

PUBLIC

**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 TO COMPEL

I.

On October 16, 2020, Federal Trade Commission (“FTC”) Complaint Counsel filed a motion seeking to compel Respondents Traffic Jam Events, LLC and David J. Jeansonne II (“Respondents”) to provide further discovery (“Motion”). Specifically, Complaint Counsel challenges as inadequate and incomplete Respondents’ Initial Disclosures, responses to Complaint Counsel’s Request for Production of Documents, and disclosures provided in Respondents’ Preliminary Witness List. Respondents filed their Opposition on October 21, 2020 (“Opposition”). Included in Respondents’ Opposition was a request for oral argument, as to which Complaint Counsel filed an opposition. Oral argument is unnecessary and the request for oral argument is therefore DENIED.

For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART WITHOUT PREJUDICE.

II.

A. Summary of Pleadings

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 (alleging that “Respondents have disseminated or caused to be disseminated deceptive advertisements and promotional materials, including advertisements purporting to provide COVID-19 stimulus relief to consumers”); ¶ 6 (“[I]n or around March 2020, Respondents’ advertisements sought to lure consumers to dealerships under the guise that valuable government relief related to COVID-19 was available at designated locations for a short period of time.”). The Complaint includes detailed allegations as to two such alleged advertisements: an advertisement used for a Florida auto sales event (Complaint ¶ 9) (the “Florida Mailer”); and an advertisement used for cars available from a car dealer in Alabama (Complaint ¶ 10) (the “Alabama Mailer”).

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 (“Respondents have also disseminated or have caused to be disseminated advertisements and promotional materials claiming that recipients have won prizes to lure individuals and families to auto sales events.”). The Complaint includes, “[f]or [an] example” of the alleged prize notification advertising, details regarding a promotion for certain auto sales events occurring from May 28 through June 3, 2020 (the “Prize Notification Mailer”).

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, “including, but not limited to,” the Florida Mailer and the Alabama Mailer. Complaint ¶¶ 14, 20-23.

The Notice of Contemplated Relief in the Complaint includes a prohibition against “advertising and marketing concerning auto vehicles, government relief, or prizes, sweepstakes, and promotions,” and a prohibition against “misleading representations in connection with the advertising, marketing, promoting, or offering for sale of any product or services,” among other related terms. Complaint at 9.

In their Answer to the Complaint, Respondents admit Complaint Counsel’s allegations that they “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 violated the FTC Act as alleged. Respondents deny that they disseminated or caused to be disseminated any deceptive advertisements, including any deceptive advertisements purporting to provide COVID-19 stimulus relief to consumers, or any deceptive advertisements concerning prize winnings. Answer ¶¶ 5-6, 9, 12, 15-19. Respondents also deny that they disseminated advertisements that failed to clearly and conspicuously disclose terms required by federal law. Answer ¶¶ 14, 20-23. In addition, Respondents’ Answer asserts a number of affirmative defenses, including that the allegations of the Complaint are moot because Respondents discontinued the purportedly unfair and deceptive practice long before the institution of the current proceeding. Answer at 17, Third Affirmative Defense.

B. Relevant Background Facts

Based on the Motion, the Opposition, and the exhibits submitted therewith, including a declaration from Complaint Counsel and copies of correspondence between Complaint Counsel and Respondents' counsel, the background facts relevant to the pending discovery dispute are as follows:

The discovery process in this case began on September 7, 2020 when Respondents provided their Initial Disclosures to Complaint Counsel pursuant to FTC Rule 3.31(b). Motion Ex. A. Respondents' Initial Disclosures did not include any documents. Declaration of Thomas J. Widor ("Widor Decl.") ¶ 11. On September 10, 2020, Complaint Counsel served Respondents with Requests for Production of Documents pursuant to Rule 3.37 ("RFPs"). Motion Ex. B.

On October 1, 2020, Respondents' counsel asked Complaint Counsel for a 20-day extension of time to respond to Complaint Counsel's RFPs. Widor Decl. ¶ 12, Motion Ex. C. Based on what Complaint Counsel perceived to be deficiencies in Respondents' Initial Disclosures and anticipating similar issues with Respondents' upcoming RFP responses, Complaint Counsel replied that it was "open to negotiating an extension of time," but asked to schedule a meet and confer "to discuss a rolling production schedule beginning with the documents already identified in Respondents initial disclosures and any issues or objections that you foresee to any of the pending requests that we can try to address and resolve." *Id.*

On October 6, 2020, the parties conferred by telephone. Widor Decl. ¶ 13. According to the Widor Declaration: "During the call, Respondents' counsel made clear that Respondents would not provide information beyond the three mailers provided as examples in the Complaint in any discovery unless compelled by the Court. [Complaint Counsel] explained that the Complaint was not limited to the examples" of alleged unlawful advertisements that were detailed in the Complaint. *Id.*

