

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

**ORDER GRANTING MOTION FOR CERTIFICATION TO THE COMMISSION OF
REQUEST FOR COURT ENFORCEMENT OF NONPARTY SUBPOENA**

I.

On December 11, 2020, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Certify to the Commission a Request Seeking Court Enforcement of a Subpoena *Duces Tecum* (“Motion”). The Motion relates to a September 10, 2020 subpoena *duces tecum* issued by Complaint Counsel to nonparty Platinum Plus Printing, LLC (“PPP”) (“Subpoena”). PPP filed a response opposing the Motion on December 22, 2020 (“Opposition”).

On December 28, 2020, the Commission issued an Order Withdrawing Matter from Adjudication for the Purpose of Considering a Proposed Consent Agreement. On May 3, 2021, the Commission issued an Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date.

As set forth below, the Motion is GRANTED.

II.

The FTC’s Complaint against Traffic Jam Events, LLC (“TJE”), and its president, David J. Jeansonne II (“Jeansonne”) (collectively, “Respondents”) alleges three counts of violating the FTC Act. Count I alleges deceptive advertising regarding COVID-19 government stimulus benefits. Count II alleges that Respondents deceptively advertised that consumers had won a specific prize that could be collected by visiting a particular auto dealership, when consumers had not won the specific prize. Count III alleges that Respondents violated the FTC Act by

failing to make certain disclosures required under the Truth in Lending Act and Regulation Z, 12 C.F.R. § 226.24(d). Respondents' Answer admits Complaint Counsel's allegations that Respondents "have advertised, marketed, promoted, or offered for sale or lease, and sold or leased motor vehicles for or on behalf of auto dealerships nationwide" and that Respondents "create advertising, offer direct mail marketing services, and staff tent sales events to automotive dealerships." Complaint ¶ 3, Answer ¶ 3.

The record on the Motion shows the following: Complaint Counsel served the Subpoena directed to PPP on September 10, 2020. Motion Ex. A. The Subpoena contains 12 requests for production of documents ("RFPs"). In summary, the RFPs seek documents regarding: PPP's relationship with Respondents and any related agreements or payments (RFPs 1-3); the creation, development, and review of advertisements for Respondents (RFPs 4-5); the dissemination of the advertisements for Respondents (RFP 6); representations and communications relating to the claims in the advertisements for Respondents (RFPs 7-9); complaints regarding TJE or TJE's advertising, and communications relating to the FTC (RFPs 10-11); and documents identifying the employees and others having responsibilities relating to advertisements in general and PPP's relationship with Respondents in particular (RFP 12).

On October 13, 2020, counsel for PPP responded to the Subpoena with a letter listing a number of general objections to the Subpoena, but did not serve any formal response or objections to the individual document requests in the Subpoena. Motion Ex. B. Complaint Counsel and PPP's counsel conferred on October 26, 2020 and reached some accommodations. Complaint Counsel memorialized the result of the meet and confer negotiations, including a plan for producing outstanding discovery on a rolling basis, in an email to PPP's counsel on October 27, 2020. Motion Ex. D. When PPP did not produce any subpoenaed documents thereafter, on November 6, 2020, Complaint Counsel filed a motion for an order compelling PPP's compliance, under Rule 3.38(a). On November 17, 2020, PPP filed a response opposing the motion to compel, arguing, among other things, that the Subpoena improperly seeks documents from PPP that are also in the possession of Respondents, and that it is more convenient for Complaint Counsel and less burdensome for PPP for Complaint Counsel to obtain such documents through discovery from Respondents. *See* Response to Complaint Counsel's Motion to Compel, November 17, 2020, at 4. Complaint Counsel's motion to compel PPP to comply with the Subpoena was denied on procedural grounds. *See In re Traffic Jam Events, LLC*, No. 9395, 2020 WL 6938319 (Nov. 20, 2020) ("November 20 Order").¹

Complaint Counsel states that as of the filing of the instant Motion, PPP has not provided any further responses to the Subpoena or responded to Complaint Counsel's additional requests

