

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

In the Matter of	)	
	)	
HomeAdvisor, Inc., a corporation,	)	
d/b/a Angi Leads,	)	Docket No. 9407
d/b/a HomeAdvisor Powered By Angi,	)	
	)	
Respondent.	)	

**ORDER DENYING COMPLAINT COUNSEL’S MOTION FOR  
DISCOVERY SANCTIONS AGAINST HOMEADVISOR, INC.**

**I.**

On September 14, 2022, Federal Trade Commission (“FTC”) Complaint Counsel filed an “Expedited Motion for Discovery Sanctions Against HomeAdvisor, Inc.” (“Motion”). The Motion alleges that Respondent HomeAdvisor, Inc. (“Respondent” or “HomeAdvisor”) failed to comply with its discovery obligations and this Court’s August 16, 2022 Order. HomeAdvisor filed a response opposing the Motion on September 26, 2022 (“Opposition”).

For the reasons set forth below, the Motion is DENIED.<sup>1</sup>

**II.**

The Complaint in this matter alleges that HomeAdvisor violated the provisions of the FTC Act by making false, misleading, or unsubstantiated representations to home service providers about the quality, characteristics, and source of information HomeAdvisor collected about potential customers that HomeAdvisor then sold to the providers. Complaint ¶¶ 61-69. On June 8, 2022, Complaint Counsel served HomeAdvisor with its Second Set of Requests for Production of Documents, including Request 14, which sought the following electronically stored information (“ESI”) (“ESI Request”):

For the time period from May 1, 2019, through October 31, 2019, recordings of all telephone calls between Your sales agents and prospective Service Providers during

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<sup>1</sup> Complaint Counsel’s Motion requested an expedited ruling on the basis that “expert deadlines are imminent.” Motion at 1. Thereafter, on September 19, 2022, the Commission issued an Order Granting Complaint Counsel’s Expedited Motion to Continue Evidentiary Hearing Date and Prehearing Deadlines, which postponed the hearing commencement date and extended prehearing deadlines by three months. Accordingly, Complaint Counsel’s request to expedite is DENIED.

which the prospective Service Provider completed Your Voice Log Process and responded affirmatively to all of the questions asked in Your Voice Log Process. This request seeks, to the extent available, recordings of the entirety of such telephone calls, and is not limited to the recordings of the Voice Log Process.

Motion, Exhibit A at 3 (emphases omitted).

On August 16, 2022, Complaint Counsel's motion to compel HomeAdvisor's production of documents responsive to the ESI Request ("August 16 Order") was granted.<sup>2</sup> Subsequently, on August 30, 2022, HomeAdvisor provided Complaint Counsel with a link to a virtual machine containing millions of files. Motion at 3.

### III.

Commission Rule 3.37(c)(ii) governs the production of ESI and provides that "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form in which it is ordinarily maintained or in a reasonably usable form." 16 C.F.R. § 3.37(c)(ii). In addition, "[a] party need not produce the same electronically stored information in more than one form." 16 C.F.R. § 3.37(c)(iii).

Commission Rule 3.38(b) allows the Administrative Law Judge, upon motion by the aggrieved party, to impose sanctions upon a party who "fails to comply with any discovery obligation." 16 C.F.R. § 3.38(b). "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)). Whether sanctions are warranted, and the form of any such sanctions, are discretionary determinations. *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 Judge "may take such action in regard thereto as is just") (emphasis added).

In its Motion, Complaint Counsel asserts that in response to the ESI Request, HomeAdvisor "dumped 30-50 million data files, many of which are nonresponsive, into a practically unsearchable depository." Motion at 1. Complaint Counsel contends that these data files are "not reasonably usable" because "HomeAdvisor has not provided the ability to make the ESI searchable" apart from searching by date, and that there is "no functional way to narrow [the records] to responsive recordings." Motion at 5-6. Complaint Counsel further argues that "where ESI is produced as ordinarily maintained, a producing party cannot merely facilitate access to voluminous documents without regard to responsiveness." Motion at 5. As a result, Complaint Counsel argues that HomeAdvisor violated the August 16 Order, and that imposing sanctions is warranted. Motion at 7.

