NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3292-20

MATTHEW J. PLATKIN,
Attorney General of the
STATE OF NEW JERSEY,
and CARI FAIS,
Acting Director of the
NEW JERSEY DIVISION OF
CONSUMER AFFAIRS,

Plaintiffs-Respondents,

v.

SMITH & WESSON SALES CO.,
INC., a/k/a AMERICAN
OUTDOOR BRANDS SALES CO.,
a/k/a SMITH & WESSON CORP.,

Defendant-Appellant.

APPROVED FOR PUBLICATION

January 26, 2023

APPELLATE DIVISION

Argued October 31, 2022 – Decided January 26, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-000025-21.

Courtney G. Saleski argued the cause for appellant (DLA Piper LLP (US), attorneys; Courtney G. Saleski, Christopher M. Strongosky, and Edward S. Scheideman (DLA Piper LLP (US) of the District of Columbia bar, admitted pro hac vice, on the briefs).

Melissa Medoway, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Jeremy M. Feigenbaum, State Solicitor, Angela Cai, Deputy State Solicitor, of counsel; Mayur Saxena, Assistant Attorney General, of counsel and on the brief; Monica Finke, Melissa Medoway, John T. Passante, Tim Sheehan, and Chanel Van Dyke, Deputy Attorneys General, on the brief).

The opinion of the court was delivered by

SMITH, J.A.D.

Defendant Smith & Wesson Co., Inc.,[1] appeals from a June 30, 2021 Chancery Division order directing it to comply with a subpoena issued by plaintiffs Gurbir S. Grewal,[2] Attorney General of the State of New Jersey, and Kaitlin A. Caruso,[3] Acting Director of the New Jersey Division of Consumer Affairs (collectively, plaintiffs). Defendant also appeals a second June 30, 2021 Chancery Division order denying its cross-motion to dismiss, stay, or quash the subpoena.

[1] Smith & Wesson Co., Inc., will be referred to as defendant throughout this opinion.

[2] Mr. Grewal is no longer the attorney general. Andrew J. Bruck, then Acting Attorney General of New Jersey, responded to this appeal. Mr. Bruck was succeeded on February 14, 2022, by Matthew Platkin as Attorney General of the State of New Jersey.

[3] Ms. Caruso is no longer the acting director. Cari Fais is the current Acting Director of New Jersey Division of Consumer Affairs.

On appeal, defendant argues the trial court erred when it: rejected its NAACP v. Alabama[4] arguments; failed to consider defendant's claims under the First, Second, Fourth, and Fourteenth Amendments; and abused its discretion by failing to dismiss, stay, or quash plaintiffs' subpoena under the first-filed doctrine.

We affirm for the reasons that follow.

I.

On October 13, 2020, plaintiffs issued an Administrative Action Subpoena Duces Tecum pursuant to the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -226, and the State's Hazardous Products Regulations, N.J.A.C. 13:45A-4.1 to -4.3, requesting the production of certain documents by defendant. Subpoena responses were due on or before November 13, 2020. However, the Attorney General granted defendant a thirty-day extension to submit its responses, objections, and produce documents. The subpoena requested several categories of documents, summarized in relevant part below:

> 1. [A]ll advertisements for defendant's merchandise available in New Jersey concerning home safety, concealed carry, personal protection, personal defense, personal safety, or home defense benefits of firearms;

[4] NAACP v. Alabama, 357 U.S. 449 (1958).

2. all documents concerning any test, study, analysis, or evaluation considered or undertaken by defendant or its agents regarding the claims made by defendant in those advertisements or the performance of any defendant's merchandise identified in those advertisements;

4. all documents concerning:

   a. whether defendant's firearms can be legally carried and concealed while in New Jersey;

   b. whether the concealed carry of a firearm enhances one's lifestyle;

   c. whether it is safer to confront a perceived threat by drawing a firearm rather than seeking to move away;

   d. whether having a firearm makes a home safer;

   e. whether defendant's firearms are designed to be more safe, reliable, accurate, or effective than firearms made by other manufacturers for use in personal or home defense or other activities; and

   f. whether untrained consumers could successfully and effectively use defendant's firearm for personal or home defense.

5. all documents concerning any efforts by defendant to: determine whether its advertisements comply with New Jersey law; as well as assess the personal, health or safety risks possessing a firearm or drawing a firearm in response to a perceived threat;

6. a myriad of documents relating to defendant's corporate organizational structure, communications and marketing strategies, and training materials.

On December 14, 2020, the subpoena's return date, defendant did not produce the sought-after documents, but rather sent written objections to plaintiffs. The next day, defendant filed suit in federal court against the Attorney General and the Acting Director of the New Jersey Division of Consumer Affairs, alleging that plaintiffs' subpoena violated various constitutionally protected rights.[5]

On February 21, 2021, plaintiffs filed this action to enforce the subpoena. The one-count verified complaint alleged defendant failed to comply with the October 13, 2020 subpoena.

