites*, when applying § 13(b), district courts have analyzed whether the surrounding circumstances – in addition to the past violations alleged – create a reasonable expectation that violations will continue.”<sup>53</sup> In determining whether the evidence supports a reasonable expectation of continuing violations, courts in this Circuit consider the following non-exclusive factors: (1) the egregiousness of the defendant’s actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the defendant’s assurances against future violations; (5) the defendant’s recognition of the wrongful nature of his conduct; and (6) and the likelihood that the defendant’s occupation will present opportunities for future violations.<sup>54</sup>

### III. ANALYSIS

#### **A. The FTC has failed to show that it has reason to believe that Defendants are violating or are about to violate any provision of law enforced by the FTC, as required by Section 13(b) of the FTC Act and Fifth Circuit precedent.**

The Court begins its analysis with the crux of the case as put forth by the FTC. The evidence presented at the hearing reflects that Defendants created and mailed an advertising mailer in an official-looking envelope in March of 2020, which specifically referenced “COVID-19 automotive stimulus program relief funds,” and,

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<sup>52</sup> *Federal Trade Commission v. Educare Centre Services, Inc.*, 433 F. Supp. 3d 1008, 1014 (W.D. Tex. 2020).

<sup>53</sup> *Id.* (citing *United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811, 816 (N.D. Tex. 2008); *FTC v. Hughes*, 710 F. Supp. 1524, 1531 (N.D. Tex. 1989)).

<sup>54</sup> 549 F. Supp. 2d at 816.

“COVID-19 economic stimulus documents.”<sup>55</sup> The mailer included a document that appeared to be a check from the “Stimulus Relief Program.”<sup>56</sup> According to the evidence before the Court, there were 45,000 mailings that occurred for a one-time sales event which occurred over a one week period in Florida and Alabama.<sup>57</sup> There was no evidence presented that future mailings offering COVID-19 stimulus relief were conceived, attempted, or contemplated.

The Court further notes the significant factual distinctions between *Southwest Sunsites*<sup>58</sup> and this case. The facts established in *Southwest Sunsites* showed that the appellee began acquiring large tracts of land in Southwest Texas in 1973.<sup>59</sup> After subdividing the land, the appellees conducted an extensive nationwide advertising and sales effort to offer parcels of between five and forty acres for sale for approximately \$600 to \$700 per acre, with representations that the property had good potential for both commercial and private owners.<sup>60</sup> These representations were proven to be false. The evidence further showed that the appellee’s efforts were financially successful as “the total balance of outstanding accounts receivable on purchase contracts as of June 1979,” some six years later, “was approximately \$10,000,000.”<sup>61</sup> As noted earlier, the Fifth Circuit concluded that the district court acted “well within its discretion” in ordering appellee to cease and desist from further

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<sup>55</sup> R. Doc. 3-2 at pp. 32-38.

<sup>56</sup> *Id.* at pp. 37-38.

<sup>57</sup> R. Doc. 11-1 at ¶¶ 6 & 9.

<sup>58</sup> 665 F.2d 711 (5th Cir. 1982).

<sup>59</sup> *Id.* at 714-15.

<sup>60</sup> *Id.* at 715.

<sup>61</sup> *Id.*

violations of the FTC Act.<sup>62</sup> The Fifth Circuit explained that, “This is particularly true when the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a ‘fair inference of a reasonable expectation of continued violations’ absent restraint.”<sup>63</sup>

It is clear from the evidence presented in this case that the mailer at issue was not part of a large-scale systematic scheme, but was part of “one advertising program,”<sup>64</sup> which was ultimately unsuccessful.<sup>65</sup> The evidence shows that less than 40 people, combined, attended the Florida and Alabama events.<sup>66</sup> The evidence before the Fifth Circuit in *Southwest Sunsites* showed a continuing, multi-year, fraudulent scheme that reaped at least ten million dollars.<sup>67</sup> In contrast, the evidence before this Court shows that the mailer at issue was an unsuccessful, one-time mailing. Mr. Jeansonne testified during the June 25, 2020 hearing that the mailer was “beyond a flop”<sup>68</sup> because only approximately nine or ten vehicles were sold at the Florida sales event, while zero vehicles were sold at the Alabama sales event.<sup>69</sup> He further testified that Defendants lost \$52,000 as a result of the unsuccessful mailer since they paid for the advertising at issue in this matter.<sup>70</sup> The FTC did not

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<sup>62</sup> *Id.* at 723.

<sup>63</sup> *Id.* (quoting *Securities and Exchange Commission v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1100-01 (2d Cir. 1972)).

<sup>64</sup> R. Doc. 11-1 at ¶ 9.

<sup>65</sup> *Id.* at ¶ 11.

<sup>66</sup> *Id.*

<sup>67</sup> 665 F.2d at 714-15.

<sup>68</sup> Draft transcript of June 25, 2020 hearing, p. 41.

