PUBLIC

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

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, Respondents.	)	Docket No. 9395

ORDER ON COMPLAINT COUNSEL'S MOTION TO PRECLUDE OR LIMIT DEPOSITION

I.

On July 15, 2021, Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed a Motion to Preclude or Limit Respondents Traffic Jam Events, LLC and its president, David J. Jeansonne II (collectively, "Respondents") from taking the deposition of a former FTC paralegal. Respondents filed an opposition to the Motion on July 21, 2021 ("Opposition"). As set forth below, the Motion is GRANTED in part and DENIED in part.

II.

Respondents seek to depose Emilie Saunders, a former FTC paralegal. Tankersley Declaration ("Tankersley Decl.") ¶¶ 4, 5. In June 2020, while working at the FTC, Ms. Saunders executed a declaration in connection with litigation between the FTC and Respondents (the "Saunders Declaration") that had been filed in the United States District Court for the Eastern District of Louisiana (the "Federal Court" matter). *Id*; Exhibit A. The Saunders Declaration recites that Ms. Saunders worked on the investigation of Respondents and that she obtained certain documents regarding Respondents from searches of the internet and social media, including corporate filings, court records, and advertisements. The referenced documents were attached to the Saunders Declaration.[1]

[1] On August 7, 2020, the FTC filed a voluntary dismissal of the Federal Court matter and the Administrative Complaint was issued the same day.

Complaint Counsel identified Ms. Saunders in Complaint Counsel's Initial Disclosures in this case as an individual "likely to have information relating to the practices at issue in the complaint." Complaint Counsel also identified Ms. Saunders as a potential witness on Complaint Counsel's preliminary witness list, who was anticipated to testify about "(i) Respondents' advertising, marketing, and promotional material; and (ii) consumer complaints." Ms. Saunders left the FTC in 2020. Complaint Counsel has since determined not to call Ms. Saunders as a witness, and in July 2020, after Respondents' inquiries into deposing Ms. Saunders, notified Respondents that Ms. Saunders will not be a witness for the FTC in this matter. Tankersley Decl. ¶¶ 5, 6; Exhibit B.

III.

Under Rule 3.33(b), the Administrative Law Judge may order "that a deposition shall not be taken upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under §3.31(c) . . . ." 16 C.F.R. § 3.33(b). Pursuant to FTC Rule 3.31(c)(1), "[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). "Discovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency . . . ." 16 C.F.R. § 3.31(c)(4).

According to Complaint Counsel, in meet and confer discussions, Respondents made clear that they seek to probe Ms. Saunders' investigative work in order to challenge the adequacy of the information the Commission possessed when it decided to file the Federal Court matter and, later, to issue the Administrative Complaint. Complaint Counsel argues that such matters are beyond the permissible scope of discovery, including because of privilege, and that therefore, the deposition should be precluded. Complaint Counsel argues in the alternative that if any deposition of Ms. Saunders is allowed, it should be limited to the "four corners" of the Saunders Declaration.

Respondents' Opposition confirms that they are seeking discovery into the extent of Ms. Saunders' investigation, including what information she obtained and from where; whether she discovered or investigated any consumer complaints, to whom she presented the information, and "what other facts were developed and documents gathered." Opposition at 7. *See also* Opposition at 6 ("Respondents simply want to know if any factual information existed to bring this Complaint, and, if so, what that factual information was and where it came from."). Respondents contend that such information is relevant to determine whether the Commission had a proper basis for bringing the Complaint, citing 15 U.S.C. § 45(n).

