

**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 ON COMPLAINT COUNSEL’S MOTION FOR SANCTIONS

I.

On June 21, 2021, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a motion for sanctions (“Motion”) against Respondents Traffic Jam Events, LLC (“TJE”) and its president, David J. Jeansonne II (“Jeansonne”) (collectively, “Respondents”). Complaint Counsel requests an order of default against Respondents as a consequence for Respondents’ alleged failure to comply with certain Orders issued in this case, addressed below. Respondents filed an opposition to the Motion on June 28, 2021 (“Opposition”). As set forth below, the Motion is GRANTED IN PART.

II.

A.

The FTC’s Complaint against Respondents alleges three counts of violating the FTC Act. Count I alleges deceptive advertising regarding COVID-19 government stimulus benefits. Complaint ¶¶ 15-16; *see also* ¶ 5. 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. Complaint ¶¶ 17-18; *see also* ¶ 12. Count III alleges that Respondents violated the FTC Act by failing to make certain disclosures required under the Truth in Lending Act (“TILA”) and Regulation Z, 12 C.F.R. § 226.24(d), in Respondents’ advertisements promoting closed-end credit. Complaint ¶¶ 14, 20-23.

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. Respondents deny that they disseminated any deceptive advertising, or any advertising failing to make required federal disclosures. Answer ¶¶ 5, 12, 14, 15, 17, 21.

B.

On December 16, 2020, on motion by Complaint Counsel, an Order was issued directing Respondent TJE to produce certain documents in response to Complaint Counsel's first request for production of documents¹ and to provide complete, responsive answers to Complaint Counsel's first set of interrogatories to TJE no later than December 23, 2020 ("December 16 Order").

On June 9, 2021, Complaint Counsel filed a motion for sanctions against Respondents for failure to comply with the December 16 Order ("First Motion for Sanctions").² As explained in the June 29, 2021 Order, which granted Complaint Counsel's First Motion for Sanctions in part ("June 29 Order"), Complaint Counsel requested entry of default against Respondents, or in the alternative, to enter a number of specific adverse findings against Respondents, together with other relief. Complaint Counsel demonstrated that, although on May 12, 2021, Respondents produced some materials required under the December 16 Order, such as advertisements and related materials, the production did not include documents from

¹ Specifically, the order directed TJE to produce, without limitation: a copy of each unique Advertisement and Promotional Material ("Advertising"); invoices; work orders; documents sufficient to show the relationship between TJE and Platinum Plus Printing, including any agreements; documents sufficient to show the relationship between TJE and the telephone numbers and websites listed on Respondents' Advertising; data files showing mailing information relating to Respondents' Advertising; sales logs and any other materials tracking leads or consumer responses to Respondents' Advertising through a customer relationship management database or otherwise; email, text messages, and any other communications to, from, or copying David J. Jeanson II, Justin Brophy, Chad Bullock, Jim Whelan, William Lilley, and Mariela Everst relating to Respondents' Advertising; business plans, proposals, financial analyses, market or sales strategies, sales projections, sales pitches or prospectuses, or return on investment analyses relating to Respondents' Advertising; all complaints relating to Respondents' Advertising; all documents relating to the FTC or compliance with consumer protection laws; all documents relating to the Florida, Kansas, and Indiana investigations and lawsuits; and documents sufficient to show all persons having any responsibilities for or on Respondents' behalf for any Advertising.

² On December 23, 2020, the parties signed a proposed consent order. On December 28, 2020, Complaint Counsel filed a consent motion with the Commission seeking to withdraw the matter from adjudication for the purpose of considering the parties' proposed consent order, pursuant to FTC Rule 3.25(b). The Commission granted the consent motion on the same day and ordered the matter withdrawn from adjudication. The Commission extended the withdrawal from adjudication twice, by Orders issued on March 1, 2021 and April 2, 2021. On May 3, 2021, the Commission ordered the matter returned to adjudication, stating that "consideration of the consent proposal is no longer in the public interest." Commission Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date, May 3, 2021, at 1. The Commission's Order also set a new hearing date of September 14, 2021.

numerous categories addressed in the December 16 Order.³ The record also demonstrated that the answers to interrogatories provided by Respondents were insufficient, as unsworn and lacking in meaningful detail. In addition, electronically stored information (“ESI”) had not yet been produced, although the parties appeared to be making progress in agreeing to a protocol that would protect against the production of privileged communications.

