PUBLIC[1]

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

In the Matter of	)	
Axon Enterprise, Inc. a corporation,	)	Docket No. 9389
and	)	
Safariland, LLC, a partnership,	)	
Respondents.	)	

ORDER GRANTING MOTION FOR CERTIFICATION TO THE COMMISSION OF REQUEST FOR COURT ENFORCEMENT OF NONPARTY SUBPOENAS

I.

On August 21, 2020, Respondent Axon Enterprise, Inc. ("Respondent" or "Axon") filed a Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoenas ("Motion"). On August 26, 2020, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion for Leave to File an Opposition to the Motion. Leave is GRANTED and the opposition has been considered ("Opposition"). As of the date of this Order, there has been no response from the nonparties that are the subject of the subpoenas at issue, Wolfcom Enterprises

[1] Although the parties made extensive use of the confidential designation for materials included in their filings, based on a review of the information, and any supporting bases, none of the information revealed in this Order merits confidential treatment. Confidential material, as defined in the January 6, 2020 Protective Order Governing Confidential Material issued in this case ("Protective Order") refers "to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information." Protective Order ¶ 1. "A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of [the Protective] Order." Protective Order ¶ 5.

("Wolfcom") and its founder and Chief Executive Officer, Peter Onruang ("Onruang").[2] As set forth below, Respondent's Motion is GRANTED.

II.

The instant action by the FTC against Axon seeks to unwind Axon's acquisition of VieVu, LLC ("VieVu") from Safariland, LLC in May 2018 (the "Acquisition"). Complaint ¶ 2. According to the pleadings in this case, Axon is a manufacturer and supplier of body-worn cameras ("BWCs") and digital evidence management systems ("DEMS") (collectively "BWC systems"). Complaint ¶ 1, Answer ¶ 1. Axon admits in its Answer to the Complaint that VieVu was one of the companies with which Axon competed for the supply of BWCs and DEMS. Answer ¶ 2.

Complaint Counsel alleges that the Acquisition has had or is likely to have anticompetitive effects in an alleged product market for BWC systems and is unlawful under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 21, 60. Respondent denies the Acquisition has had or will have anticompetitive effects. Among other defenses, Respondent contends that VieVu was a failing or flailing firm. Answer at 21, Twelfth Defense.

Based on the Motion, the Opposition, and the accompanying exhibits, including excerpts of a deposition of Onruang on August 7, 2020, the relevant facts are as follows: Wolfcom is a company that sells BWCs and DEMS (Motion Ex. B ¶ 1). Onruang executed a declaration for use in this matter, which Complaint Counsel had drafted for him (Motion Ex. F, Onruang Dep. Tr. 31:6-17; Motion Ex. B), stating in relevant part: "Wolfcom would have been interested in purchasing VieVu had Wolfcom known VieVu was for sale." (Motion Ex. B ¶ 2).

Respondent served a subpoena *duces tecum* on Wolfcom that, in summary, requested documents reflecting Wolfcom's bids in response to requests for proposals and documents reflecting Wolfcom's financial condition, including sales data and business plans. (Motion Ex. C). Respondent included with the subpoena *duces tecum* a copy of the Protective Order issued in this case.

Respondent and Complaint Counsel each served a subpoena *ad testificandum* on Wolfcom and Onruang for the deposition of Wolfcom and Onruang. (Motion Ex. D, E). Prior to the deposition, Onruang advised Respondent's counsel that he would not be producing any documents. (Motion Ex. H ("I will not be able to comply with your request. Given the past history of your client, its reputation, and aggression towards my company, I remain fearful of reprisal and wish not to be victimized again. Although you may assure me that my sensitive information will remain confidential within your network, your client's influence reaches far and deep. I will not provide the company that has done everything to destroy me any information that they can use to hurt me

[2] Respondent's Amended Certificate of Service, filed August 25, 2020, indicates that it served on the nonparties a copy of the Motion via electronic mail on August 22, 2020. Any opposition by the nonparties was due by September 3, 2020.

again. If this disqualifies my declaration, then I must have faith that the truth from others in my stead will prevail.")). Neither Wolfcom nor Onruang filed a motion to quash or limit the document subpoena or the deposition subpoenas.