<sup>69</sup> *Id.* at pp. 37-38.

<sup>70</sup> *Id.* at pp. 40-41.

offer any evidence to contradict Mr. Jeansonne's testimony. Apparently, the targeted consumers were wiser than the Defendants who conceived this mailer.

The Court further notes that, during the June 25<sup>th</sup> hearing, counsel for the FTC stated, "We do not currently have evidence of other COVID-specific mailers that since have gone out since the Florida investigation."<sup>71</sup> Counsel for the FTC then asserted, for the first time, "We do have additional evidence that suggests they may be continuing other deceptive advertising."<sup>72</sup> The Court questioned counsel extensively regarding this newly provided information, during which counsel further stated, "We have found at least one complaint now involving one other mailer for events that took place as recently as June 3<sup>rd</sup> that resembles the same mailer that resulted in law enforcement action in Kansas."<sup>73</sup> When asked whether this recent mailer involved "representation about COVID-19 stimulus relief" or anything similar to the representations at issue in this case, counsel answered, "No, Your Honor, but we do have additional potential deceptive representations that potentially violate the FTC Act."<sup>74</sup> When the Court pressed counsel a second time as to whether the recent mailer involved any references to COVID-19 stimulus relief, FTC's counsel responded, "Your Honor, it does not—it does not involve specific COVID claims as I indicated. It is still we think relevant because it still leads to deceptive advertising that's potentially in violation of the FTC Act."<sup>75</sup>

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<sup>71</sup> *Id.* at p. 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at p. 9.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at p. 10.

Later in the hearing, the Court asked counsel for the FTC a few follow-up questions about the new information regarding a June 3, 2020 mailer. Specifically, the Court inquired, “Where is the information that you stated regarding possible sales in June or discussions of mailers in June of this year?”<sup>76</sup> Counsel for the FTC responded, “So, your Honor, that was what I was discussing earlier of other potentially deceptive conduct in violation of the FTC Act. We are happy to make that available to the court. We have just identified it as of yesterday.”<sup>77</sup> The Court then asked counsel if the information was in evidence at the time of the hearing, to which counsel responded, “No, this was done in response to the questions that you had posed to the parties on Tuesday. As I mentioned earlier, we are still trying to collect information but it would certainly be information in defendant’s possession.”<sup>78</sup>

The Court finds that this new information does not establish that the FTC had reason to believe that Defendants were violating or were about to violate a provision of the FTC Act at the time it filed the instant Motion, as required under Section 13(b) of the FTC Act. Even if accepted on its face as true, the FTC’s counsel was clear in stating that he was bringing *potential*, not established, violations to the Court’s attention. As evidenced by the foregoing colloquy during the June 25, 2020 hearing, counsel for the FTC repeatedly confirmed that the recent mailer did not involve any references to COVID-19 stimulus relief or anything similar to the representations at issue in this case. Further, counsel for the FTC confirmed during the hearing that

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<sup>76</sup> *Id.* at p. 27.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

this new information was only prompted by questioning from the Court during a hearing that occurred two days earlier, on June 22, 2020. The FTC filed its Complaint and the instant Motion on June 16, 2020.<sup>79</sup> Thus, it is abundantly clear to Court that at the time the FTC filed the instant Motion on June 16, 2020, it was not aware of any additional mailers sent by Defendants after March 2020. Accordingly, the Court is not persuaded that the new information offered by the FTC during the June 25<sup>th</sup> hearing shows that the FTC had reason to believe that Defendants were violating or were about to violate the FTC Act when it sought injunctive relief under Section 13(b) of the FTC Act.

Based upon the foregoing evidence and the binding precedent set by *Southwest Sunsites*, the Court finds that the FTC has not proven that the Commission has reason to believe that Defendants are violating or are about to violate any provision of law enforced by the Federal Trade Commission.

**B. The FTC has failed to establish a likelihood of continued violations under the *Cornerstone* factors.**

The Court further finds that the FTC has failed to establish a likelihood of continued violations by Defendants based upon their past violations, as reflected in prior consent judgments, under the six non-exclusive factors set forth by our sister court in *FTC v. Cornerstone Wealth Corp., Inc.*<sup>80</sup> Regarding the egregiousness of Defendants' actions, the Court finds that this factor squarely weighs in favor of the FTC and in the Court granting the Motion for Temporary Restraining Order.

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<sup>79</sup> R. Docs. 1 & 3.

<sup>80</sup> 549 F. Supp. 2d 811, 816 (N.D. Tex. 2008) (citation omitted).



Defendants' actions, as alleged by the FTC, using a mailer which purported to provide financial relief during this global pandemic, preying upon people at a particularly vulnerable time not only for those people, but for the world, all in an attempt to make an automobile sale, are clearly egregious. Were the Court not analyzing this matter under factors enunciated by other courts, this Court would use stronger words to describe the egregiousness of this mailer.