¹ As explained in the November 20 Order, the appropriate vehicle for enforcing compliance with a subpoena directed to a nonparty is not a motion to compel under Rule 3.38(a), but a motion to certify to the Commission a request to seek court enforcement, as directed by Rule 3.38(c). 16 C.F.R. § 3.38(c) (stating that "in instances where a nonparty fails to comply with a subpoena or order, [the Administrative Law Judge] shall certify to the Commission a request that court enforcement of the subpoena or order be sought"). *See In re Traffic Jam Events, LLC*, No. 9395, 2020 WL 6938319, at * 2-3. *See also In re Axon Enter., Inc.*, No. 9389, 2020 WL 5543022 (Sept. 4, 2020) (granting motion for certification and rejecting as unsupported complaint counsel's argument that the respondent was required to first obtain an order compelling discovery under Rule 3.38(a) before seeking certification to seek subpoena enforcement against nonparty under Rule 3.38(c)).

to continue negotiations. Declaration of Thomas J. Widor (“Widor Decl.”) ¶ 21; Motion Ex. H. PPP’s Opposition does not dispute these statements.

III.

“Parties 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). The FTC Rules also require that discovery be limited when the Administrative Law Judge determines that:

- (i) The 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;
- (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

Id.

The Subpoena to PPP was issued pursuant to Rule 3.34(b), which states in relevant part: “Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced.” 16 C.F.R. § 3.34(b).

Rule 3.38(c) states that “in instances where a nonparty fails to comply with a subpoena or order, the Administrative Law Judge shall certify to the Commission a request that court enforcement of the subpoena or order be sought.” 16 C.F.R. § 3.38(c); *see also In re Axon Enter., Inc.*, 2020 WL 5543022, at *3 (certifying request for court enforcement where nonparty recipient failed and refused to comply with the subpoena). The requirement in Rule 3.38(c) that a party seek court enforcement of a nonparty subpoena in the event of noncompliance, through the process of certification from the Administrative Law Judge and authorization from the Commission, derives from the FTC’s authorizing statute. 15 U.S.C. § 49.² As the Commission

² Section 49 of Title 15 of the United States Code states in pertinent part:

[I]n case of disobedience to a subpoena the [C]ommission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena . . . issue an order requiring such person, partnership, or corporation to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

has stated, “the Commission’s organic statute prescribes that the enforcement of a subpoena must be undertaken in Federal District Court.” *In re Market Dev. Corp.*, 1980 FTC LEXIS 162, at *246 (Jan. 15, 1980). Accordingly, “the Commission cannot itself enforce [a] subpoena[.]” *In re Cowles Communications, Inc.*, 1972 FTC LEXIS 251, at *4 (Mar. 2, 1972) (“If respondents doubt the specificity, relevancy and reasonableness of the subpoenas, they can refuse to comply, which will require the Commission to allege and prove these factors in a United States district court on an enforcement action filed under Section 9 of the Federal Trade Commission Act (15 U.S.C. § 49).”).

Complaint Counsel argues that the RFPs in the Subpoena are stated with reasonable particularity, as required under Rule 3.34. Complaint Counsel further argues that the information sought through the RFPs is relevant, including to: the misrepresentations alleged in this case; any substantiation or information relating to the advertising claims at issue; the dissemination of the challenged advertising; the potential existence of consumer injury; the alleged materiality of the challenged claims; and issues of knowledge and intent.

PPP argues that the RFPs seek irrelevant information and that even if the information sought is relevant, the RFPs are improper to the extent that the Subpoena requests production of documents that are more easily obtainable from Respondents. PPP notes that Complaint Counsel issued the Subpoena to PPP and served Complaint Counsel’s request for production of documents from TJE on the same day, that a number of the RFPs in the Subpoena overlap with the document requests issued to TJE, and that there is an Order in this case compelling TJE to produce many of the same categories of documents requested from PPP. *See* Order Granting Complaint Counsel’s Motion to Compel Production of Documents and Answers to Interrogatories, December 16, 2020.³

Complaint Counsel denies that the RFPs improperly duplicate requests for documents being sought from Respondents. Complaint Counsel asserts that nonparty printers have reported dealing directly with PPP and not Respondents concerning the challenged advertising, and that,

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with this Act or any order of the commission made in pursuance thereof.

