



which the prospective Service Provider completed Your Voice Log Process and responded affirmatively to all of the questions asked in Your Voice Log Process. This request seeks, to the extent available, recordings of the entirety of such telephone calls, and is not limited to the recordings of the Voice Log Process.

Motion, Exhibit A at 3 (emphasis omitted)

On August 16, 2022, Complaint Counsel's motion to compel HomeAdvisor's production of documents responsive to the ESI Request ("August 16 Order") granted. Subsequently, on August 30, 2022, HomeAdvisor provided Complaint Counsel with a link to a virtual machine containing millions of files. Motion at 3.

### III.

Commission Rule 3.37(d)(ii) governs the production of ESI and provides that "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form in which it is ordinarily maintained or in a reasonably usable form." 16 C.F.R. § 3.37(c)(ii). In addition, "[a] party need not produce the same electronically stored information in more than one form." 16 C.F.R. § 3.37(d)(iii).

Commission Rule 3.38(b) allows the Administrative Law Judge, upon motion by the aggrieved party, to impose sanctions upon a party who "fails to comply with any discovery obligation." 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 reasonable in light of the material withheld and the purposes of Rule 3.38(b)." ECM BioFilms, Inc., 2014 FTC LEXIS 44, at \*5 (Mar. 11, 2014) (quoting *Int'l Tel. & T. Co. v. U.S. Dist. Ct.*, 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)(1) (the Administrative Law Judge "may take such action in regard thereto as is just"). (emphasis added).

In its Motion, Complaint Counsel asserts that in response to the ESI Request, HomeAdvisor "dumped 30-50 million data files, many of which are nonresponsive, into a practically unsearchable depository." Motion at 1. Complaint Counsel contends that data files are "not reasonably usable" because "HomeAdvisor has not provided a way to make the ESI searchable" apart from searching by date, that there is "no functional way to narrow the records] to responsive recordings." Motion at 5. Complaint Counsel further argues that "where ESI is produced as ordinarily maintained, a producing party cannot merely facilitate access to voluminous documents without regard to responsiveness." Motion at 5. As a result, Complaint Counsel argues that HomeAdvisor violated the August 16 Order, and that imposing sanctions is warranted. Motion at 7.

In its Opposition, HomeAdvisor makes the following representations regarding the production:

<sup>2</sup> As an alternative to producing the documents, the August 16 Order allowed for Respondent to stipulate to treating its prior production of sales call recordings as representative of HomeAdvisor's typical sales calls.

x HomeAdvisor's responsive recordings were created and historically stored within HomeAdvisor's prior recording database, as referred to as VPI, in VPI's proprietary VP2 format. Opposition at 3.

x

based entirely on the claim that the data produced is not reasonably ~~usable~~ <sup>Seaboard</sup> in opposition at 5-6. However, the plain language of Rule 3.37(c)(2) and the inclusion of the word ~~clearly~~ <sup>clearly</sup> indicates two alternative production options are available. Reasonably interpreted, the language of the rule means that the produced ESI need ~~only~~ <sup>only</sup> be in a “reasonably usable form” when the ESI is not produced in the form in which ordinarily maintained, and vice versa.

The above interpretation is further supported by decisions under Federal Rule of Civil Procedure 34(b)(2)(E) which is similar to FTC Rule 3.37(c)<sup>3</sup>. In *Hahn v. Massage Envy Franchising, LLC*, the court explained that Federal Rule 34 “does not demand that a responding party produce ESI in the format the requesting party believes is a reasonably useable form.” 2014 WL 12899290, at \*8 (S.D. Cal. July 24, 2014). Instead, “Rule 34 only requires a responding party to produce ESI in a reasonably useable form when the responding party chooses to convert its data out of the form it is ordinarily maintained and into a different format for production.” Similarly, in *Ark. River Power Auth. v. Babcock & Wilcox Power Generation Grp., Inc.*, the court found that where an ESI production was at issue, the relevant inquiry was whether the responding party produced its ESI in the form in which it is ordinarily maintained ~~or~~ <sup>or</sup> a reasonably usable form or forms. The Rule clearly requires one or the other, but not ~~both~~ <sup>both</sup>.” 2015 WL 2128312, at \*11 (D. Colo. May 5, 2015) (emphasis in original). Therefore, where Complaint Counsel has neither alleged or provided evidence that HomeAdvisor produced ESI in a form other than that in which it was ordinarily maintained, HomeAdvisor was not required to produce the ESI in a “reasonably usable form”

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