Based on the applicable law and the record then presented, the presiding Administrative Law Judge declined to enter the requested sanctions of default or adverse inferences. The June 29 Order directed Respondents, by July 13, 2021, to “submit a sworn statement verifying that Respondents have completed their obligations to provide discovery in compliance with the December 16 Order” and warned Respondents that “[f]ailure to comply may result in an order to show cause why sanctions should not be imposed against Respondents, up to and including default.” The June 29 Order also prohibited Respondents from introducing into evidence or otherwise relying on any improperly withheld or undisclosed information; and precluded Respondents from objecting to Complaint Counsel’s using secondary evidence to prove what the withheld or undisclosed materials would have shown.

III.

A.

The record on the Motion, including the declarations and the correspondence between the parties submitted as exhibits shows the following. Since the June 29 Order, Complaint Counsel has not received any documents responsive to Complaint Counsel’s first request for production. Declaration of Thomas J. Widor (“Widor Decl.”) ¶ 6; Exhibit A. With respect to ESI, Respondents have provided Complaint Counsel with the name of the third party custodian that maintains Respondents’ email server, but access to the email communications has not yet been provided to Complaint Counsel. Exhibit A. TJE served Complaint Counsel with its sworn answers to Complaint Counsel’s first set of interrogatories on July 13, 2021. In addition, Respondents did not submit the sworn statement of compliance directed by the June 29 Order.

Complaint Counsel contends that Respondents continue to be in violation of the December 16 Order by failing to produce all required documents and failing to provide complete responsive answers to interrogatories. Complaint Counsel further contends that Respondents’ failings are unjustified and willful, and are intended to “run out the clock” on discovery and force Complaint Counsel to trial without a full evidentiary record. Complaint Counsel argues that the June 29 Order did not move Respondents to compliance, despite the threat of a default sanction, and that, at this stage, holding Respondents in default, together with striking their Answer and Affirmative Defenses, is the appropriate sanction.

Respondents argue that default is too drastic a remedy. Respondents maintain that Respondents have fully cooperated with Complaint Counsel; that Complaint Counsel already

³ These include: (i) documents pertaining to Platinum Plus Printing; (ii) documents pertaining to websites and telephone numbers on Respondents’ advertising; (iii) sales logs and other materials tracking consumer leads; (iv) emails and text messages; (v) complaints; (vi) compliance materials; (vii) documents pertaining to state investigations; and (viii) documents identifying persons responsible for Respondents’ advertising.

possesses substantial information on Respondents, both from prior document productions from Respondents and as a result of Complaint Counsel’s non-party discovery; and that Complaint Counsel has failed to undertake the inspection and copying of documents offered by Respondents.

B.

The authority to impose sanctions is set forth in Commission Rule 3.38(b), and includes, among other sanctions, the authority to “[r]ule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.” 16 C.F.R. § 3.38(b)(6)⁴

Sanctions may be imposed for failing to comply with a discovery obligation where the failure to comply was “unjustified and the sanction imposed ‘is reasonable in light of the material withheld and the purposes of Rule 3.38(b).’” *In re ECM BioFilms, Inc.*, 2014 FTC LEXIS 44, at *5 (Mar. 11, 2014) (quoting *In re IT&T*, 104 F.T.C. 280, 1984 WL 565367 at **127 (July 25, 1984)). The explanation for a party’s failure to comply with a discovery order “is crucial in determining whether to invoke the sanctions.” *In re Grand Union Co.*, 1983 FTC LEXIS 61, at *594 (July 18, 1983).

⁴ Rule 3.38(b) states in full:

If a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to the following:

- (1) Order that any answer be amended to comply with the request, subpoena, or order;
- (2) Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;
- (3) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- (4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;
- (5) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (6) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

16 C.F.R. § 3.38(b).

IV.

A.

The record demonstrates that Respondents remain in violation of the December 16 Order with respect to the production of documents. The categories of documents that were outstanding as of the June 29 Order remain outstanding. In addition, ESI, which consists of Respondents' email communications, has not been produced. Complaint Counsel asserts, and Respondents do not rebut, that while Respondents have provided Complaint Counsel with the name of the third party custodian, Respondents have done nothing to facilitate Complaint Counsel's access to the emails with the third party, or to designate or otherwise describe the responsive documents. Widor Decl. ¶ 8; Motion Exhibit A; Declaration of David J. Jeansonne II ("Jeansonne Decl.") ¶¶ 17-18; Opposition Exhibit 1.