Onruang arrived for the deposition as scheduled, but confirmed at his deposition that he would not produce documents. (Motion Ex. F, Onruang Dep. Tr. 9:22-10:4; 163:5-9). Furthermore, Onruang did not give full or complete answers to a number of questions that he deemed would expose confidential trade or financial information, notwithstanding the Protective Order. (Motion Ex. F, Onruang Dep. Tr. 19:24-20:23; 77:21-78:21; 161:5-25). Both sides left the deposition open in case documents were provided thereafter, which might raise the need for additional questioning. (Motion Ex. F, Onruang Dep. Tr. 163:10-17).

Respondent asserts that Wolfcom and Onruang have refused to comply with the subpoena *duces tecum* by failing to produce any documents, and have also failed to provide complete answers to deposition questions. In doing so, Respondent argues, Wolfcom and Onruang have effectively denied Respondent the opportunity to test Onruang's declaration by cross-examination or by reference to documentary evidence.

By way of opposition, Complaint Counsel does not provide substantive argument supporting a conclusion that the subpoenas are vague, overbroad, or seek information that is not relevant. Nor does Complaint contend that Wolfcom and/or Onruang have fully complied with the subpoenas.[3] Instead, Complaint Counsel's Opposition focuses on an alleged procedural defect. Specifically, Complaint Counsel argues that Respondent is required to first file a motion to compel and obtain an order from the Administrative Law Judge compelling compliance with the subpoenas, pursuant to Rule 3.38(a), as a procedural prerequisite to any certification to the Commission for court enforcement under Rule 3.38(c).[4] In addition, Complaint Counsel notes Onruang's concern about supplying confidential information to Axon as a basis for not producing business documents.

Respondent disputes Complaint Counsel's interpretation of Rule 3.38. Respondent argues that the plain language of Rule 3.38(a) does not apply to efforts to obtain a nonparty's compliance with a subpoena, and that both Section 9 of the FTC Act and Rule 3.38(c) contemplate district court enforcement, pursuant to an authorization from the Commission after certification under Rule 3.38(c). Motion at 3 n.3.

[3] Complaint Counsel cursorily asserts in a footnote that Respondent has failed to demonstrate that the subpoenaed documents are relevant to the case, given that the subpoena includes 14 specifications of documents covering a 10 year time period. This conclusory argument is insufficient to raise a genuine issue.

[4] Complaint Counsel also argues that Respondent's request for certification must be denied because it amounts to an impermissible interlocutory appeal under Rule 3.23. A request for certification to enforce a subpoena under Rule 3.38(c) is patently different from an interlocutory appeal under Rule 3.23 and Complaint Counsel's attempt to conflate the two is unsupported and unpersuasive.

III.

Rule 3.38(a) states in relevant part:

> A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37.

16 C.F.R. § 3.38(a). A motion to compel compliance with a subpoena under § 3.34 is not included in this list of items for which a party may apply by motion for an order compelling discovery.

The subpoenas at issue in this Motion were issued pursuant to Rule 3.34. Rule 3.34 provides for subpoenas to compel testimony or documents, for trial or discovery, and for the right to assert objections through a motion to quash:

> (a) Subpoenas *ad testificandum*. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena or to attend and give testimony at an adjudicative hearing.
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> (b) Subpoenas *duces tecum*; subpoenas to permit inspection of premises. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. . . .
>
> (c) Motions to quash; limitation on subpoenas. Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, ...

16 C.F.R. § 3.34. Rule 3.34 does not include or reference a mechanism to force compliance with a subpoena by a recalcitrant nonparty.