15 U.S.C. § 49.

³ The December 16, 2020 Order Granting Complaint Counsel’s Motion to Compel required Respondents to produce material responsive to Complaint Counsel’s Requests for Production of Documents, for the relevant time period defined therein, no later than December 23, 2020. After this matter was returned to adjudication, Complaint Counsel informed the Office of Administrative Law Judges that because Respondents had provided a signed proposed consent order on December 23, 2020, Complaint Counsel agreed to defer Respondents’ discovery responses. Complaint Counsel further states that, now that the matter has been returned to adjudication, Complaint Counsel has requested that Respondents produce responsive material in compliance with the December 16 Order by May 12, 2021.

therefore, PPP may have relevant documents that are not in possession of Respondents. *See* Widor Decl., ¶ 22.⁴

IV.

Based on review and consideration of the Motion, the Opposition, the exhibits thereto and the record in this case, the information sought through the Subpoena is relevant. The record indicates that PPP had a role in distributing the alleged deceptive advertisements referenced in the Complaint. Widor Decl. ¶ 7; Motion Ex. E; Complaint ¶ 9 (Exhibits A-C). Furthermore, Complaint Counsel states that as part of discovery, Complaint Counsel issued nonparty subpoenas to auto dealers and printers concerning the advertising and marketing challenged in the Complaint, and that one of the nonparty printers reported that it dealt directly with PPP and not with Respondents. Widor Decl. ¶ 22. In addition, the registered agent for PPP, Jim Whelan (Motion Ex. G) has, according to Complaint Counsel, been listed by Respondents in their Initial Disclosures and on Respondents' Preliminary Witness List, thus indicating that information from PPP is relevant. Widor Decl. ¶ 9. Finally, Respondent Jeansonne is a manager of PPP (Motion Ex. F) and PPP and TJE share a business address. Widor Decl. ¶ 10. The foregoing is sufficient to establish that the requested documents are relevant within the meaning of Rule 3.31(c). *See also In re Basic Research, LLC*, Docket No. 9318, 2004 FTC Lexis 272, at *4-5 (Aug. 18, 2004) (holding that nonparty documents regarding compensation received from each respondent for, *inter alia*, marketing, advertising, or promoting the challenged products were discoverable because the documents might lead to information about the relationships between the corporate respondents, "which may be relevant to determining liability or drafting an appropriate remedy").

Furthermore, the fact that discovery indicates that one of the nonparty printers subpoenaed by Complaint Counsel reported that it dealt directly with PPP and not with Respondents rebuts the assertion that PPP's business records will necessarily be duplicative of those of TJE. In addition, the specifications of the Subpoena are stated with reasonable particularity, as required under Rule 3.34.

The record further shows that PPP has, to date, failed to comply with the Subpoena. As noted above, PPP did not serve any formal response to the Subpoena or serve objections to the specific RFPs. PPP also did not file a motion to quash or limit the Subpoena, as permitted by FTC Rules. *See* 16 C.F.R. § 3.34(c) ("Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation . . .").

⁴ Complaint Counsel argues that PPP has waived any claim that Complaint Counsel can more easily or conveniently obtain the subject documents from Respondents because PPP failed to raise the objection when its response to the Subpoena was originally due or, according to Complaint Counsel, during meet and confer negotiations. PPP did, however, raise this argument in its Response to Complaint Counsel's Motion to Compel PPP's compliance with the Subpoena, referenced above. Under these circumstances, the argument will not be deemed waived for purposes of the instant Motion.

PPP contends that much of the requested discovery is more easily obtainable from Respondents, and notes that it has been held that “when information or documents are held by both a non-party and a party, one should seek that information first from the party.” *Tacita Fair v. Commun. Unlimited, Inc.*, 2019 U.S. Dist. LEXIS 7632, at *5 (E.D. Mo. Jan. 16, 2019) (citations omitted). PPP’s contention is conclusory and unsupported. In the instant case, to the extent there are document requests to PPP that have some overlap with document requests to Respondents, the record shows that there have been substantial difficulties in procuring documents from Respondents, and that there is currently an outstanding order compelling production of documents from TJE. Under these circumstances, PPP has failed to demonstrate that it is more convenient or less burdensome for Complaint Counsel to obtain the requested documents from Respondents. *See Tacita Fair*, 2019 U.S. Dist. LEXIS 7632, at *5 (denying nonparty’s motion to quash and noting that the plaintiff had tried to obtain similar discovery from the defendants three times).

V.

For all the foregoing reasons, the Motion is GRANTED. It is hereby ORDERED that Complaint Counsel’s request for court enforcement of the Subpoena issued to PPP be and hereby is certified to the Commission, with the recommendation that district court enforcement be sought.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 13, 2021