In its Opposition, HomeAdvisor makes the following representations regarding the production:

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<sup>2</sup> As an alternative to producing the documents, the August 16 Order allowed for Respondent to stipulate to treating its prior production of sales call recordings as representative of HomeAdvisor's typical sales calls.

- HomeAdvisor’s responsive recordings were created and historically stored within HomeAdvisor’s prior recording database, referred to as VPI, in VPI’s proprietary VP2 format. Opposition at 3.
- VPI is no longer in business and HomeAdvisor removed all recordings from VPI when it ceased using VPI. Opposition at 3. However, written records of previously stored recordings still appear within VPI and HomeAdvisor “presently knows of no way to” “eliminate from VPI written records relating to non-responsive files.” Opposition at 3-4.
- HomeAdvisor’s VPI files are presently kept in archival storage within the Amazon Web Services Glacier database (“Glacier”). Opposition at 2.
- “The only known means to access and use VP2 files is to restore them to their original place within HomeAdvisor’s own legacy VPI database.” Opposition at 3.
- To comply with the August 16 Order, HomeAdvisor restored the VP2 files it deemed responsive from Glacier to the VPI database and provided Complaint Counsel with access via a virtual machine created for Complaint Counsel. Opposition at 3.
- VPI’s functionality allows Complaint Counsel to listen to recordings within VPI, download and export the recordings in .WAV format, filter by date, and filter by sales representative. Opposition at 3, 5.

HomeAdvisor argues that Complaint Counsel’s argument erroneously focuses on whether the ESI was produced in a “reasonably usable” form. Opposition at 7. According to HomeAdvisor, under Rule 3.37(c)(ii), ESI need only be produced “in a form in which it is ordinarily maintained *or* in a reasonably usable form— not both.” Opposition at 7. HomeAdvisor argues that, by restoring responsive VP2-format recordings to the original VPI database and providing Complaint Counsel with access to VPI, it has produced its data in the form in which the data is “ordinarily maintained,” and that, therefore, HomeAdvisor has complied with Rule 3.37(c)(ii). Opposition at 6-7. HomeAdvisor states although it has attempted to remove nonresponsive files from VPI, these files appear “as they did when VPI was active,” and that Complaint Counsel seeks a “non-existent ‘technological workaround’” to the limitations present in VPI. Opposition at 6. Moreover, HomeAdvisor states that it has operated in good faith and expended significant time and resources in restoring responsive files to VPI, resolving technical issues that Complaint Counsel experienced, and attempting to remove nonresponsive written records from VPI. *See* Opposition at 2-5, RX0002 at 1-2, RX0005 at 2-5. HomeAdvisor acknowledges that “VPI’s functionality is limited” but represents that it “continues to work with [Complaint Counsel] to address its questions and requests,” including by providing rosters of sales representatives employed during the responsive period and updating settings within VPI to enable Complaint Counsel to sort by representative name. Opposition at 4-5.

#### IV.

It is undisputed that Complaint Counsel’s ESI request does not specify a form for producing electronically stored information. Therefore, the relevant inquiry in determining HomeAdvisor’s compliance with Rule 3.37(c)(ii) is whether the ESI was produced “in a form in which it is ordinarily maintained or in a reasonably usable form.” 16 C.F.R. § 3.37(c)(ii). Complaint Counsel does not claim that HomeAdvisor produced ESI in a form other than that in which it is ordinarily maintained. Instead, Complaint Counsel’s criticisms of the production are

based entirely on the claim that the data produced is not reasonably usable. *See* Opposition at 5-6. However, the plain language of Rule 3.37(c)(2) and the inclusion of the word “or” clearly indicates two alternative production options are available. Reasonably interpreted, the language of the rule means that the produced ESI need only be in a “reasonably usable form” when the ESI is *not* produced in the form in which ordinarily maintained, and vice versa.