Moreover, Respondents fail to justify their conduct. Respondents contend that it is Complaint Counsel's burden to initiate and complete all necessary arrangements for ESI inspection with the third party custodian, and to search years' worth of documents kept by the custodian, as well as documents at Respondents' offices, to find responsive documents. Opposition at 3-4; Motion Exhibit A; Jeansonne Decl. ¶ 15. Respondents note that they are entitled under Rule 3.37(c)(i) to produce documents as they are kept in the usual course of business. *See* 16 C.F.R. § 3.37(c)(i) ("A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request."). However,

it is not enough for a party who produces documents as they are kept in the ordinary course of business to simply invite the requesting party to sift through its file cabinets in an effort to locate those documents that are responsive to its requests, *Oklahoma, ex rel. Edmondson*, 2007 WL 1498973, *5 (N.D. Okla. May 17, 2007) (and cases cited therein), or to engage in a wholesale "document dump" with an instruction to the requesting party to "go fish." *Residential Constructors, LLC v. ACE Property and Cas. Ins. Co.*, 2006 WL 1582122, *2 (D. Nev. June 5, 2006); *U.S. Commodities Futures Trading Commission v. American Derivatives Corp.*, 2007 WL 1020838, *2 (N.D. Ga. Mar. 30, 2007) (and cases cited therein).

Henderson v. Holiday CVS, L.L.C., No. 09-80909-CIV, 2010 WL 11505168, at *2 (S.D. Fla. Aug. 11, 2010) (interpreting Federal Rules of Civil Procedure Rule 34(b)(2)(E)(i)).⁵

⁵ Federal Rule 34(b)(2)(E)(i) states in pertinent part:

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; . . .

Where federal rules are similar to FTC rules, the federal rules and their interpretation may be looked to for guidance. *In re LabMd, Inc.*, 2014 WL 253518, at *2 n.3 (F.T.C. Jan. 16, 2014).

In addition, Respondents unduly focus on ESI, which consists of email communications, and do not attempt to justify the failure to produce other categories of documents remaining to be produced pursuant to the December 16 Order. Furthermore, Respondents' refrains that Complaint Counsel already has ample non-party discovery relating to Respondents and that Complaint Counsel has "all documents relating to" Count 1, Opposition at 5, does not justify the current status of Respondents' required document production and also ignores that the Complaint in this case contains three counts.

Based on the foregoing, the record shows that Respondents remain in violation of the December 16 Order and that the violation is not justified.

B.

The December 16 Order directed submission of complete and responsive answers to Complaint Counsel's first set of interrogatories to TJE. Respondents thereafter submitted answers that were unsworn and lacked meaningful detail, as noted in the June 29 Order, and therefore remained in violation of the December 16 Order. On July 13, 2021, Respondents submitted sworn answers. Complaint Counsel contends the answers are neither complete nor responsive. Respondents' Opposition does not analyze or defend the answers, but instead focuses on Jeansonne's deposition, appearing to imply that this is a suitable substitute for interrogatory answers from TJE. Opposition at 6-7.

Upon review, the interrogatory responses, in summary, do not fairly address the substance of the question, are evasive, and/or refer Complaint Counsel to unidentified documents or deposition testimony of Respondent Jeansonne. Motion Exhibit B. For example, for interrogatory number 3, which requested TJE to identify and describe in detail the role of third party agents with respect to Respondents' advertising and promotional materials, TJE responded with "boiler-plate" objections and, subject to those objections, responded that "the Advertisement and Promotional Material is created by agents and third parties as identified in Mr. Jeansonne's deposition" Respondents did not specify any section or sections of that deposition where any such information might be found. Similarly, interrogatory number 5 requested TJE, for each advertisement or promotion involving a prize or giveaway, to describe in detail the manner for selecting winners, including any conditions or prerequisites for winning. In response, TJE inserted objections and answered, "it is impossible for Respondent to give an intelligible response without reference to specific materials, as each mailer or advertisement may give a different manner or method for selecting winners." However, Respondents did not reference any documents.