Also on October 6, 2020, Respondents served Complaint Counsel with their Preliminary Witness List, pursuant to the Scheduling Order issued in this case, which requires each side to provide a preliminary witness list "with a brief summary of the proposed testimony." Scheduling Order (September 4, 2020) at 1 ("Scheduling Order"). For 11 of their potential witnesses, for the brief summary of the proposed testimony, Respondents stated only that the witness is expected to testify as to "[t]he allegations of the Commission's complaint, the facts underlying the complained of activities and the proposed relief, and the defenses of the Respondents." Motion Ex. D.¹ For three other potential witnesses, the brief summary stated only that the witness is expected to testify as to "[t]he allegations of the Commission's complaint, the facts underlying the complained activities, and the defenses of the Respondents." *Id.*

¹ For the individuals listed as witnesses 12-18, the summary of testimony includes this same general language with additional designated topics for testimony.

Following up on the parties' telephone conference of October 6, 2020, on October 9, 2020, Complaint Counsel provided Respondents' counsel with a letter summarizing the parties' positions as to the sufficiency of Respondents' Initial Disclosures, challenging the sufficiency of Respondents' Preliminary Witness List, and requesting that Respondents supplement this discovery by October 15, 2020. Motion Ex. F. Among other points, the letter reiterated Complaint Counsel's opposition to Respondents' expressed intention to limit all their discovery responses to information regarding the three examples of alleged unlawful advertisements that were detailed in the Complaint (*i.e.*, the Florida Mailer, the Alabama Mailer, and the Prize Notification Mailer). Motion Ex. E. Complaint Counsel requested that Respondents "reconsider th[is] position" for purposes of responding to Complaint Counsel's RFPs. In reply, Respondents maintained their positions that Respondents had complied with their discovery obligations and that the only "relevant factual information" was that which was related to the three advertising examples contained in the Complaint.

Respondents served their responses to Complaint Counsel's RFPs on October 12, 2020. Respondents objected to the requests, including on the grounds that the requests were "not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent . . . [,]" and were overly broad, vague and unduly burdensome. Motion Ex. G. Respondents produced 14 documents in response to the RFPs. Widor Decl. ¶ 17.

According to correspondence between counsel, on October 15, 2020, Complaint Counsel notified Respondents' counsel of Complaint Counsel's intention to file a motion to compel on October 16, 2020. Respondents' counsel replied with a request to meet and confer but stated that counsel was not available until the following week. In response, Complaint Counsel expressed the belief that the parties were at an impasse as to the permissible scope of discovery and that further discussion was unlikely to result in agreement. Motion Ex. F ("The issue you raise is a fundamental disagreement over the scope of discovery that we have now discussed repeatedly by telephone and through numerous email exchanges since last Friday with no progress. There is no change in either parties' positions. . . . We do not see how further "comprehensive and substantive discussion" of that position on Monday will result in the parties reaching an agreement . . ."). This Motion followed.²

² Respondents argue that the Motion should be denied without reaching the merits because, according to Respondents, Complaint Counsel failed to comply with the meet and confer requirements in Rule 3.22(g) (requiring a motion to compel to be accompanied by "a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement"). The facts surrounding the parties' discussions, summarized above, belie Respondents' claim. In particular, the parties' impasse on the fundamental question as to the applicable scope of discovery is evident and is ripe for resolution.

III.

A. Scope of Discovery

The permissible scope of discovery is governed by Commission Rule of Practice 3.31(c), which provides in pertinent part: “Parties may obtain 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.” 16 C.F.R. § 3.31(c)(1). “Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at *2 (Jan. 9, 2009). If a party fails to comply with any discovery obligation under the rules, Rule 3.38 authorizes the opposing party to seek an order compelling such compliance. “Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . documents, depositions, or [answers to] interrogatories be served or disclosure otherwise be made.” 16 C.F.R. § 3.38(a). To determine whether Respondents’ objections are justified, the discovery requests are evaluated, below, in relation to the allegations of the Complaint, the defenses of Respondents, and the proposed relief. *See In re Rambus Inc.*, No. 9302, 2002 FTC LEXIS 90, at *4 (Nov. 18, 2002).

B. Initial Disclosures

FTC Rules provide for mandatory initial disclosures to be exchanged by the parties no later than five days after the respondent files its answer. 16 C.F.R. 3.31(b). Such disclosures must include the name and contact information of each individual “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.” 16 C.F.R. § 3.31(b)(1). Parties also must provide a copy of, or a description of, all documents and electronically stored information . . . and tangible things in the possession, custody, or control of the respondents that are “relevant to the allegations of the Commission’s complaint, to the proposed relief, or to the defenses of the respondent.” 16 C.F.R. § 3.31(b)(2).

