

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

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In the Matter of )  
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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. )  

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**ORDER ON COMPLAINT COUNSEL’S MOTION FOR SANCTIONS**

**I.**

On June 9, 2021, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a motion for sanctions against Respondents Traffic Jam Events, LLC (“TJE”) and its president, David J. Jeansonne II, (“Jeansonne”) (collectively, “Respondents”) alleging failure to produce discovery previously ordered in this case (“Motion”). Respondents filed an opposition to the Motion on June 15, 2021 (“Opposition”). As set forth below, the Motion is GRANTED IN PART.

**II.**

**A.**

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. 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. 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. Complaint ¶¶ 14, 20-23.

Respondents' Answer admits Complaint Counsel's allegations that Respondents "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 all other material allegations.

**B.**

Based on the Motion, the Opposition, the Exhibits submitted therewith, and the record in this case, the following is a summary of the relevant facts.

On December 16, 2020, on motion by Complaint Counsel, an Order was issued directing Respondent TJE to produce certain documents in response to Complaint Counsel's first request for production of documents and to provide complete, responsive answers to Complaint Counsel's first set of interrogatories to TJE no later than December 23, 2020 ("December 16 Order").<sup>1</sup>

On December 23, 2020, the parties signed a proposed consent order. Because the proposed order would have resolved the matter if accepted by the Commission, Complaint Counsel agreed to defer Respondents' discovery responses. Widor Declaration ("Decl.") ¶ 3.

On December 28, 2020, Complaint Counsel filed a consent motion with the Commission seeking to withdraw the matter from adjudication for the purpose of considering the parties' proposed consent order, pursuant to FTC Rule 3.25(b). The Commission granted the consent motion on the same day and ordered the matter withdrawn from adjudication. The Commission extended the withdrawal from adjudication twice, by Orders issued on March 1, 2021 and April 2, 2021. On May 3, 2021, the Commission ordered the matter returned to adjudication, stating that "consideration of the consent proposal is no longer in the public interest." Commission Order Returning the

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<sup>1</sup> Specifically, the order directed TJE to produce, without limitation: a copy of each unique Advertisement and Promotional Material ("Advertising"); invoices; work orders; documents sufficient to show the relationship between Respondent TJE and Platinum Plus Printing, including any agreements; documents sufficient to show the relationship between Respondent TJE and the telephone numbers and websites listed on Respondents' Advertising; data files showing mailing information relating to Respondents' Advertising; sales logs and any other materials tracking leads or consumer responses to Respondents' Advertising through a customer relationship management database or otherwise; email, text messages, and any other communications to, from, or copying David J. Jeanson II, Justin Brophy, Chad Bullock, Jim Whelan, William Lilley, and Mariela Everst relating to Respondents' Advertising; business plans, proposals, financial analyses, market or sales strategies, sales projections, sales pitches or prospectuses, or return on investment analyses relating to Respondents' Advertising; all complaints relating to Respondents' Advertising; all documents relating to the FTC or compliance with consumer protection laws; all documents relating to the Florida, Kansas, and Indiana investigations and lawsuits; and documents sufficient to show all persons having any responsibilities for or on Respondents' behalf for any Advertising.

Matter to Adjudication and Setting a New Evidentiary Hearing Date, May 3, 2021, at 1. The Commission's Order also set a new hearing date of September 14, 2021.

On May 6, 2021, shortly after the Commission returned the matter to adjudication, Complaint Counsel emailed Respondents summarizing the outstanding discovery due under the December 16 Order and requested compliance by May 12, 2021. Widor Decl. ¶ 4, Exhibit A. Respondents stated they would make a partial document production by May 12, and did produce some materials that day, such as advertisements and related materials. Widor Decl. ¶ 6. Complaint Counsel assessed that the May 12 production did not include documents from numerous categories outstanding from the December 16 Order: (i) documents pertaining to Platinum Plus Printing; (ii) documents pertaining to websites and telephone numbers on Respondents' advertising; (iii) sales logs and other materials tracking consumer leads; (iv) emails and text messages; (v) complaints; (vi) compliance materials; (vii) documents pertaining to state investigations; and (viii) documents identifying persons responsible for Respondents' advertising. Widor Decl. ¶ 6; Exhibit H.