Turning to the second factor, the isolated or recurrent nature of the infraction, the Court finds this factor weighs in favor of Defendants and against granting injunctive relief. The evidence presented by both the FTC and Defendants reflect that this was a one-time mailing of 45,000 mailers within Florida and Alabama.<sup>81</sup> There has been no evidence presented that there was any subsequent mailing related to potential COVID-19 stimulus relief since that one-time mailing. The evidence also shows that this mailing occurred in March 2020.<sup>82</sup> There has been no evidence presented to the Court indicating that Defendants were in preparation of, or intended to send, any subsequent mailing using similar language, and Mr. Jeansonne has submitted a Declaration stating that no subsequent mailing or similar mailing is intended or will be undertaken.<sup>83</sup> In response to the Court's question, "Since this mailing we're talking about, have you contemplated or had any discussions with anyone about any other mailing including such language as COVID-19, stimulus, and stimulus recovery program," Mr. Jeansonne testified, "Absolutely not. . . . Since

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<sup>81</sup> R. Doc. 11-1 at ¶¶ 6 & 9.

<sup>82</sup> *Id.* at ¶ 9; R. Doc. 3-2 at pp. 32-38.

<sup>83</sup> R. Doc. 11-1.

this one isolated incident, I've never used even the word, much less any type of factual information, never and never will.”<sup>84</sup>

The FTC has brought to the Court's attention three prior consent agreements entered into by Defendants that resulted from three prior state court proceedings, two in Kansas and one in Indiana.<sup>85</sup> The Court notes that the Fifth Circuit in *Southwest Sunsites* appeared to read the phrases “reason to believe” and “is violating” or “about to violate,” as set forth in Section 13(b) of the FTC Act, as covering situations where defendants claim that the violations have ceased, but that the FTC provides evidence that the violations will continue absent injunctive relief.<sup>86</sup> Such is the FTC's argument in this matter, relying on the past consent agreements entered into by Defendants. The Court has reviewed all of the consent agreements and notes that the Kansas agreements are from 2010 and 2013, respectively,<sup>87</sup> and the Indiana consent agreement, while signed in 2019, is in reference to Traffic Jam Events, LLC's actions from 2015 and 2016.<sup>88</sup> The Court also notes that the facts of those purported violations in Kansas and Indiana, which led to the consent agreements, differ from the facts of the case before this Court. In almost each of those matters, Defendants purportedly offered prizes or the chance to win a prize to consumers if they appeared at some sales or marketing event. None of those matters involved or included language related to any disaster or tragedy as shown in this case. Based upon the

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<sup>84</sup> Draft Transcript of June 25, 2020 hearing, p. 46.

<sup>85</sup> R. Doc. 3-3 at pp. 2-13, 15-20 & 60-66.

<sup>86</sup> *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 722-23 (5th Cir. 1982).

<sup>87</sup> R. Doc. 3-3 at pp. 2-13 & 15-20.

<sup>88</sup> *Id.* at pp. 60-66.

length of time between the three prior consent judgments and the actions in this case, which occurred in March 2020, and perhaps even more importantly, the significant factual differences between the three prior matters and the instant case, the Court finds that the second factor, the isolated or recurrent nature of the infraction, weighs in favor of the Defendants.

The Court finds that the third factor, the degree of scienter involved, weighs in favor of the FTC. Although not stated directly in Mr. Jeansonne's Declaration, the Court inquired during the June 25, 2020 hearing whether Mr. Jeansonne was aware of the contents of the March 2020 mailing. Mr. Jeansonne testified during the hearing that he was indeed aware of the mailer's content, testifying that he "takes full responsibility" and that the mailer was his idea.<sup>89</sup> The Court has not been presented with any evidence that Defendants lacked knowledge of the mailer's content. As a result, this factor weighs in favor of the FTC.

Regarding the fourth factor, the sincerity of Defendants' assurances against future violations, Mr. Jeansonne has provided a Declaration stating the following:

Traffic Jam and David Jeansonne, II will not represent or imply to any consumers that official COVID-19 government stimulus funds, including but not limited to funds available under the Coronavirus Aid, Relief, and [sic] Economic Security ("CARES") Act, are being offered by Traffic Jam and/or David Jeansonne, II, or any car

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<sup>89</sup> Draft transcript of June 25, 2020 hearing, p. 39.

dealership with which they work or provide advertising and marketing services to.<sup>90</sup>

The Declaration further provides that:

Traffic Jam and David Jeansonne, II will not represent or imply to any consumers that Defendants or any car dealership with which they work are affiliated with, are supported, endorsed, certified, or licensed by, or are working in partnership with or as an agent of any government agency, for the purpose of providing official, government-issued COVID-19 stimulus relief funds or other government relief funds related to COVID-19 as currently enacted.<sup>91</sup>