Complaint Counsel argues that Respondents’ Initial Disclosures are incomplete and inadequate because the responses were limited to the three advertising examples included in the Complaint. Complaint Counsel asserts that the Complaint encompasses more than the three advertising examples, by alleging broadly that Respondents disseminated or caused to be disseminated: deceptive advertising as to government benefits; deceptive advertising as to prize winnings; and advertising of closed-end credit transactions without required disclosures. Complaint Counsel further argues that the Complaint makes clear that the advertisements cited in the Complaint are not exclusive and are merely examples.

Complaint Counsel also contends that Respondents’ Initial Disclosures include responses that are impermissibly vague. Complaint Counsel cites as an example Respondents’ including among those persons likely to have discoverable information persons identified only as “authorized representative(s)” of certain auto dealerships. Complaint Counsel argues that the

names and contact information of individuals with whom Respondents have dealt should already be known or be easily obtainable by Respondents.

Respondents' Opposition maintains their position that the Complaint is based only upon the alleged deceptive nature of the three specific advertisements detailed in the Complaint. Respondents assert that Complaint Counsel is not entitled to "information regarding all of Respondents' potentially deceptive activities," but is instead limited solely to information related to the advertisement examples detailed in the Complaint. Opposition at 5. Applying this standard, Respondents contend that they have disclosed "all relevant factual information related to the factual activities complained of in the Complaint." Opposition at 6.

As indicated by the summary of the pleadings set forth above, Respondents view the Complaint too narrowly. Paragraph 5 alleges generally that "Respondents have disseminated or caused to be disseminated deceptive advertisements and promotional materials, *including* advertisements purporting to provide COVID-19 stimulus relief to consumers." Complaint ¶ 5 (emphasis added). Paragraphs 9 and 10 allege details concerning two such advertisements. Complaint ¶¶ 9, 10; *see also* Complaint ¶ 15 ("In connection with the advertising, marketing, promotion, or offering for sale, or sale of motor vehicles, Respondents have represented, directly or indirectly, expressly or by implication, that consumers are receiving official COVID-19 stimulus information."). Similarly, paragraph 12 alleges generally that Respondents have "disseminated or have caused to be disseminated advertisements and promotional materials claiming that recipients have won prizes to lure individuals and families to auto sales events . . ." Complaint ¶ 12; *see also* Complaint ¶ 17 ("In connection with the advertising, marketing, promotion, or offering for sale, or sale of motor vehicles, Respondents have represented, directly or indirectly, expressly or by implication, that consumers have won a specific prize that can be collected by visiting a particular dealership."). The Complaint includes an example of one such advertisement. Complaint ¶ 12. Finally, the Complaint alleges that Respondents disseminated advertisements that promote closed-end credit without making disclosures required under federal law, Complaint ¶¶ 14, 21, "including but not necessarily limited to" the Florida Mailer and the Alabama Mailer. Complaint ¶ 21. Viewing the allegations in their totality, Respondents' argument that the Complaint reaches only the three advertisements specifically referenced in the Complaint is without merit and is rejected.

Furthermore, as summarized above, Respondents have denied the material allegations of the Complaint, including that Respondents disseminated any deceptive advertising, or any advertising failing to make required federal disclosures. Answer ¶¶ 5, 12, 14, 15, 17, 21. Thus, information related to advertisements other than the three examples cited in the Complaint are relevant to test and/or rebut Respondents' assertions in this regard.

Moreover, discovery into Respondents' advertising beyond the three examples cited in the Complaint is relevant to the issue of remedy, in the event that Complaint Counsel prevails in this case. Respondents claim that they have long ceased the alleged deceptive advertisements, and the action is therefore moot. Answer, Third Affirmative Defense. According to the Notice of Contemplated Relief, should Complaint Counsel prevail, it intends to seek a broad "fencing-in" injunction that reaches beyond Respondents' advertising for automobile sales events to

include any of Respondents' advertising for any product or service. Such relief requires consideration of, among other things, the seriousness and deliberateness of the violation and whether the respondent has a history of prior violations. *In re Telebrands Corp.*, 140 F.T.C. 278, 334-35, 2005 FTC LEXIS 178, *92 (Sept. 19, 2005). Thus, discovery into Respondents' advertising activity in addition to the three examples cited in the Complaint is reasonably calculated to uncover evidence relevant to these potential remedy issues as well.

Accordingly, Complaint Counsel's Motion to Compel further Initial Disclosures by Respondents is GRANTED.