In its continued effort to obtain the discovery still pending under the December 16 Order, from approximately May 18 until June 8, 2021, Complaint Counsel communicated first with Respondent Jeansonne directly, and subsequently through counsel for Respondents.<sup>2</sup> Ultimately, Complaint Counsel and Respondents appeared to agree that Respondents would make their electronically stored information ("ESI"), which Respondents state contains all their responsive information (Opposition at 2), available for inspection and copying by Complaint Counsel. Respondents identified the third-party holder of Respondents' ESI and, on June 8, 2021, inquired how the inspection protocol would protect against disclosure of privileged or non-responsive materials. Widor Decl. ¶¶ 8, 9; Exhibits D, H; Opposition, Exhibit 1. Complaint Counsel responded on June 8, 2021, reasserting a protocol that Complaint Counsel had originally proposed to Respondents in November 2020. Motion, Exhibit D.

Complaint Counsel and Respondents also discussed depositions of TJE employees identified as persons with knowledge in Respondents' Initial Disclosures, which Complaint Counsel originally sought in December 2020. Widor Decl. ¶¶ 14, 15; Exhibits E, F. Respondents notified Complaint Counsel that TJE had lost its employees. In order to facilitate those depositions, Complaint Counsel requested that Respondents update their November 6, 2020 Supplemental Initial Disclosures with new contact information for TJE's former employees or to confirm that Respondents' counsel would remain the point of contact, as stated in the Supplemental Initial Disclosures. Widor Decl. ¶¶ 15-18; Exhibit G. According to Complaint Counsel's declaration, Respondents have not replied to this request. Widor Decl. ¶ 18.

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<sup>2</sup> By Order issued December 21, 2020, the motion by counsel of record for Respondents (L. Etienne Balart) for leave to withdraw as counsel was granted; Respondent TJE was ordered to appoint an officer to enter an appearance as its representative; and Respondent Jeansonne was ordered to enter an appearance on behalf of himself. On June 10, 2021, L. Etienne Balart and Taylor K. Wimberly filed notices of appearance on behalf of Respondents.

The record further shows that on May 27, 2021, Respondent Jeansonne sent an email to Complaint Counsel setting forth what he stated were his answers to the overdue interrogatories. Widor Decl. ¶ 11; Exhibit C. Complaint Counsel states that the deposition of Respondent Jeansonne has been scheduled for June 22, 2021. Widor Decl. ¶ 20.

### **III.**

#### **A.**

The authority to impose sanctions is set forth in Commission Rule 3.38(b), which states in pertinent part:

If a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to the following:

- (1) Order that any answer be amended to comply with the request, subpoena, or order;
- (2) Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;
- (3) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- (4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;
- (5) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (6) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

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). *See also In re USLife Credit Corp.*, 1978 FTC LEXIS 314, at \*122-23 (Sept. 26, 1975) (“[T]he administrative law judges may properly exercise discretion in deciding what kind of sanction, if any, is warranted.”).

The role of sanctions is to “encourage discovery and to promote the production of relevant evidence” and thus courts “have generally been reluctant to impose sanctions that would dispose of a case without regard to the merits except in cases involving extreme contumacy against orders to produce evidence without which the elements of dispute cannot be determined on the merits.” *In re R.J. Reynolds Tobacco Co.*, 1988 FTC LEXIS 88, at \*5 (Oct. 28, 1988) (citations omitted). As explained in *In re LabMD, Inc.*, 2014 FTC LEXIS 42, \*9 (Mar. 10, 2014), “Rule 3.38 is designed both to prohibit a party from resting on its own concealment and to maintain the integrity of the administrative process.” *In re Grand Union Co.*, 102 F.T.C. 812, 1983 FTC LEXIS 61, at \*594 (July 18, 1983). Thus, the explanation for a party’s failure to comply with a discovery order “is crucial in determining whether to invoke the sanctions.” *Id.*

## **B.**

Complaint Counsel argues that TJE has failed to comply with the directives of the December 16 Order by failing to produce all required documents and failing to provide complete responsive answers to interrogatories. Complaint Counsel further argues that Respondents have breached their duty to timely supplement their Supplemental Initial Disclosures regarding contacting TJE’s now-former employees.