Additionally, this Court had the opportunity to question Mr. Jeansonne directly regarding his assurances against future violations during the June 25, 2020 hearing. In doing so, the Court was able to observe his demeanor and evaluate the sincerity of his testimony, and the Court finds that this factor weighs in favor of Defendants. While Mr. Jeansonne did not acknowledge the wrongful nature of his conduct, the Court is satisfied that Mr. Jeansonne's assurances regarding future violations are sincere. Mr. Jeansonne acknowledged that his business suffered financial losses as a result of his decision to use this advertising campaign. He further testified that his 21-year reputation in the advertising business, past awards, and engagements as a motivational speaker had been damaged as a result of his actions.<sup>92</sup> While it was clear that those matters which affected him personally weighed significantly in Mr. Jeansonne's determination not to have future violations, the Court is convinced of his sincerity, even if for selfish reasons. Further, there has

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<sup>90</sup> R. Doc. 11-1 at ¶ 19.

<sup>91</sup> *Id.* at ¶ 20.

<sup>92</sup> Draft transcript of June 25, 2020 hearing, pp. 43-44.

been no evidence presented to the Court that Mr. Jeansonne has been insincere. Accordingly, the fourth factor weighs in favor of Defendants.

The Court finds that the fifth factor, Defendants' recognition of the wrongful nature of their conduct, weighs in favor of the FTC. During the June 25, 2020 hearing, the Court explicitly asked Mr. Jeansonne if he thought the mailer in question preyed on consumers' vulnerabilities, to which he responded, "I absolutely do not."<sup>93</sup> Mr. Jeansonne also testified that he still believes the mailer was legal and the intent was to use catchy phrases to get the attention of consumers.<sup>94</sup> As such, the Court finds that the fifth factor weighs in favor of the FTC and in granting injunctive relief.

The Court further finds that the sixth and final *Cornerstone* factor, the likelihood that Defendants' occupation will present opportunities for future violations, appears, at least on its face, to weigh in favor of the FTC. Mr. Jeansonne remains the president and owner of Traffic Jam Events, LLC, and defense counsel confirmed during the June 25, 2020 hearing that Traffic Jam Events, LLC remains in the business of direct mail advertising. The Court questioned defense counsel about the extent of Traffic Jam Events, LLC's current business during the hearing, and counsel stated that the entity is in the advertising business, describing advertising as its "bread and butter."<sup>95</sup>

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<sup>93</sup> Draft transcript of June 25, 2020 hearing, pp. 42-43.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at p. 33.

However, the evidence before the Court also shows that the Attorney General of the State of Florida has instituted legal proceedings against Defendants involving the same mailer at issue in the instant case.<sup>96</sup> That suit has been pending since April 2020. Counsel for both parties confirmed during the June 25, 2020 hearing that those legal proceedings remain pending.<sup>97</sup> Defendants are also aware that at least one automotive dealer in Florida is in discussions to cooperate with the Attorney General of Florida to pay restitution to customers who appeared at the tent sale and to hold some other amount of money for “future enforcement efforts.”<sup>98</sup> Counsel for the FTC has also informed the Court that Defendants’ mailer has become the topic of several news stories, and Mr. Jeansonne testified to the many news stories associated with his actions.<sup>99</sup> In light of the evidence that Defendants are in a legal action currently pending in state court in Florida, that the Attorney General of Florida is seeking, or has obtained, the cooperation of automobile dealers from Florida with whom Defendants worked, and that there is media coverage of Defendants’ actions, the Court finds the sixth factor is either neutral, or weighs slightly in favor of Defendants. The Court would not be going out on a limb to suggest that ongoing legal action, media coverage, and the potential for additional automobile dealers to be cooperating with legal authorities would very likely curtail any opportunities for future violations.

Having analyzed the evidence adduced at the hearing and on the record in this case using the *Cornerstone* factors, the Court finds that the factors do not clearly

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<sup>96</sup> R. Doc. 3-2 at pp. 40-58.

<sup>97</sup> Draft transcript of June 25, 2020 hearing, pp. 26-27 & 49-50.

<sup>98</sup> R. Doc. 11-1 at ¶ 14.

<sup>99</sup> Draft transcript of June 25, 2020 hearing, pp. 40-42, 44-45.

weigh in favor of the FTC or Defendants. As set forth above, three factors weigh in favor of the FTC and three factors weigh in favor of Defendants. Nonetheless, the Court finds that injunctive relief is not warranted in this case. First, the Court has already determined that the facts of this case are significantly distinguishable from the facts in *Southwest Sunsites*, and that the FTC has not borne its burden of proving that, at the time it filed this Motion, it had reason to believe that Defendants were violating, or were about to violate, any provision of law enforced by the FTC, as required to obtain injunctive relief under Section 13(b). Second, and more importantly, the Fifth Circuit has made clear that, “A preliminary injunction is an extraordinary remedy,” and that, “The decision to grant a preliminary injunction is to be treated as the exception rather than the rule.”<sup>100</sup> Thus, injunctive relief remains an extraordinary measure, and one not to be ordered lightly.