C. Preliminary Witness List

The Scheduling Order requires that each party provide the other party with a preliminary witness list, identifying potential witnesses and setting forth "a brief summary of the proposed testimony." (Scheduling Order at 1). As noted in the background facts, for at least 11 of their potential witnesses, Respondents' "brief summary of the proposed testimony" stated only that the witness is expected to testify regarding "[t]he allegations of the Commission's complaint, the facts underlying the complained of activities and the proposed relief, and the defenses of the Respondents." Motion Ex. D. Complaint Counsel argues that such description fails to provide any meaningful summary of the testimony and fails to comply with the requirement of the Scheduling Order. Respondents contend that they cannot provide detailed descriptions of witness testimony because they "have no way of knowing what a potential witness may state in his or her testimony," and therefore their admittedly "boiler plate" summaries meet the "brief summary" requirement in the Scheduling Order. Opposition at 8.

The requirement in the Scheduling Order that the Preliminary Witness List provide a "brief summary" of expected witness testimony does not require Respondents to know exactly what each individual potential witness will say. However, Respondents are required to disclose a summary of what they do know about the witness' expected testimony. At a minimum, Respondents should know, and are required to disclose, the topics as to which they intend to elicit testimony from each expected witness.

Respondents' witness testimony summaries do not comply with the Scheduling Order. Accordingly, Complaint Counsel's Motion to Compel Respondents to supplement the witness testimony summaries in their Preliminary Witness List is GRANTED.

D. Requests for Production of Documents

As noted above, Respondents served their responses to Complaint Counsel's RFPs on October 12, 2020, raising several objections and producing 14 documents. Respondents included objections that the requests were "not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent . . . [,]" and were overly broad, vague, and unduly burdensome. Motion Ex. G. Respondents' Opposition characterizes Complaint Counsel's document as a "fishing expedition" that impermissibly seeks discovery beyond information related to the three specific advertisements

detailed in the Complaint. Opposition at 6. As an example, Respondents cite RFP 15, which seeks:

All Documents relating to any audits, inquiries, investigations, proceedings, subpoenas, civil investigative demands, or reviews by any federal, state, county, or local agencies, including any determinations, findings, recommendations, reports, citations, fines, penalties, resolutions, or settlements relating to any Advertisement or Promotional Material.

Motion Ex. B. Respondents maintain that Complaint Counsel's request for investigations into conduct other than the three advertisements referenced in the Complaint is beyond the scope of discovery, and therefore Respondents have no obligation to produce documents in response to this Request. However, as explained above, discovery in this matter is not properly limited to information regarding these three advertisements.

Respondents' objections to Complaint Counsel's RFPs, to the extent they are based on the assertion that discovery is limited to information regarding the three advertisements detailed in the Complaint, are without merit. However, Respondents have raised additional objections, such as undue burden, overbreadth and vagueness, which, based on the record of the parties' communications submitted with the Motion and Opposition, have yet to be discussed between the parties. The parties' meet and confer teleconference took place on October 6, 2020 and Complaint Counsel memorialized the teleconference in a letter sent to Respondents' counsel on October 9, 2020, prior to Respondents' serving Complaint Counsel with their responses to Complaint Counsel's RFPs on October 12, 2020. Other than the issue of the permissible scope of discovery, the record shows no discussion of issues affecting the RFPs. Although Complaint Counsel contends that any delay in document production will adversely affect its schedule for identifying and scheduling discovery to be obtained from nonparties, the fact discovery deadline in this matter is not until February 19, 2021, which leaves ample time for good faith negotiations and motion practice if necessary.

Accordingly, the Motion to compel further production of documents is **DENIED WITHOUT PREJUDICE** to enable a brief period for the parties to confer and negotiate in good faith, in an attempt to resolve remaining disputes.

IV.

Upon full consideration of the Motion, the Opposition, and the exhibits submitted therewith, and for all the reasons set forth above, Complaint Counsel's Motion to Compel is **GRANTED IN PART** and **DENIED IN PART WITHOUT PREJUDICE**, and it is hereby **ORDERED**:

1. Respondents shall serve Complaint Counsel with amended Initial Disclosures that are consistent with this Order and Rule 3.31 by November 6, 2020.
2. Respondents shall serve Complaint Counsel with an amended Preliminary Witness

List consistent with this Order and the requirements of the Scheduling Order by November 6, 2020.

3. Complaint Counsel and Respondents' counsel shall confer and negotiate in good faith to attempt to reach an agreement regarding Respondents' objections to Complaint Counsel's RFPs that have not been resolved by this Order. To the extent an agreement is not reached, Complaint Counsel may file a motion to compel under Rule 3.37.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 28, 2020