Complaint Counsel contends that the record demonstrates willful misconduct and abuse of discovery on the part of Respondents that has impeded the production of evidence necessary to determine the case on the merits and has obstructed Complaint Counsel’s ability to develop additional evidence. Complaint Counsel further argues that Respondents’ misconduct in this regard is long standing in this case and is likely to continue absent imposition of sanctions. In this regard, Complaint Counsel points to a pattern of previous unfulfilled promises by Respondents, which has only served to delay and frustrate the progress of discovery. Complaint Counsel requests entry of default against Respondents, or in the alternative, to enter certain adverse inferences against Respondents together with related relief. *See Motion at 8-9 and Proposed Order.*

Respondents do not dispute the current status of discovery but contend that they have been working “diligently” and in good faith to produce all outstanding discovery. Respondents point out that Respondent Jeansonne’s deposition has been scheduled and that Complaint Counsel has subpoenaed the deposition of one former employee, based on contact information found in previously produced documents, and that such information for other former employees can also be gleaned from documents already produced to Complaint Counsel. According to Respondents, delays in producing all remaining

documents were the result of Respondents' being temporarily without assistance of counsel or the assistance of staff, who have left Respondents' employ. Respondents state that they are "committed" to Complaint Counsel's inspection, by its data vendor, of all of Respondents' ESI, "*provided that standard protocols are established to allow for the protection of privilege.*" Opposition at 5 (emphasis in original).

In addition, Respondents argue that the record presented does not merit any sanctions, especially default, and that in any event, Complaint Counsel's requested adverse inferences are not sufficiently linked to the outstanding discovery. Respondents request that the Motion be denied and that, instead, "Complaint Counsel should be ordered to complete the inspection and retention of ESI with an agreed protocol to preserve privilege and eliminate irrelevant materials." Opposition at 7.

#### IV.

The record in this matter amply supports the conclusion that the directives of the December 16 Order have not been met. It is undisputed that the required document production has not been completed. Respondents' purported answers to interrogatories, contained in an email to Complaint Counsel, lacked any meaningful detail and were unsworn. Motion, Exhibit C. Moreover, pursuant to Rule 3.31(e), Respondents had a duty to supplement their prior disclosures to provide updated contact information for TJE's now-former employees, which duty, at present, Respondents have not fulfilled.<sup>3</sup>

The record further supports the conclusion that Respondents' completion of discovery has been long-delayed, but it does not, at this stage, support a finding that Respondents' delays were willful or intended to obstruct. During the relevant time period, Respondents were partially without the aid of counsel and TJE lost most or all of its employees, which further deprived Respondents of assistance with the production of documents. Nevertheless, Respondents' characterization of their approach to complying with discovery obligations as "diligent" is unsupported and rejected.

Despite delays, progress in completing discovery is being made. It appears that the parties have made progress with establishing an ESI protocol for inspection of all Respondents' responsive documents. Furthermore, the parties have successfully scheduled Respondent Jeansson's deposition, which should reduce any risk of undue prejudice to Complaint Counsel from any inadequacy in Respondents' answers to interrogatories. In addition, pursuant to the Order issued June 15, 2021, Complaint Counsel obtained relief with respect to discovery deadlines that may be impacted by Respondents' discovery delays.

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<sup>3</sup> Complaint Counsel's contention that Respondents' failure to provide updated former employee contact information violated a discovery order entered on October 28, 2020 is without merit. That Order, granting Complaint Counsel's motion to compel Respondents to amend their initial disclosures, overruled certain objections raised by Respondents as to the scope of discovery and directed Respondents to amend their disclosures in accordance with the Order. *See* Order on Complaint Counsel's Motion to Compel, October 28, 2020. Complaint Counsel's motion to compel did not raise, and that Order did not address, an alleged failure of supplementation.

Based on the present record, Complaint Counsel's requested sanctions of default, or in the alternative, entry of adverse inferences, are not reasonable. In this regard, Complaint Counsel's Motion is DENIED. The purpose of a motion for sanctions is "to induce parties to supply [requested discovery]." *IT&T*, 104 F.T.C. 280, 1984 WL 565367 at \*\*128. To effectuate this purpose, the Motion is GRANTED IN PART, and it is hereby ORDERED:

(1) No later than July 13, 2021, Respondents shall submit a sworn statement verifying that Respondents have completed their obligations to provide discovery in compliance with the December 16 Order. Respondents shall act promptly and cooperate fully and diligently in completing their discovery obligations. Failure to comply may result in an order to show cause why sanctions should not be imposed against Respondents, up to and including default.

(2) Respondents may not introduce into evidence or otherwise rely, in support of any claim or defense, upon any improperly withheld or undisclosed materials, witnesses, or other discovery.

(3) Respondents are precluded from objecting to the introduction and use of secondary evidence by Complaint Counsel to show what any withheld admission, testimony, documents, or other evidence would have shown, with regard to Respondents' existence, composition, or acts and practices challenged by the Complaint in this matter.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: June 29, 2021