The sole issue before the Court is whether, based on the evidence in the record today, the FTC has met the statutory requirements set forth in Section 13(b) for the issuance of a temporary restraining order.<sup>101</sup> The Court finds that it has not. The FTC has failed to prove that it has reason to believe that Defendants are violating or are about to violate any provision of law enforced by the FTC. The Court agrees with defense counsel’s assertion during the June 25, 2020 hearing that the instant Motion constitutes an overreach by the FTC of its authority to seek injunctive relief under Section 13(b). This may be due, at least in part, to the FTC’s fundamental

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<sup>100</sup> *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621-22 (5th Cir. 1985) (citation omitted).

<sup>101</sup> See 15 U.S.C. § 53(b).

misunderstanding of the Fifth Circuit’s decision in *Southwest Sunsites*, and its assertion that, “the Fifth Circuit explicitly rejected the defendant’s argument that the FTC needed to show continuing or future violations for the case to be heard in federal court.”<sup>102</sup> As previously discussed, the Fifth Circuit in *Southwest Sunsites* affirmed the district court’s decision to grant injunctive relief, concluding that the evidence “suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a ‘fair inference of a reasonable expectation of *continued violations*’ absent restraint.”<sup>103</sup> The FTC has failed to present the Court with evidence showing that it has a reasonable expectation of continued violations absent injunctive relief.

While the Court finds that the FTC has not sustained its burden of proving that it has reason to believe that Defendants are violating or are about to violate any provision of law enforced by the FTC, the Court specifically makes no finding regarding whether the FTC will succeed on the merits of its Complaint, or whether the FTC will succeed in proving that Defendants have previously violated any provision of law enforced by the FTC. That determination, which carries its own penalties, is not before the Court at this time. While the well-known phrase is “buyer beware,” the Court would suggest that advertiser beware.

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<sup>102</sup> R. Doc. 10-1 at p. 1 (citing *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 723 (5th Cir. 1982)).

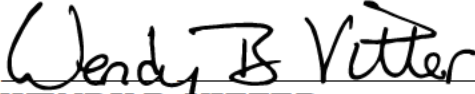
<sup>103</sup> 665 F.2d at 723 (quoting *Securities and Exchange Commission v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1100-01 (2d Cir. 1972)) (emphasis added).



#### IV. CONCLUSION

**IT IS HEREBY ORDERED** that the Motion for A Temporary Restraining Order, and Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue<sup>104</sup> is **DENIED**.

New Orleans, Louisiana, June 26, 2020.

  
WENDY B. VITTER  
United States District Judge

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<sup>104</sup> R. Doc. 3.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAFFIC JAM EVENTS, LLC, a limited liability  
company, and

DAVID J. JEANSONNE II, individually and as an  
officer of TRAFFIC JAM EVENTS, LLC,

Defendants.

**Civil Action No. 2:20-cv-1740**

**SECTION D(3)**

**Judge: Wendy B. Vitter**

**Magistrate: Dana Douglas**

**PLANTIFF FEDERAL TRADE COMMISSION'S NOTICE OF VOLUNTARY  
DISMISSAL WITHOUT PREJUDICE**

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), Plaintiff Federal Trade Commission respectfully provides this Honorable Court with notice of a voluntary dismissal of this action without prejudice. Fed. R. Civ. P. 41(a)(1)(B). Neither of the Defendants has served either an answer or a motion for summary judgment to date.

[SIGNATURE PAGE FOLLOWS]

Dated: August 7, 2020

Respectfully submitted,

/s/ Thomas J. Widor  
THOMAS J. WIDOR (D.C. Bar No. 490184)  
SANYA SHAHRASBI (D.C. Bar No. 1671001)  
600 Pennsylvania Avenue NW, CC-10232  
Washington, DC 20580  
Telephone: (202) 326-3039  
(202) 326-2709  
Email: twidor@ftc.gov  
sshahrasbi@ftc.gov

**Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION**

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 7, 2020, a copy of Plaintiff Federal Trade Commission's Notice of Voluntary Dismissal Without Prejudice was served on counsel for Defendants via the Court's electronic case filing ("ECF") system.

/s/ Thomas J. Widor

**From:** Widor, Thomas <twidor@ftc.gov>  
**Sent:** Friday, October 16, 2020 8:46 AM  
**To:** Balart, Etienne  
**Cc:** Shahrasbi, Sanya; Mastio, Lauren; Brickman, Jennifer; Broadwell, Eleni  
**Subject:** RE: [EXTERNAL] RE: In re Traffic Jam Events, LLC, D9395 -- Respondents discovery deficiencies

Etienne,

Unfortunately, given the short discovery period and the lack of any meaningful discovery responses, we cannot agree to further delay by Respondents. Respondents have been on notice for nearly 10 days since last Tuesday, October 6. On our telephone call on Tuesday, we discussed the scope of discovery and the problems with Respondents' initial disclosures. At that time, you made clear Respondents' position that Respondents would be limiting all discovery to the specific examples cited in the Complaint. I explained that the Complaint was not limited to the examples and that the scope of discovery encompassed information and material reasonably expected to yield relevant information to the allegations, proposed relief, and defenses. You again disagreed and indicated the question would need to be settled by Judge Chappell.

