

Interlocutory Orders, Etc.

IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC,

AND

DAVID J. JEANSONNE II

Docket No. 9395. Order, June 9, 2021

Order granting Complaint Counsel's request for court enforcement of a subpoena to nonparty Platinum Plus Printing, LLC.

ORDER DIRECTING GENERAL COUNSEL TO ENFORCE NONPARTY SUBPOENA

On December 10, 2020, Complaint Counsel filed a motion requesting that the Chief Administrative Law Judge ("ALJ") certify to the Commission, pursuant to Commission Rule 3.38(c), 16 C.F.R. § 3.38(c), Complaint Counsel's request for court enforcement of a subpoena to nonparty Platinum Plus Printing, LLC ("PPP"). PPP opposed the motion, asserting that the subpoena was overbroad and sought information that was irrelevant or could be obtained from parties to the action. Following a period when this proceeding had been removed from adjudication, on May 13, 2021, the ALJ granted Complaint Counsel's motion, certifying their request for court enforcement of the subpoena and recommending that court enforcement be sought. Having reviewed the parties' respective filings and the ALJ's certification and recommendation, we direct the General Counsel to seek enforcement of the subpoena in federal district court.¹

Respondents Traffic Jam Events, LLC and its owner, managing member, and president, David J. Jeansonne II, provide marketing services to auto dealerships nationwide. Complaint ¶¶ 2, 3; Answer ¶¶ 2, 3. As Respondents put it, Traffic Jam Events "is in the business of creating mailers on behalf of automotive dealerships to promote automotive sales." Answer at 1. The Commission's Complaint charges that Respondents violated the FTC Act by (1) providing false or misleading information about COVID-19 stimulus relief in connection with their marketing of motor vehicles and (2) falsely or misleadingly advertising 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 ¶¶ 15-19. The Complaint also charges that Respondents failed to make certain disclosures required by the Truth in Lending Act and Regulation Z, 12 C.F.R. § 226.24(d). Complaint ¶¶ 20-23.

¹ We use the following abbreviations for citations to the pleadings:

- Motion: Complaint Counsel's Motion to Certify to the Commission a Request Seeking Court Enforcement of a Subpoena *Duces Tecum* Issued to Platinum Plus Printing, LLC (Dec. 10, 2020)
- Widor Decl.: Declaration of Thomas J. Widor attached to Motion
- Opposition: Platinum Plus Printing, LLC's Response to Complaint Counsel's Motion to Certify (Dec. 21, 2020)
- ALJ Order: Order Granting Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena (May 13, 2021)

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Complaint Counsel assert that nonparty PPP assisted Respondents in executing their deceptive advertising and marketing, including the dissemination of one of the COVID-19 mailers cited in the Complaint. Motion at 1. Complaint Counsel further assert that Respondents share numerous other connections to PPP, such as that Respondent Jeansonne is a manager of PPP; PPP's registered agent is a key employee of Respondent Traffic Jam Events; and PPP and Traffic Jam Events share a business address. Motion at 5; Widor Decl. ¶¶ 8-10. On September 10, 2020, Complaint Counsel served PPP with a subpoena *duces tecum* for the production of documents broadly regarding: PPP's corporate structure and relationship with Respondents, as well as any related agreements or payments (requests for production ("RFPs") 1-3); the creation, development, review, and dissemination of advertisements for Respondents (RFPs 4-6); communications relating to the Respondents and their customers, advertisements, and advertisement recipients (RFPs 7-9); complaints regarding Respondents or their advertising, and communications relating to the Federal Trade Commission (RFPs 10-11); and the identities of employees and others having responsibilities relating to advertisements in general and PPP's relationship with Respondents in particular (RFP 12). See Widor Decl. Ex. A.

PPP did not produce the requested documents, serve objections to the individual requests for production, or move to quash. See Widor Decl. ¶¶ 4, 23 & Ex. B. Instead, three days after the production deadline, on October 13, 2020, counsel for PPP sent a letter to Complaint Counsel listing a number of general objections to the subpoena. Widor Decl. Ex. B. Complaint Counsel and PPP's counsel met and conferred on October 27, 2020, at which time counsel for PPP indicated her client's willingness to produce documents on a rolling basis subject to some modifications. Widor Decl. Ex. D. When PPP still did not produce documents, on November 6, 2020, Complaint Counsel moved the ALJ for an order compelling PPP's compliance under Commission Rule 3.38(a). See Widor Decl. Ex. C. The ALJ denied Complaint Counsel's motion on the ground that Rule 3.38(a) does not authorize him to compel nonparties to comply with subpoenas. See *In re Traffic Jam Events, LLC*, No. 9395, 2020 WL 6938319 (Nov. 20, 2020). Instead, enforcement of such subpoenas must be obtained in federal district court in accordance with Rule 3.38(c), which provides 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." *Id.* at *2; see also 15 U.S.C. § 49 ("[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.").