It is true that FTC Rule 3.35(c) permits a party to specify documents in connection with answering an interrogatory. Such an answer is sufficient, however, only if the specification includes "sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained" and the party serving the interrogatory is given "reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries." 16 C.F.R. § 3.35(c). The interrogatory answers at issue do not meet this standard. In addition, it is inappropriate to answer an interrogatory with a

general reference to other discovery, such as initial disclosures, which TJE did in partial answer to interrogatory number 3 (stating that the agents and third parties involved with Respondents' advertising were identified "in Mr. Jeansonne's deposition, including the persons listed in Respondent's Initial Disclosures"). Motion Exhibit B at 2. See *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 680 (D. Kan. 2004) (holding that the plaintiff's answer to an interrogatory referencing the plaintiff's complaint and initial disclosures was improper under Federal Rule of Civil Procedure 33(d)).⁶

Based on the foregoing, TJE's answers do not comply with the December 16 Order, and the record does not present adequate justification for the failure to comply.

C.

Having determined that Respondents remain in violation of the December 16 Order and that the violation is unjustified, the question remains as to whether Complaint Counsel's requested sanction of default is reasonable under the circumstances.

Entry of a default judgment is "the most severe in the spectrum of sanctions" available. *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). See also *In re Rambus, Inc.*, 2003 FTC LEXIS 25, at *6-7 (Feb. 26, 2003) (characterizing default judgment as a "drastic sanction"). The role of sanctions is to "encourage discovery and to promote the production of relevant evidence" and thus courts "have generally been reluctant to impose sanctions that would dispose of a case without regard to the merits except in cases involving extreme contumacy against orders to produce evidence without which the elements of dispute cannot be determined on the merits." *In re R.J. Reynolds Tobacco Co.*, 1988 FTC LEXIS 88, at *5 (Oct. 28, 1988) (citations omitted). As explained in *LabMD*, "Rule 3.38 is designed both to prohibit a party from resting on its own concealment and to maintain the integrity of the administrative process." *In re LabMD, Inc.*, 2014 FTC LEXIS 42, *9 (Mar. 10, 2014) (quoting *In re Grand Union Co.*, 1983 FTC LEXIS 61, at *594).

Ultimately, whether sanctions are warranted, and the form of any such sanctions, are discretionary determinations for the Administrative Law Judge. *In re ECM BioFilms, Inc.*, 2014 FTC LEXIS 171, at *12-13 (Feb. 4, 2014). See 16 C.F.R. § 3.38(b) (the Administrative Law

⁶ Similar to FTC Rule 3.35(c), Federal Rule 33(d) provides:

Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

- (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
- (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Judge “*may take such action in regard thereto as is just*”) (emphasis added). *See also In re USLife Credit Corp.*, 1978 FTC LEXIS 314, at *122-23 (Sept. 26, 1975) (“[T]he administrative law judges may properly exercise discretion in deciding what kind of sanction, if any, is warranted.”).

Based on the present record, Complaint Counsel’s requested sanction of default, together with a striking of Respondents’ Answer and Affirmative Defenses, is not reasonable. Complaint Counsel’s cited cases reflect more egregious conduct than presented in the instant case. Complaint Counsel relies on *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 763 (Oct. 16, 1996), in which the Administrative Law Judge found two of the respondents to be in default. In that case, the respondents had failed to answer the complaint or otherwise participate in the proceedings, including responding to discovery. *Id.* at *2-5. In *RustEvader Corp.*, the respondent, after answering, had ceased to participate in proceedings, including discovery, and on motion, the Administrative Law Judge struck the answer and entered a default judgment. *In re RustEvader Corp.*, 1996 FTC LEXIS 368, *at 2-4 (Aug. 15, 1996).

While default may not be appropriate at this time, it is apparent that additional action is required, as the June 29 Order was insufficient to bring Respondents into compliance with the December 16 Order. A reasonable and appropriate sanction for Respondents’ discovery failures is provided under Rule 3.38(b)(2), which permits an inference that “testimony, documents, or other evidence” required to be provided in discovery and not provided “would have been adverse to the party[.]”

The adverse inference rule “provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” *In re IT&T Corp.*, 104 F.T.C. 280, 1984 FTC LEXIS 44, at *382 (July 25, 1984 (quoting *International Union, United Auto. v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972)). The court in *International Union* explained:

As Professor Wigmore has said:

“. . . The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party’s fear of exposure. But the propriety of such inference in general is not doubted.”

International Union, 459 F.2d at 1336.

Accordingly, Complaint Counsel's Motion is GRANTED IN PART, and it is hereby ORDERED that, for purposes of a decision on the merits in this case, pursuant to Rule 3.38(b)(2), the Administrative Law Judge may infer that discovery ordered to be provided by Respondents that was not provided by Respondents, would have been adverse to Respondents.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 9, 2021