The above interpretation is further supported by decisions under Federal Rule of Civil Procedure 34(b)(2)(E), which is similar to FTC Rule 3.37(c).<sup>3</sup> In *Hahn v. Massage Envy Franchising, LLC*, the court explained that Federal Rule 34 “does not demand that a responding party produce ESI in the format the requesting party believes is a reasonably useable form.” 2014 WL 12899290, at \*8 (S.D. Cal. July 24, 2014). Instead, “Rule 34 only requires a responding party to produce ESI in a reasonably useable form when the responding party chooses to convert its data out of the form it is ordinarily maintained and into a different format for production.” *Id.* Similarly, in *Ark. River Power Auth. v. Babcock & Wilcox Power Generation Grp., Inc.*, the court found that where an ESI production was at issue, the relevant inquiry was whether the responding party “produced its ESI in the form in which it is ordinarily maintained *or* in a reasonably usable form or forms. The Rule clearly requires one or the other, but not both.” 2015 WL 2128312, at \*11 (D. Colo. May 5, 2015) (emphasis in original). Therefore, where Complaint Counsel has neither alleged nor provided evidence that HomeAdvisor produced ESI in a form other than that in which it was ordinarily maintained, HomeAdvisor was not required to produce the ESI in a “reasonably usable form.” 16 C.F.R. § 3.37(c)(ii).

Complaint Counsel’s contention that HomeAdvisor’s ESI production violates the August 16 Order because the VPI database contains nonresponsive files is similarly unavailing. In *In re Traffic Jam Events*, which Complaint Counsel cites in support of its Motion, the respondent did not produce any ESI at all, but merely provided Complaint Counsel with the name of a third-party email custodian and did “nothing to facilitate Complaint Counsel’s access to the emails with the third party.” 2021 WL 3701656, at \*3. In the instant case, by contrast, HomeAdvisor has affirmatively represented, including through sworn declarations, that only files responsive to the ESI request were repopulated into VPI, the original database in which the files were created, and that “there is no other way to produce and access the responsive recordings,” “nor is HomeAdvisor currently aware of a way to eliminate the written records of certain non-responsive files.” Opposition at 5-7; *see* RX0002 at 2, RX0005 at 2-3. In addition, HomeAdvisor represents that VPI has the functionality to allow Complaint Counsel to search the ESI files by date and sales representative. Opposition at 3, 5. Based on the foregoing, Complaint Counsel’s argument that HomeAdvisor “merely facilitate[d] access to voluminous documents without regard for responsiveness” is not persuasive. Motion at 5. As in *Martinez-Sanchez v. Anthony Vineyards, Inc.*, HomeAdvisor provided Complaint Counsel with “the same access” that it has,

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<sup>3</sup> Federal Rule of Civil Procedure 34(b)(2)(E)(ii) (“Federal Rule 34”) states:

If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms[.]

Fed. R. Civ. P. 34(b)(2)(E)(ii). Where, as here, a federal rule of procedure is similar to the Commission’s rules, cases applying the federal rule may be referred to for guidance. *See In re Traffic Jam Events, LLC*, 2021 WL 3701656, at \*4 n.5 (F.T.C. Aug. 9, 2021).

and “produced the electronically stored information in the form in which it is ordinarily maintained and with the same limitations . . . as [Respondent] experience[s].” 2021 WL 1696274, at \*8-9 (E.D. Cal. Apr. 29, 2021).

In summary, Complaint Counsel has failed to prove its contention that HomeAdvisor failed to comply with Commission Rule 3.37(c)(ii) and thereby violated the August 16 Order. Accordingly, Complaint Counsel has failed to demonstrate that a discovery sanction is appropriate.

V.

As set forth above, the Motion is DENIED.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: October 4, 2022