Following the ALJ's decision, Complaint Counsel sought to enforce the subpoena by moving the ALJ for a certification under Rule 3.38(c). PPP opposed the Motion, asserting that the subpoena was overbroad and sought information that was irrelevant or could be obtained from Respondents. Opposition at 1-2. To support these objections, PPP invoked two provisions of our Rules—Rule 3.31(c)(1) and Rule 3.31(c)(2)(i), 16 C.F.R. §§ 3.31(c)(1) & 3.31(c)(2)(i). Opposition at 1. Rule 3.31(c)(1) allows parties to seek 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." Rule 3.31(c)(2)(i) provides that the ALJ shall limit discovery to nonparties if he finds that it "is unreasonably cumulative or duplicative,

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or is obtainable from some other source that is more convenient, less burdensome, or less expensive.”²

Over these objections, the ALJ certified Complaint Counsel’s request for enforcement of the subpoena and recommended that the Commission authorize enforcement in federal court. Emphasizing PPP’s connections to the Respondents and its role in the distribution of the allegedly deceptive advertising, the ALJ found that the requested information was relevant within the meaning of Rule 3.31(c). *See* ALJ Order at 5. Further, the ALJ rejected the argument that PPP’s business records would necessarily be duplicative of those of Respondents, given that one of the nonparty printers subpoenaed by Complaint Counsel reported that it dealt directly with PPP and not with Respondents. *Id.* Moreover, the ALJ found that there have been substantial difficulties in procuring documents from Respondents, and he consequently rejected PPP’s assertion that the requested documents could be obtained from Respondents with greater convenience or less burden. *Id.* (citing *Tacita Fair v. Commun. Unlimited, Inc.*, 2019 U.S. Dist. LEXIS 7632, at *5 (E.D. Mo. Jan. 16, 2019)). The ALJ also determined that the subpoena was stated with reasonable particularity, as required by Rule 3.34, and that Respondent had failed to comply with the subpoena. ALJ Order at 5.

We agree with the ALJ’s conclusions. The subpoena seeks documents that may be reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the Respondents’ defenses. For example, documents about PPP’s creation of advertising materials for Respondents may be relevant to advertisement substantiation or to Respondents’ knowledge and intent. Requests about PPP’s communications with Respondents’ clients or customers may lead to relevant information regarding the advertisements’ materiality or Respondents’ knowledge and intent, among other things. Requests concerning PPP’s corporate structure, relationship with the Respondents, and payments between Respondents and PPP may be helpful to determining relevant actors’ liability or drafting an appropriate remedy. Indeed, Complaint Counsel have identified potentially significant relationships between PPP and Respondents and are evaluating whether to seek leave to amend the Complaint to add PPP as a respondent based on evidence obtained since the Commission issued the Complaint. Complaint Counsel’s Motion to Compel Platinum Plus Printing, LLC to Produce Materials Responsive to a Subpoena *Duces Tecum* at 1 n.1 (Nov. 6, 2020); *see also Auto-Owners Ins. Co. v. Se. Floating*

² More specifically, PPP asserted that documents regarding its corporate structure (RFP 1), payments between PPP and Respondents (RFP 3), PPP’s creation of advertising materials for Respondents (RFP 5), PPP’s communications with Respondents’ clients or customers (RFP 8), and PPP’s communications related to the Federal Trade Commission (RFP 10) are irrelevant. Opposition at 2-6. PPP further asserted that documents regarding agreements and payments between PPP and Respondents (RFPs 2-3), PPP’s creation, development, review, and dissemination of advertisements for Respondents, and communications related to such advertisements (RFPs 4-5, 9), dissemination schedules and recipients of advertisements (RFPs 6, 7), and communications between PPP and Respondents (RFP 8) could be more easily and conveniently obtained from Respondents. *Id.* at 3-5. With respect to RFP 12, which sought information about individuals with responsibilities related to Respondents, PPP asked to strike it as improper because it was really an interrogatory and interrogatories cannot be directed to nonparties. Opposition at 7 (citing 16 C.F.R. § 3.35). RFP 12, however, does not ask PPP to answer any questions but only to produce responsive documents to the extent they exist.