You since have been in possession of our letter for a week since last Friday, October 9, which laid out our legal basis, requested Respondents comply with their discovery obligations, and indicated we would file a motion to compel by this Friday. In your response, you stated that you would "further analyze [the] letter, and reserve the right to supplement this response in the time frame [we] have outline[d]." You never responded until we again had to contact you.

The issue you raise is a fundamental disagreement over the scope of discovery that we have now discussed repeatedly by telephone and through numerous email exchanges since last Friday with no progress. There is no change in either parties' positions. Respondents' position lacks any legal or factual basis. The most Respondents have proposed to comply with their discovery obligations has been conditioned on Complaint Counsel "agree[ing] that the Complaint is limited to the factual charges the FTC has voted on and the mailers cited therein." We do not see how further "comprehensive and substantive discussion" of that position on Monday will result in the parties reaching an agreement, rather than further delay and serious prejudice to Complaint Counsel's ability to proceed with discovery.

We are available to discuss today prior to filing the motion if you, Lauren, or any other Jones Walker attorneys on this matter would like to confer again to work out an acceptable production schedule.

Tom W

-----Original Message-----

**From:** Balart, Etienne <ebalart@joneswalker.com>  
**Sent:** Thursday, October 15, 2020 8:17 PM  
**To:** Widor, Thomas <twidor@ftc.gov>  
**Cc:** Shahrasbi, Sanya <sshahrasbi@ftc.gov>; Mastio, Lauren <lmastio@joneswalker.com>; Brickman, Jennifer <jbrickman@joneswalker.com>; Broadwell, Eleni <ebroadwell@ftc.gov>  
**Subject:** Re: [EXTERNAL] RE: In re Traffic Jam Events, LLC, D9395 -- Respondents discovery deficiencies

Tom,

I do not think that less than 24 hour notice to address the issue is appropriate and, additionally am not available to confer until Monday morning at the earliest. I repeat, I don't see how letters sent before discovery responses were

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 10/21/2020 | OSCAR NO. 599662 | Page 165 of 170 | PUBLIC received can be deemed to meet the requirements. The FTC's position is untethered to any allegations of fact in the Complaint, which I am happy to address in a comprehensive and substantive discussion on Monday.

Etienne

Sent from my iPhone

On Oct 15, 2020, at 6:52 PM, Widor, Thomas <twidor@ftc.gov> wrote:

Etienne,

We are happy to confer yet again tomorrow morning. Let us know if 9:30 am EST/8:30 am CST works.

In addition to last week's telephone call, we laid out the deficiencies in our October 19, 2020 letter along with the legal basis for our positions. On last week's call you made clear that Respondents would not produce anything in discovery beyond the three mailers cited in the complaint unless the Judge tells otherwise. You again confirmed in the response to our letter that Respondents would be limiting their responses to the mailers. Notwithstanding the legal position we laid out on the call and in the letter, Respondents have held true to their staked position and provided incomplete discovery responses that mainly repeat boilerplate objections. Respondents produced a total of 14 documents, and, based on the response, Respondents do not even appear to have conducted any real diligent searches, especially of electronically stored information.

We look forward to speaking with you tomorrow morning and hope we can engage in some meaningful progress concerning the parties' positions on the scope of discovery. In advance, we would appreciate knowing any actual legal authority Respondents can provide supporting their objections or refusal to comply.

Best,

Tom W.

From: Balart, Etienne <ebalart@joneswalker.com>  
Sent: Thursday, October 15, 2020 6:41 PM  
To: Shahrasbi, Sanya <sshahrasbi@ftc.gov>; Widor, Thomas <twidor@ftc.gov>; Mastio, Lauren <lmastio@joneswalker.com>; Brickman, Jennifer <jbrickman@joneswalker.com>  
Cc: Broadwell, Eleni <ebroadwell@ftc.gov>  
Subject: RE: In re Traffic Jam Events, LLC, D9395 -- Respondents discovery deficiencies

Sanya,

A few things. We disagree that the meet and confer requirement has been met for any of the mentioned topics. The whole purpose of the meet and confer is to discuss the substance of the responses, the legal support for the relevance of the requested items, and any reasonable compromises. None of that has happened. We scheduled a call to talk about, per Tom's email, the following:

> We are open to negotiating an extension of time. Can we schedule a meet and confer for either Monday or Tuesday to discuss a rolling production schedule beginning with the documents already identified in Respondents initial disclosures and any issues or objections that you foresee to any of the pending requests that we can try to address and resolve?