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[5] Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J., 27 F.4th 886, 889 (3d Cir. 2022). After the district court dismissed this federal complaint, the Third Circuit reinstated it on March 10, 2022. The Third Circuit held that the Younger doctrine, which "requires federal courts to abstain from deciding cases that would interfere with certain ongoing state proceedings," does not apply. Id. at 890 (quoting Malhan v. Sec'y of U.S. Dep't of State, 938 F.3d 453, 461 (3d Cir. 2019); Younger v. Harris, 410 U.S. 37, 53-54 (1971)). It reasoned that "'Younger extends . . . no further' than three 'exceptional circumstances': (1) 'state criminal prosecutions'; (2) 'civil enforcement proceedings'; and (3) 'civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.'" Id. at 891 (quoting Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013)). It found the Attorney General's subpoena enforcement action does not fall within the Sprint exceptions, and as such, "abstention was not warranted." Id. at 895. On remand, the district court dismissed the federal complaint again, finding the complaint barred by res judicata. Smith & Wesson Brands, Inc. v. Grewal, No. 20cv19047, 2022 WL 17959579, at *5 (D.N.J. Dec. 27, 2022).

On March 11, 2021, defendant moved to dismiss, stay, or quash the subpoena, positing three arguments. First, defendant contended that its objections, when combined with the federal lawsuit, constituted a proper response to the subpoena. Next, it argued plaintiffs failed to demonstrate the subpoena was related to a legitimate purpose. Finally, defendant contended the first-filed rule compelled the trial court to dismiss or stay the action. Defendant also appended to its motion the federal complaint describing plaintiffs' alleged constitutional violations.

In opposition, plaintiffs submitted signed orders to show cause from other New Jersey trial courts which had been entered in other subpoena enforcement actions.

On May 27, 2021, Judge Jodi Lee Alper, heard arguments and issued an order enforcing the subpoena on June 30, 2021. The judge provided a written statement of reasons addressing the first-filed rule, the validity of the subpoena issued pursuant to the CFA, the Hazardous Product Regulations, and defendant's constitutional arguments.

First, the court cited settled principles associated with the first-filed doctrine, noting that we "ordinarily stay or dismiss a civil action in deference to an already pending substantially similar lawsuit in 'another state' unless compelling reasons dictate that [we] retain jurisdiction." The court explained

the doctrine is flexible where "special equities exist, such as forum shopping to deny benefit of the natural forum to the other party, or when a party acting in bad faith filed first where the opposing party was anticipated to file in a less favorable forum . . . ." The court explained "[a] stay or dismissal of a second filed action should be denied if an 'injustice would be perpetrated' on a party in the first[-]filed action and 'no hardship, prejudice, or inconvenience' would be inflicted on the other by proceeding in the second filed action."

Next, the court examined the special equities. Highlighting defendant's non-compliance, the court found the "expected action" was the parties' engagement in state court, whether it be plaintiffs' motion to enforce or defendant's motion to quash the subpoena. The court considered defendant's request for a thirty-day extension of the subpoena deadline, and found that upon expiration of the extension, defendant immediately filed a federal declaratory judgment action, rather than submit documents. The court found defendant's conduct in filing the federal action to be conduct which would "create confusion and unnecessary lawsuits." Finding defendant's state claims "substantially similar on the 'first-filed' federal action," it concluded "special equities exist for [the state] enforcement action to continue."

The court made additional findings. It found defendant had withdrawn its federal application seeking emergent relief and was "pursuing the [federal]

lawsuit through the normal course." The court also found plaintiffs' investigation of defendant's potential CFA violations would be stalled because "the issues in the federal case will take months and likely years to be litigated." Taking these findings into account, the court concluded the "case involve[d] state interests that overcome . . . considerations of comity raised by the first-filed rule. . . ."

Turning to defendant's constitutional arguments, the court found defendant's interpretation of NAACP "overly broad," because unlike NAACP and similar cases where enforcement of the subpoena would have interfered with individual members' constitutional right to freely associate under the First Amendment, freedom of association was not implicated by subpoena enforcement here. The court further distinguished NAACP, noting plaintiffs did "not seek information regarding [defendant's] association with other individuals or corporations, only information [about] representations [defendant] made about [its] products to the public."

The court found the subpoena was tailored to obtain documents relating to defendant's advertising claims regarding "product safety, benefits, and effectiveness," and relating to whether defendant disclosed to New Jersey consumers that the firearms it markets to them are "unlawful to possess or use in the State without permit."

The court next found the "documents, if any exist, would establish whether [defendant] made any promises or representations to consumers and whether its documents supported or belied those claims," and that plaintiffs "demonstrated the relevance of the documents to its CFA investigation." The court also found the subpoena to be limited in scope, relevant in purpose, and specific in directive, given the "very early stage of [the] investigation." "Thus," the court concluded, "the document requests go to the very core of whether [defendant] may have violated the CFA."

