

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 DENYING MOTION TO COMPEL
NONPARTY TO COMPLY WITH SUBPOENA**

I.

On November 6, 2020, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a Motion to Compel Platinum Plus Printing, LLC (“PPP”), a nonparty, to comply with a subpoena *duces tecum* issued by Complaint Counsel on September 10, 2020 (“Motion to Compel”). On November 17, 2020, PPP filed an opposition to the Motion (“Opposition”).¹

For the reasons set forth below, the Motion to Compel is DENIED.

¹ On November 18, 2020, Complaint Counsel filed a Motion for Leave to File a Reply to the Opposition, together with a proposed reply. FTC Rule 3.22(d) states in pertinent part: “Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge’s or the Commission’s attention to recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief.” 16 C.F.R. § 3.22(d). Complaint Counsel’s proposed reply does not present any recent important developments or controlling authority that could not have been raised in Complaint Counsel’s original motion. Accordingly, Complaint Counsel’s motion for leave to file the proposed reply is DENIED.

II.

Complaint Counsel contends that PPP has acknowledged it possesses responsive documents but has failed to produce any responsive material and that therefore Complaint Counsel is entitled to an order compelling such production by PPP, pursuant to the authority of FTC Rule 3.38. Specifically, Complaint Counsel argues: “When a third party fails to make any or inadequate disclosures required” by a subpoena *duces tecum* issued pursuant to Rule § 3.34, “Complaint Counsel may move to compel their production under Rule § 3.38.” Motion to Compel at 3.

PPP argues that Complaint Counsel’s Motion to Compel should be denied. According to PPP, Rule 3.38 does not authorize an order compelling a nonparty to comply with a subpoena; Complaint Counsel’s subpoena improperly seeks production of documents from PPP that are more easily obtained from Respondents; and PPP and Complaint Counsel have not yet had a meaningful opportunity to negotiate PPP’s objections.

III.

The authority for motions to compel is set forth in Rule 3.38(a), which states in relevant part:

Motion for order to compel: A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37.

16 C.F.R. § 3.38(a).

An order compelling a nonparty’s compliance with a subpoena issued under § 3.34 is not listed as one of the orders that can be obtained through a motion to compel under Rule 3.38(a). While Rule 3.38(a) authorizes a motion for an order to compel production of documents under § 3.37, Rule 3.37 sets forth: “Any party may serve on *another party*” a request to produce documents. 16 C.F.R. § 3.37(a) (emphasis added). With respect to nonparties, Rule 3.37 sets forth: “A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34.” 16 C.F.R. § 3.37(a). Rule 3.34 does not provide for a motion for an order to compel a nonparty to produce documents. 16 C.F.R. § 3.34.²

² Rule 3.34 provides for subpoenas to compel testimony or documents, for trial or discovery, and for the right to assert objections through a motion to quash:

(a) Subpoenas *ad testificandum*. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena or to attend and give testimony at an adjudicative hearing.

(b) Subpoenas *duces tecum*; subpoenas to permit inspection of premises. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit

On the specific issue of noncompliance with a subpoena by a nonparty, Rule 3.38(c) states that “in instances where a nonparty fails to comply with a subpoena or order, [the ALJ] shall certify to the Commission a request that court enforcement of the subpoena or order be sought.” 16 C.F.R. § 3.38(c). 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 ALJ and authorization from the Commission, derives from the FTC’s authorizing statute. As set forth in Section 9 of the FTC Act:

[I]n case of disobedience to a subpoena the commission 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.

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.

Consistent with the above, the Commission has affirmed that “the Commission’s organic statute prescribes that the enforcement of a subpoena must be undertaken in Federal District Court.” *In re Market Dev. Corp.*, 95 F.T.C. 100, 225, 1980 FTC LEXIS 162, *245-46 (Comm. Jan. 15, 1980). Accordingly, “the Commission cannot itself enforce [a] subpoena[.]” *In re Cowles Communications, Inc.*, 80 F.T.C. 1007, 1972 FTC LEXIS 251, *4 (Comm. 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).”). *See, e.g., In re Trans Union Corp.*, 123 F.T.C. 393, 1997 FTC LEXIS 337 (Comm. Feb. 11, 1997); *In re American Family Publishers, Inc.*, 1991 FTC

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. . . .

(c) Motions to quash; limitation on subpoenas. 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, . . .

LEXIS 9, *6-7 (Comm. Jan. 11, 1991) (granting requests to authorize court enforcement of subpoenas).³

Based on the foregoing, Complaint Counsel has failed to demonstrate that Rule 3.38 authorizes an order compelling a nonparty to comply with a subpoena.

IV.

For the above stated reasons, the Motion to Compel is DENIED. This Order is not ruling on the merits of any underlying dispute regarding Complaint Counsel's subpoena *duces tecum* to PPP, and is without prejudice to Complaint Counsel's ability to file a motion to certify to the Commission a request that court enforcement of the subpoena be sought, pursuant to Rule 3.38(c). No such motion shall be submitted prior to reaching an impasse after good faith, reasonable efforts to narrow and/or resolve any disputes as to the subpoena.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: November 20, 2020

³ See also decisions by ALJs: *In re Phoebe Putney Health Sys. Inc.*, 2013 FTC LEXIS 82, *2 n.2 (May 30, 2013) (denying request for an order requiring nonparty to comply with subpoena, stating: "A request to enforce a subpoena must be presented by a properly supported motion in accordance with Rule 3.22 and, ultimately, be resolved by a Federal Court," citing *inter alia* Rule 3.38(c)); *In re Rambus, Inc.*, 2003 FTC LEXIS 8, *1 (Jan. 2, 2003) (denying motion to compel a nonparty to comply with a document subpoena, and holding, based on Rule 3.38(c), that Respondent's "motion to compel [the nonparty] to produce documents pursuant to 16 C.F.R. § 3.38(a)(2) is inappropriate"); *In re Hoechst Marion Rousell, Inc.*, 2000 FTC LEXIS 155, *12-13 (Oct. 17, 2000) ("The Commission's Rules of Practice state 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). This rule is derived from the Commission's organic statute which sets forth 'in case of disobedience to a subpoena the Commission 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.' 15 U.S.C. § 49." Cf.; *In re 1-800 Contacts, Inc.*, (Jan. 17, 2017) available at <https://www.ftc.gov/system/files/documents/cases/170117orderdenyntncompel.pdf> at 2 (denying request for an order compelling nonparty to comply with a subpoena, or in the alternative to certify the matter to the Commission for court enforcement pursuant to Rule 3.31(c), because the subpoenaed documents were not relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, stating: "Absent this showing, there is no right to discover the documents requested by the subpoena, and the subpoena should not be enforced."). The order granting in part a motion to compel directed at a nonparty in *In re OSF Healthcare System*, 2012 FTC LEXIS 30 (Feb. 13, 2012), to the extent contrary to the foregoing cases, is an anomaly and against the weight of applicable authority.