Notably absent from this request was a listing of a disagreement over the "scope of discovery." This was not raised until we had the call, and was done in a way that simply could not have provided a meaningful opportunity to "meet and confer." This is especially true with respect to two documents that had not even been filed as of this date: the

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 10/21/2020 | OSCAR NO. 599662 | Page 166 of 170 | PUBLIC preliminary witness list and the discovery responses. At a minimum, I am not sure how you could represent to the Court that we have “met and conferred” on the specific responses to discovery when, in fact, no such discussion has been had. I pointed out some of the deficiencies in the position the FTC expressed during our call in my email to you and Tom on October 9, 2020.

If you would like to file a motion challenging the sufficiency of the initial disclosures, you at least have semi-fulfilled the meet and confer requirement I still believe the FTC has not met the obligation to truly meet and confer (a few helpful pieces of information would be a better understanding of what limits, if any, the FTC thinks are not relevant for the entire 6.5 year time period, as opposed to what is in the Complaint, and under what legal authority the FTC can vote out a Complain on actual events and then simply ask for information that was never deemed actionable). As the record now stands, Respondents have not been provided any such explanation other than the conclusory “the FTC deems relevant anything it wants to deem relevant for the last 6.5 years.” That presents quite the challenge to respond to, as I am sure you can imagine.

With respect to the remaining two items, we very clearly have not had a meet and confer on either, so any such filing would be premature. I am happy to schedule a time to substantively discuss both the preliminary witness list, the specific deficiencies the FTC feels exist, reasonable accommodations to those deficiencies, and any specific issues you have with respect to the specific discovery responses. Please let me know what time works for you and/or Tom.

Etienne

L. Etienne Balart | Partner  
Jones Walker LLP  
D: 504.582.8584 | M: 504.756.2192  
ebalart@joneswalker.com<mailto:ebalart@joneswalker.com>

From: Shahrasbi, Sanya <sshahrasbi@ftc.gov>  
Sent: Thursday, October 15, 2020 5:21 PM  
To: Balart, Etienne <ebalart@joneswalker.com>; Widor, Thomas <twidor@ftc.gov>; Mastio, Lauren <lmastio@joneswalker.com>; Brickman, Jennifer <jbrickman@joneswalker.com>  
Cc: Broadwell, Eleni <ebroadwell@ftc.gov>  
Subject: [EXTERNAL] RE: In re Traffic Jam Events, LLC, D9395 -- Respondents discovery deficiencies

Counsel,

Notwithstanding our letter sent on October 9, 2020, we have yet to receive corrected initial disclosures, complete discovery responses, or a preliminary witness list with the level of specificity required by the Scheduling Order. Your response to our letter reiterated the view that discovery is limited to “the mailers cited” in the Complaint. While you indicated you would further analyze our letter, we have not received any additional response. As we fundamentally disagree on the scope of discovery, we intend to file a motion to compel with the Court tomorrow.

Best Regards,

Sanya S.

Sanya Shahrasbi  
Attorney  
Federal Trade Commission-Division of Financial Practices  
600 Pennsylvania Ave NW, CC-10218  
Washington, D.C. 20580  
(202) 326-2709

From: Balart, Etienne <ebalart@joneswalker.com<mailto:ebalart@joneswalker.com>>  
Sent: Friday, October 9, 2020 12:58 PM  
To: Widor, Thomas <twidor@ftc.gov<mailto:twidor@ftc.gov>>; Mastio, Lauren <lmastio@joneswalker.com<mailto:lmastio@joneswalker.com>>; Brickman, Jennifer <jbrickman@joneswalker.com<mailto:jbrickman@joneswalker.com>>  
Cc: Shahrasbi, Sanya <sshahrasbi@ftc.gov<mailto:sshahrasbi@ftc.gov>>; Broadwell, Eleni <ebroadwell@ftc.gov<mailto:ebroadwell@ftc.gov>>  
Subject: RE: In re Traffic Jam Events, LLC, D9395 -- Respondents discovery deficiencies

Tom,

We are in receipt of your letter, and there are a few items to correct the record. We did not cite the Commerce Clause as a reason for limiting our responses. To the contrary, it was not until the FTC stated during our call on October 6 (which was not convened as a meet and confer, but rather to discuss our request for an extension of time to respond) that they believe the proper scope of “relevant” discovery is, basically, anything Traffic Jam Events and David Jeansonne have done since 2015, that we raised the issue of the FTC’s lack of jurisdiction based on the fact that the Act’s requirement of “commerce” has not been established.