As the Commission stated in *In re Exxon Corporation*:

> [I]t has long been settled that the adequacy of the Commission's 'reason to believe' a violation of law has occurred and its belief that a proceeding to stop it would be in the 'public interest' are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission

> has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

In re Exxon Corp., Docket No. 8934, 1974 FTC LEXIS 226 at *2-3 (June 4, 1974). Accordingly, established precedent holds that the reasons for issuing a complaint and the information considered or evaluated prior to issuance, "are outside the scope of discovery, absent extraordinary circumstances." *In re Axon Enter.*, 2020 FTC LEXIS 127, at *7 (July 21, 2020) (quoting *In re LabMD, Inc.*, 2014 FTC LEXIS 45, at *7 (Mar. 10, 2014) (denying the respondents' motion to compel discovery into the reasons that the respondents' merger was being challenged in an administrative action by the FTC, rather in a federal court action by the United States Department of Justice)). *See also e.g.*, *In re Basic Research LLC*, 2004 FTC LEXIS 210, *10-11 (Nov. 4, 2004) (denying as irrelevant discovery into the Commission's decision to file the complaint); *In re Metagenics, Inc.*, 1995 FTC LEXIS 23, *1-2 (Feb. 2, 1995) (denying as irrelevant discovery of documents that "led up to the complaint" and discovery related to respondent's claim that it had been unfairly singled out for prosecution).

In addition, inquiry into the reasons for issuing a complaint and the information considered or evaluated prior to issuance typically implicates privileged matters that are entitled to protection. As stated in *Axon*, "any 'attempt to probe the mental processes' of investigators and the decision-making leading up to the complaint 'is ordinarily privileged since [such information relates] to an integral part of the decision-making process' of government." *In re Axon*, 2020 FTC LEXIS 127, at *8 (quoting *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, at *5 (June 16, 1967)). *See also In re Volkswagen of Am., Inc., et al.,* 1985 WL 260890, at *3 (Mar. 12, 1985) (rejecting respondent's effort to depose two of complaint counsel's consultants, stating that information pertaining to litigation strategy "involves the most intimate details of attorney deliberations and is entitled to the highest degree of protection. It appears obvious that any deposition of [the consultants] will inevitably penetrate complaint counsel's mental impressions, thought processes, strategy, and conclusions").

Respondents contend that they are entitled to determine whether the Commission had information to conduct the "necessary analysis as required by 15 U.S.C. § 45(n) to bring the Complaint." Opposition at 6. This argument is without merit. Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), provides that "[t]he Commission shall have no authority under this section or [through rulemaking proceedings] to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." An administrative complaint does not "declare" that a practice is unlawful; rather, as stated in the Complaint in this matter, a complaint constitutes the Commission's determination that there is "reason to believe" that unlawful conduct has occurred, and that a proceeding to determine the merits of the claim "is in the public interest." *See, e.g.*, Complaint at 1. In addition, although the Complaint includes a single, "boiler-plate" allegation that Respondents' advertisements constitute "unfair or deceptive practices" in violation of the FTC Act (Complaint ¶ 19), the Complaint alleges deceptive advertising, and does not directly allege or seek to support an independent finding that

Respondents' advertisements were also "unfair" because of substantial consumer injury. *Compare In re LabMD, Inc.*, 2016 FTC LEXIS 128, *12-13 (July 28, 2016) (Complaint alleged that the respondent's failure to have "reasonable and appropriate" computer security, which resulted in substantial consumer injury, constituted "an unfair act or practice in violation of Section 5 of the FTC Act"). Moreover, "[i]t is well established that proof of deception does not require proof of actual consumer injury." *In re Daniel Chapter One et al.*, No. 9329, 2009 WL 2584873, at *92 (Aug. 5, 2009).

IV.

In the instant case, it is readily apparent that Respondents are impermissibly seeking to discover the reasons for the Commission's decision to litigate against Respondents and, specifically, the information considered or evaluated in making that decision. The above-cited cases make clear that such discovery is generally disallowed. Respondents have not identified any extraordinary circumstances that would justify departing from the general rule. For these reasons, the deposition could be precluded in its entirety; however, to the extent it is possible for Respondents to depose Ms. Saunders solely on the statements made in the Saunders Declaration, and avoid violating the discovery limits described herein, the deposition will be allowed.

Accordingly, Complaint Counsel's Motion is GRANTED in part and DENIED in part. The deposition may proceed consistent with the limits set out in this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 23, 2021