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Docks, Inc., 231 F.R.D. 426, 430 (M.D. Fla. 2005) (allowing plaintiff to conduct discovery regarding nonparties' corporate structure, corporate governance, and relationship to defendants because it could show that nonparties were interrelated with defendants and should be added to the lawsuit as real parties in interest). Further, as the ALJ found, the discovery sought is not unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, less burdensome, or less expensive.³ We therefore find that the subpoena is proper, that PPP has failed to comply with the subpoena, and that PPP's objections do not provide a basis for its failure to comply. Accordingly,

IT IS ORDERED THAT the General Counsel take appropriate action to enforce in federal district court Complaint Counsel's subpoena *duces tecum* to Platinum Plus Printing, LLC.

By the Commission.

³ Complaint Counsel argue that PPP waived this argument because it did not raise it as an objection when its discovery response was due or in the meet-and-confer conference. Motion at 6. The ALJ declined to find the argument waived for purposes of the Motion because PPP did raise it in its response to Complaint Counsel's earlier motion to compel. ALJ Order at 5 n.4. We need not decide the issue of waiver of this or any other argument because we find that, even assuming the objections were timely and properly made, they do not support PPP's withholding of responsive documents.

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IN THE MATTER OF

**HEALTH RESEARCH LABORATORIES, LLC,
WHOLE BODY SUPPLEMENTS, LLC,
AND
KRAMER DUHON***Docket No. 9397. Order, June 15, 2021*

Order denying Respondents' motion to strike Complaint Counsel's statements of the material facts and granting Complaint Counsel's motion to extend their time to reply to the Response to Statement of Additional Material Facts.

**ORDER DENYING MOTION TO STRIKE COMPLAINT COUNSEL'S STATEMENT OF ADDITIONAL
MATERIAL FACTS AND EXTENDING TIME FOR COMPLAINT COUNSEL'S REPLY**

On May 14, 2021, the Commission issued an order directing the parties in this proceeding to file statements of the material facts that they intend to assert, other than facts expressly alleged in the Complaint. Order for Further Proceedings before the Commission (May 14, 2021). Complaint Counsel filed their statement on May 25, 2021, and Respondents have moved to strike that filing as untimely.¹ Complaint Counsel have filed a motion to extend their time to reply to the Response to Statement of Additional Material Facts until June 21, 2021.²

Complaint Counsel argue that their statement of facts was timely filed under the provisions of Commission Rule 4.3, 16 C.F.R. § 4.3, relating to timing. CC Motion at 3. Respondents have now stated that they do not oppose denial of their motion to strike.³ We agree that, pursuant to Commission Rule 4.3(a), 16 C.F.R. § 4.3(a), Complaint Counsel's Statement of Additional Material Facts was timely filed on May 25, 2021, and deny the motion to strike.

Complaint Counsel state that an extension of time is needed to reply to new legal arguments raised by the Response to Statement of Additional Material Facts and to develop a proposal for structuring the remainder of this proceeding. CC Motion at 2. Respondents do not oppose extending time for the Reply until June 21. Response to Motion to Extend at 1. Although all parties will have an opportunity to brief issues relevant to liability, remedy, and defenses at a later date, we will not constrain Complaint Counsel from appropriately replying to issues raised in Respondents' filing and will extend the deadline until June 21. Accordingly,

1 Respondents' Response to Complaint Counsel's Statement of Additional Material Facts at 5 (June 1, 2021) ("Response to Statement of Additional Material Facts").

2 Motion to Extend Date for Complaint Counsel's Reply to Respondents' Response to Complaint Counsel's Statement of Additional Material Facts and Opposition to Respondents' Motion to Strike (June 7, 2021) ("CC Motion").

3 Respondents' Response to Motion to Extend Date for Complaint Counsel's Reply to Respondents' Response to Complaint Counsel's Statement of Additional Material Facts and Opposition to Respondents' Motion to Strike at 1 (June 7, 2021) ("Response to Motion to Extend").