In the event we were not clear, Respondents’ position with respect to the initial disclosures are that they have disclosed all relevant factual information related to the activities complained of in the Complaint. The Complaint that was voted on by the commission is based upon the allegation that through the identified mailers, Respondents have violated the Act. We would ask that you provide the statutory authority for allowing the FTC to exert authority beyond what is specifically set forth in sec. 45(b) of the Act, and the power to prevent current and ongoing unfair methods of competition. Sec. 45(a)(1). Based upon your representations, you seem to be articulating a position that the Commission has determined that Respondents have been engaging in unlawful conduct beginning January 1, 2015. If so, what evidence was presented to the Commission to justify this determination, and why was none of it included in the FTC’s Complaint filed in the Eastern District? I am sure you can see how these glaring inconsistencies cause us some concern.

As respects the Preliminary Witness list, given the position that the FTC is taking currently, i.e. that any activity is fair game, how can we not be allowed to use similar “boilerplate” language to describe potential witness testimony. Stated differently, as you have now made clear, the FTC intends to make the Complaint about anything it unilaterally deems “relevant;” thus, the only protection afforded to Respondents is to refer back to the allegations the FTC has chosen to make. If you would like more “detailed” witness summaries, and we can agree that the Complaint is limited to the factual charges the FTC has voted on and the mailers cited therein, we would be happy to further clarify and refine Respondents’ Preliminary Witness List and Initial Disclosures.

I will further analyze your letter, and reserve the right to supplement this response in the time frame you have outline. Have an enjoyable weekend.

Etienne

L. Etienne Balart | Partner  
Jones Walker LLP  
D: 504.582.8584 | M: 504.756.2192  
ebalart@joneswalker.com<mailto:ebalart@joneswalker.com>

From: Widor, Thomas <twidor@ftc.gov<mailto:twidor@ftc.gov>>  
Sent: Friday, October 9, 2020 2:21 PM

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 10/21/2020 | OSCAR NO. 599662 | Page 168 of 170 | PUBLIC  
To: Balart, Etienne <ebalart@joneswalker.com<mailto:ebalart@joneswalker.com>>; Mastio, Lauren  
<lmastio@joneswalker.com<mailto:lmastio@joneswalker.com>>; Brickman, Jennifer  
<jbrickman@joneswalker.com<mailto:jbrickman@joneswalker.com>>  
Cc: Shahrabi, Sanya <sshahrabi@ftc.gov<mailto:sshahrabi@ftc.gov>>; Broadwell, Eleni  
<ebroadwell@ftc.gov<mailto:ebroadwell@ftc.gov>>  
Subject: [EXTERNAL] In re Traffic Jam Events, LLC, D9395 -- Respondents discovery deficiencies

Counsel,

Following our meet and confer on Tuesday, October 6, 2020, please find attached a letter outlining Respondents' discovery deficiencies and requesting that Respondents correct, supplement, or provide the required responses and discovery by Thursday, October 15, 2020.

Sincerely,

Tom W.

Thomas J. Widor

Attorney, Division of Financial Practices Bureau of Consumer Protection Federal Trade Commission

600 Pennsylvania Avenue, NW

Mail Stop: CC-10232

Washington, DC 20580

Phone: (202) 326-3039

Fax: (202) 326-3768

twidor@ftc.gov<mailto:twidor@ftc.gov>



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of**

**TRAFFIC JAM EVENTS, LLC, a limited  
liability company**

**and**

**DAVID J. JEANSONNE II, individually and as  
an officer of TRAFFIC JAM EVENTS, LLC.**

**DOCKET NO. 9395**

**NOTICE OF REQUEST FOR ORAL ARGUMENT**

Respondents Traffic Jam Events, LLC (“Traffic Jam”) and David J. Jeansonne II (collectively, “Respondents”), by and through counsel, respectfully request oral argument on the pending Motion to Compel Respondents to Comply with their Discovery Obligations as to Initial Disclosures, Request for Production Responses, and Preliminary Witness List.

Respectfully Submitted,

*/s/ L. Etienne Balart*

---

L. ETIENNE BALART (La. #24951)  
LAUREN C. MASTIO (La. #33077)  
JENNIFER A. DAVID (La. #37092)  
TAYLOR K. WIMBERLY (La. #38942)  
Jones Walker LLP  
201 St. Charles Avenue – 48th Floor  
New Orleans, LA 70170  
Telephone: (504) 582-8584  
Facsimile: (504) 589-8584  
Email: ebalart@joneswalker.com  
lmastio@joneswalker.com  
j david@joneswalker.com  
twimberly@joneswalker.com

**Counsel for Respondents, Traffic Jam Events,  
LLC and David J. Jeansonne II**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of October, 2020, I caused a true and correct copy of the foregoing to be filed through the Federal Trade Commission's E-filing platform and have served the following parties via email:

Thomas J. Widor  
Sanya Shahrasbi  
Federal Trade Commission  
Bureau of Consumer Protection  
600 Pennsylvania Avenue, NW  
Mailstop CC-10232  
Washington, DC 20506  
twidor@ftc.gov  
sshahrasbi@ftc.gov

*/s/ L. Etienne Balart*

---