On the specific issue of noncompliance with a subpoena, the basis of the instant Motion, Rule 3.38(c) states 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). *See also* 15 U.S.C. § 49 (providing that "in 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"); *In re Market Dev. Corp.*, 95 F.T.C. 100, 225, 1980 FTC LEXIS 162, *245-46 (Comm. Jan. 15, 1980) (stating that "the Commission's organic statute prescribes that the enforcement of a subpoena must be undertaken in Federal District Court"). *E.g., In re Trans Union Corp.*, 123 F.T.C. 393, 1997 FTC LEXIS 337 (Comm. Feb. 11, 1997); *In re American Family Publishers, Inc.*, 1991 FTC LEXIS 9, *6-7 (Comm. Jan. 11, 1991).

The plain language of the certification provision in Rule 3.38(c), set forth above, does not reference any prerequisite except noncompliance. Moreover, Rule 3.38(c) provides for certification for noncompliance with either "a subpoena *or* order." The use of the disjunctive clearly implies that certification can be based on noncompliance with a subpoena alone. Complaint Counsel does not cite any case authority holding that a motion to compel under Rule 3.38(a) must first be granted and disobeyed before a party can seek certification for court enforcement of a nonparty subpoena under Rule 3.38(c). For all these reasons, Complaint Counsel's proposed procedural hurdle should not and will not be imposed in this case.

IV.

The record herein demonstrates that Wolfcom has failed and refused to comply with the subpoena *duces tecum*[5] and that Onruang has failed and refused to provide complete answers to certain deposition questions related to Wolfcom's financial and business information.[6] Complaint Counsel obtained a declaration from Onruang stating: "Wolfcom would have been interested in purchasing VieVu had Wolfcom known VieVu was for sale." (Motion Ex. B ¶ 2). Whether Wolfcom could have or would have been a potential buyer of VieVu is plainly relevant to Respondent's failing firm defense and Complaint Counsel's attempt to rebut this defense. *See In re Otto Bock HealthCare North America, Inc.*, 2019 WL 5957363, *39 (Comm. Nov. 1, 2019) (internal citations omitted) ("To sustain a failing firm defense, the proponent is called upon to demonstrate that the acquiring company was 'the only available purchaser.'. . . The antitrust enforcement agencies have implemented this element of the failing firm defense by focusing on the respondent's efforts to elicit 'reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition.'"). Respondent is thus entitled to further inquiry and examination on these and related issues. Furthermore, upon review of the subpoenas, the financial and

[5] E.g., Motion Ex. F, Onruang Dep. Tr. 9:22-10:4 ("Q: Wolfcom has not produced any documents, right. A: Correct. Q: You informed counsel for Axon that you would not be complying with the document subpoena. A: Yes.").

[6] E.g., Motion Ex. F, Onruang Dep. Tr. 19:24-20:5 ("Q: Do you know what Wolfcom's net income was in fiscal year 2017? A: 2017, I have a good idea. I do have a dollar amount in mind, in 2017, I do. Q: What is that dollar amount? A: I'd rather not disclose that."); Motion Ex. F, Onruang Dep. Tr. 161:5-25 ("Q: Are you still refusing to answer my question about Wolfcom's additional plans for its BWCs? . . . . A: Yes, of course I am. . . Q: Are you still refusing to answer my questions about Wolfcom's net worth? . . . A: Yes, I am.").

business information sought by Respondent is stated with reasonable particularity. In addition, it is well established that confidentiality concerns do not justify failure to comply with a subpoena, particularly where, as here, there is a robust protective order in place. *See, e.g., In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 193, *8-10 (Nov. 4, 2016) (rejecting nonparty's argument that the subpoena should be quashed or limited because the document requests require production of confidential or proprietary information as without merit, where there was a protective order). *See also FTC v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (stating that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement"). It is also noteworthy that neither Wolfcom nor Onruang presented any objections apart from confidentiality, and neither moved to quash or limit the subpoenas.

V.

For all the foregoing reasons, the Motion is GRANTED. It is hereby ORDERED that Respondent's request for court enforcement of nonparty subpoenas *duces tecum* and *ad testificandum* be and hereby is certified to the Commission, with the recommendation that district court enforcement be sought.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: September 4, 2020