

Interlocutory Orders, Etc.

IN THE MATTER OF

**TRAFFIC JAM EVENTS, LLC.
AND
DAVID J. JEANSONNE II***Docket No. 9395. Order, September 20, 2021*Order directing General Counsel to enforce nonparty subpoena *Ad Testificandum*.**ORDER DIRECTING GENERAL COUNSEL TO ENFORCE SUBPOENA *AD TESTIFICANDUM***

On July 28, 2021, 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 *ad testificandum* to nonparty Justin Brophy. Respondents Traffic Jam Events, LLC and David J. Jeansonne II opposed the motion on the ground that the subpoena was untimely. On August 10, 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. Traffic Jam Events has described its business as “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.

Justin Brophy was an employee of Traffic Jam Events at the time of the activities described in the Complaint. Respondents identified Mr. Brophy in their initial and supplemental disclosures as an individual likely to have discoverable information relevant to the complaint allegations,

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 <i>Ad Testificandum</i> Issued to Justin Brophy (July 28, 2021)
Widor Decl.:	Declaration of Thomas J. Widor attached to Motion
Opposition:	Respondents’ Memorandum in Opposition to Complaint Counsel’s Motion to Certify to the Commission a Request Seeking Court Enforcement of a Subpoena <i>Ad Testificandum</i> Issued to Justin Brophy (Aug. 3, 2021)
ALJ Order:	Order Granting Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena (Aug. 10, 2021)

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proposed relief, or defenses. Widor Decl. ¶¶ 3, 5, Exs. A, C. Respondents also listed Mr. Brophy on their preliminary witness list and their supplemental preliminary witness list, which stated that Mr. Brophy would be providing “[t]estimony regarding the products and services developed, disseminated, marketed, promoted, or provided by Respondents; communications with current and prospective customers; Respondents’ role in creating, developing, reviewing, editing, approving, and disseminating any advertisements or promotional materials.” *Id.* ¶¶ 4, 6, Ex. D. The initial and supplemental disclosures, as well as the preliminary witness lists, indicated that Mr. Brophy should be contacted through Respondents’ counsel. *Id.* ¶¶ 3-5, Exs. A-D. On May 18, 2021, Complaint Counsel sent a Notice of Deposition to Traffic Jam Events seeking to depose several Traffic Jam Events employees, including Justin Brophy. *Id.* ¶ 11, Ex. G. According to Respondents, they advised Complaint Counsel that Traffic Jam Events’ employees had resigned and could not be produced by counsel. Opposition at 2. Complaint Counsel advised that, if Respondents’ counsel could not confirm that Mr. Brophy’s deposition could be arranged through them, Respondents should supplement their initial disclosures to provide his contact information. *See* Widor Decl. ¶ 12, Ex. H (June 3, 2021 email from Thomas Widor).

Respondent Jeansonne provided Mr. Brophy’s telephone number during his deposition on June 22, 2021. *Id.* Ex. J (Tr. at 29, lines 13-18). Complaint Counsel made several efforts in June to reach Mr. Brophy by phone and email to schedule his deposition, but the phone calls, voicemails, and emails went unanswered. *Id.* ¶¶ 17-18. Complaint Counsel continued to press Respondents for Mr. Brophy’s last-known address. *Id.* ¶ 19, Ex. K (emails from Michael Tankersley on July 8, 2021, July 9, 2021, and July 12, 2021). Respondents finally provided that information on July 14, 2021. *Id.* ¶ 23, Ex. K.

On July 20, 2021, Complaint Counsel issued a subpoena *ad testificandum* for Mr. Brophy, with the deposition to take place remotely on July 27, 2021. *Id.* ¶ 25, Ex. M. The subpoena was served on July 22, 2021 on an individual residing at the last known address provided by Respondents, which is also associated with Mr. Brophy in property records. *Id.* ¶ 26, Ex. N. Complaint Counsel’s paralegal also sent the subpoena to Mr. Brophy’s email address. *Id.* ¶ 27, Ex. O. Mr. Brophy did not move to limit or quash the subpoena, did not respond to Complaint Counsel’s paralegal’s phone or email attempts to confirm his receipt of the subpoena and participation in the deposition, and failed to appear at the deposition. Motion at 2; Widor Decl. ¶¶ 28-32, Ex. P. Mr. Brophy also did not respond to telephone calls and emails from Complaint Counsel’s paralegal regarding his failure to appear. *Id.* ¶¶ 31-32.

On July 28, 2021, Complaint Counsel sought to enforce the subpoena by moving the ALJ for a certification under 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.” 16 C.F.R. § 3.38(c). Respondents opposed Complaint Counsel’s motion on the ground that the subpoena was issued after the discovery deadlines in the ALJ’s First Revised Scheduling Order, issued May 7, 2021. Opposition at 2. That scheduling order set the deadlines of June 11, 2021 for the issuance of most discovery requests and July 16, 2021 for the close of fact discovery.

