

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

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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.	)	

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**ORDER ON RESPONDENTS' MOTION TO COMPEL**

**I.**

On July 2, 2021, Respondents Traffic Jam Events, LLC (“TJE”) and its president, David J. Jeansonne II (“Jeansonne”), (collectively, “Respondents”) filed a Motion to Compel (“Motion”), seeking an order compelling Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel to provide a revised privilege log. Complaint Counsel filed an opposition to the Motion on July 12, 2021. As set forth below, the Motion is GRANTED in part and DENIED in part.<sup>1</sup>

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<sup>1</sup> On July 14, 2021, Respondents submitted a motion for leave to reply pursuant to Rule 3.22(d). That rule states in pertinent part:

The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge’s or the Commission’s attention to recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief. The reply may be conditionally filed with the motion seeking leave to reply.

16 C.F.R. § 3.22(d). Upon review, Respondents’ motion for leave to reply and proposed reply do not draw attention to any recent important developments or controlling authority that could not have been raised earlier in their Motion. Accordingly, Respondents’ motion for leave to file a reply is DENIED.

## 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 in the Complaint.

On October 16, 2020, Respondents served their first Request for Production of Documents ("RFPs") on the FTC. On November 17, 2020, Complaint Counsel provided its Objections and Responses to the RFPs ("Responses"), which included some objections based on various privileges. Complaint Counsel refused to produce certain responsive documents on the basis of privilege; however, Complaint Counsel did not include a privilege log with the Responses.

The case was stayed between December 28, 2020 and May 4, 2021. During a meet and confer and through an email on June 11, 2021, Respondents asked Complaint Counsel to provide a privilege log regarding any documents that the FTC was withholding on the basis of privilege. On June 25, 2021, Complaint Counsel provided Respondents with a privilege log.

### B.

Respondents state that they are seeking discovery as to who initiated the Complaint; what consumers contacted the FTC to lodge any complaint; what consumers the FTC interviewed and presented to the Commission; and what evidence the Commission looked at to determine that Respondents' acts or practices violated the FTC Act. Respondents assert that Complaint Counsel's privilege log fails to comply with FTC Rule 3.38A because it groups documents by category and date range, and fails to provide detail as to each specific withheld document.<sup>2</sup>

Complaint Counsel asserts that Respondents are seeking to probe the Commission's pre-Complaint investigation and deliberations authorizing the administrative complaint and a prior

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<sup>2</sup> Respondents also request an extension of the current July 16 discovery cut off because the privilege log was only recently produced. Respondents' request for relief from the discovery deadline is premature because the Motion only challenges the adequacy of the privilege log and does not challenge the validity of the privileges asserted or request an order compelling that any of the subject documents be produced. Accordingly, Respondents' request is DENIED WITHOUT PREJUDICE.

federal district court complaint, which matters are outside the permissible scope of discovery under FTC Rules. Complaint Counsel further asserts that its privilege log contains the detail necessary to comply with the requirements of Rule 3.38A.<sup>3</sup>

### III.

Pursuant to FTC Rule 3.31(c)(1), “[p]arties 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). FTC Rule 3.31(c)(2) places certain limits on Complaint Counsel’s discovery obligations, stating:

Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to § 3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under these rules is required to search for materials generated and transmitted between an entity’s counsel (including counsel’s legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good cause to provide such materials.

16 C.F.R. § 3.31(c)(2). In addition, as a general rule, a respondent is not permitted discovery into the reasoning or bases of the Commission in determining whether to bring an enforcement action. *See In re Axon Enter.*, 2020 FTC LEXIS 127, at \*7 (July 21, 2020) (Order Denying Respondent’s Motion to Compel Production of Documents).<sup>4</sup>

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<sup>3</sup> Complaint Counsel also argues that Respondents failed to file their motion to compel in compliance with Paragraph 8 of the September 4, 2020 Scheduling Order, requiring that any motion to compel be filed within 30 days of the response and/or objections to the discovery requests, which would have been December 17, 2020. Regardless of whether the Motion could be denied on this procedural basis, the merits of the Motion will be considered and decided herein.

<sup>4</sup> As stated in *Axon*:

Precedent holds that the reasons for issuing a complaint and the information considered or evaluated prior to issuance, “are outside the scope of discovery, absent extraordinary circumstances.” *In re LabMD, Inc.*, 2014 FTC LEXIS 45, at \*7 (Mar. 10, 2014). Moreover, any “attempt to probe the mental processes” of investigators and the decision-making leading up to the complaint “is ordinarily privileged since [such information relates] to an integral part of the decision-making process” of government. *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, at \*5 (June 16, 1967) (citation omitted). *See also FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (“[T]he government’s ‘deliberative process privilege’ . . . permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.”) (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

*In re Axon Enter.*, 2020 FTC LEXIS 127, at \*7-8.

With respect to privilege logs, FTC Rule 3.38A(a) sets forth:

Any person withholding material responsive to . . . [a] request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule *which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.* The schedule need not describe any material outside the scope of the duty to search set forth in § 3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

16 C.F.R. § 3.38A(a) (emphasis added).

Complaint Counsel's privilege log lists 6 categories of withheld documents, with a total of 116 documents. For the first five categories, the asserted privileges are attorney work product; law enforcement/investigatory files privilege; and common interest doctrine. For the first four of these categories, Complaint Counsel has asserted these privileges over "[c]ommunications in anticipation of litigation with [four other law enforcement offices]<sup>5</sup> that share a common interest regarding related law enforcement actions and that contain information that would reveal law enforcement techniques and procedures and contain mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Complaint Counsel." For the fifth category, Complaint Counsel has asserted these privileges over "[c]ommunications in anticipation of litigation with the U.S. Postal Service that shares a common interest regarding Respondents' advertisements and mailers, which contain information that would reveal law enforcement techniques and procedures and contain mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Complaint Counsel."

For the sixth category, Complaint Counsel asserts the protections of the work product doctrine for "[c]ommunications in anticipation of litigation with consumers regarding prize advertising complaints, which contain mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Complaint Counsel."

Within each of the categories, Complaint Counsel has listed a date range of the documents; the type of documents (emails); the senders/recipients; and the number of documents in each category.

#### IV.

As noted above, Rule 3.38A requires a privilege log to describe the documents "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

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<sup>5</sup> The four other law enforcement agencies are: (1) the Florida State Attorney General's Office; (2) the Indiana State Attorney General's Office; (3) the Kansas State Attorney General's Office; and (4) unspecified state law enforcement agencies.

With respect to the documents in categories 1 through 5, the description provided and the statement that the communications are with other law enforcement agencies is sufficient to enable an assessment of the claim of privilege. Accordingly, Respondents' Motion is DENIED as to these categories on the privilege log.

With respect to the documents in category 6, the description "[c]ommunications in anticipation of litigation with consumers regarding prize advertising complaints, which contain mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Complaint Counsel" does not provide sufficient detail to enable an assessment of the claim of privilege. Accordingly, Respondents' Motion is GRANTED as to category 6 on the privilege log, and it is further ORDERED that for documents in category 6, Complaint Counsel shall, no later than July 20, 2021, revise its privilege log to identify the specific documents withheld under claim of privilege and identify the dates on which the withheld documents were created.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: July 15, 2021