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The ALJ rejected Respondents' timeliness argument because he had previously extended the discovery deadlines in light of Respondents' discovery delays, which included failure to timely supplement their initial disclosures to provide contact information for the now-former employees. ALJ Order at 4 (citing Order Granting Motion to Extend Discovery Deadlines at 1 (June 15, 2021) ("Discovery Extension Order") and Order on Complaint Counsel's Motion for Sanctions (June 29, 2021)).² Specifically, the Discovery Extension Order allowed Complaint Counsel ten days "to examine any discovery information or materials Respondents provide after June 11, 2021 and to issue any additional discovery requests based on such information or materials." Order Granting Motion to Extend Discovery Deadlines at 1. Respondents did not provide Mr. Brophy's last-known address until July 14, 2021. The ALJ therefore concluded that Complaint Counsel's issuance of the subpoena on July 20, 2021, and convening of the deposition on July 27, 2021, were not untimely. ALJ Order at 4. Further, the ALJ found that the information sought through the subpoena was relevant and that Mr. Brophy failed to appear for the scheduled deposition, despite Complaint Counsel's reasonable efforts to procure his attendance. *Id.* Accordingly, the ALJ certified to the Commission the request for court enforcement of the subpoena with the recommendation that court enforcement be sought. *Id.*

We agree that court enforcement is appropriate. Complaint Counsel issued the subpoena *ad testificandum* in accordance with the discovery deadlines set out in the Discovery Extension Order, and Mr. Brophy has not complied. Further, the subpoena is within the proper scope of discovery because, by Respondents' own admission, Mr. Brophy is "likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the Respondent." Widor Decl. Ex. A at 1-2 (Respondents' Initial Disclosures), Ex. C at 1-2 (Respondents' Supplemental Initial Disclosures). *See* 16 C.F.R. § 3.31(c)(1) (providing for discovery that "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"). Respondents also listed Mr. Brophy as a potential witness on their first and supplemental preliminary witness lists. Widor Decl. ¶¶ 4, 6, Exs. B, D. Moreover, Respondent Jeansonne repeatedly mentioned Mr. Brophy at his deposition and identified Mr. Brophy as the person who could answer Complaint Counsel's questions. *Id.* ¶ 15, *citing, e.g.*, Ex. I (Tr. at 79-80, lines 24-25 & 1; 92-93, lines 23-25 & 1-2; 94 lines 4-7; 101, lines 16-19). Accordingly,

IT IS HEREBY ORDERED that the General Counsel take appropriate action to enforce in federal district court Complaint Counsel's subpoena *ad testificandum* to Justin Brophy.

By the Commission.

² As the ALJ noted in the Order on Complaint Counsel's Motion for Sanctions, pursuant to Rule 3.31(e), 16 C.F.R. § 3.31(e), Respondents had a duty to supplement their prior disclosures to provide updated contact information for Traffic Jam Events' former employees.

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IN THE MATTER OF

**HEALTH RESEARCH LABORATORIES, LLC.,
WHOLE BODY SUPPLEMENTS, LLC.,
AND
KRAMER DUHON**

Docket No. 9397. Order, September 17, 2021

Order extending the date for Complaint Counsel's reply in support of summary decision.

ORDER EXTENDING COMPLAINT COUNSEL'S REPLY DATE

On September 13, 2021, Complaint Counsel filed an expedited motion asking the Commission to extend until October 8, 2021, the deadline for Complaint Counsel to file their reply in support of summary decision. Complaint Counsel argue that Respondents, in Respondents' Opposition to Summary Disposition and Reply Findings of Fact, Conclusions of Law, and Brief (Sept. 10, 2021), have asserted a host of new facts and for the first time have articulated a very narrow interpretation of their Rule 3.12(b)(2) admissions. Complaint Counsel assert that it would not be possible to prepare a thorough response to Respondents' new factual and legal claims by the original reply date of September 20, 2021. Respondents, in turn, argue that Complaint Counsel have not "demonstrated" good cause for an extension, as they did not provide any affidavits or evidence or cite other commitments that would interfere with the completion of the reply. Respondents' Response to Complaint Counsel's Expedited Motion to Extend Complaint Counsel's Reply Date at 2 (Sept. 17, 2021).

Affidavits and extrinsic evidence, however, are not necessary. Complaint Counsel have explained with sufficient specificity that, because they must address Respondents' new position that disputes a number of central allegations in the Complaint—a position Respondents chose not to articulate when presented with opportunities to do so earlier—the short timeframe for a reply is insufficient. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), we have determined that good cause exists to extend the deadline for Complaint Counsel's submission. Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's reply in support of summary decision shall be due on October 8, 2021.

By the Commission.