The trial court rejected defendant's argument that "the subpoena itself violates constitutional rights," or that it must be quashed because plaintiffs had an improper motive in issuing it. The court found instead that the subpoena "neither bans nor does it 'directly regulate the content, time, place, or manner of expression.'" The trial court noted that the subpoena was issued pursuant to an investigation in which plaintiffs had made no determinations regarding CFA violations by defendant. Further, the court found defendant failed to demonstrate that plaintiffs "lack[ed] a valid basis to believe that [defendant] may have committed fraud."

The court also rejected as speculation defendant's argument that the Attorney General's "personal views are the same as those of anti-Second Amendment activists" and that the Attorney General had a "singular focus . . .

limited to reducing gun ownership," stating that "[p]ublic officials, including the [Attorney General], frequently make statements of public concern." The court continued, finding the Attorney General "[had] not impugned [defendant] nor suggested that he has concluded that [defendant] should be charged with violations of the [CFA]."

Judge Alper concluded the subpoena was valid on its face, and "should not be stayed, dismissed, nor should the subpoena be quashed." She ordered defendant to respond to the subpoena within thirty days, refrain from destroying the requested documents, and denied defendant's cross-motion.

In a subsequent order, the judge denied defendant's motion to stay the thirty-day deadline for production of documents.

Defendant raises the following issues on appeal:

> I. NAACP Requires Resolution of All Constitutional Objections Before Production May Be Compelled.
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> > A. NAACP Requires Resolution of All Constitutional Objections Before Production Is Ordered, and Its Holding Was Not Limited to Freedom of Association Cases
> >
> > B. The CFA Cannot Justify Ignoring [Defendant's] Constitutional Objections
>
> II. The Trial Court Erred in Holding That [Defendant's] First Amendment Rights Were Not Violated.

A. The First Amendment Applies to [Defendant's] Protected Speech

B. The Attorney General's Actions Constitute Viewpoint Discrimination against [Defendant]

C. The Actions of the Attorney General Are Chilling [Defendant's] Speech

III. The Constitutional Arguments That the Trial Court Ignored Also Require Quashing the Subpoena.

A. The Trial Court Failed to Address How the Attorney General's Actions Violate [Defendant's] Second Amendment Rights

B. The Trial Court Failed to Address How the Attorney General's Conduct Violated the Equal Protection Clause

C. The Trial Court Erred by Failing to Address [Defendant's] Due Process Claims

IV. The Subpoena Is Not Reasonably Related to a Legitimate Government Inquiry Under the Fourth Amendment.

A. The Attorney General Has Not Identified Any Statements That Justify the Subpoena

B. The Attorney General's Sole Support for the Subpoena Is a Regulation That Unconstitutionally Compels Speech

C. The Trial Court Erred by Accepting The Attorney General's Assertions Regarding the Investigation and Ignoring The Attorney General's Public Statements

V. This Case Should Have Been Stayed or Dismissed Under the First-to-File Rule.

II.

A.
THE FIRST-FILED DOCTRINE

We commence our analysis by examining the first-filed doctrine. Defendant argues the trial court erred by not staying the subpoena under New Jersey's 'first-filed' rule because it filed its federal suit nearly sixty days before plaintiffs' filed their subpoena enforcement action. It also contends the trial court abused its discretion when it found defendant had engaged in "tactical maneuver[s]." Finally, defendant contends the trial court erred when it found a compelling state interest in rooting out consumer fraud sufficient to make an exception to the first-filed rule.

"New Jersey has long adhered to 'the general rule that the court which first acquires jurisdiction has precedence in the absence of special equities.'" Sensient Colors Inc. v. Allstate Ins. Co., 193 N.J. 373, 386 (2008) (quoting Yancoskie v. Del. River Port Auth., 78 N.J. 321, 324 (1978)). "Under the first-filed rule, a New Jersey state court ordinarily will stay or dismiss a civil action in deference to an already pending, substantially similar lawsuit in another state, unless compelling reasons dictate that it retain jurisdiction." Ibid. (citing O'Loughlin v. O'Loughlin, 6 N.J. 170, 179 (1951)).

Special equities have been found under a variety of circumstances, including when:

> [1] one party has engaged in jurisdiction shopping to deny the other party the benefit of its natural forum . . . . [2] a party acting in bad faith has filed-first 'in anticipation of the opposing party's imminent suit in another, less favorable, forum' . . . [3] significant state interests . . . are implicated, and when deferring to a proceeding in another jurisdiction 'would contravene the public or judicial policy' of the forum state. . . [4] it would cause 'great hardship and inconvenience' to one party by proceeding in the first-filed action and no unfairness to the opposing party by proceeding in the second-filed action.
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> [Sensient, 193 N.J. at 387-89 (internal citations omitted).]

A "comity analysis should begin with a presumption in favor of the earlier-filed action." Id. at 387. The analysis should be "a fact-specific inquiry that weighs considerations of fairness and comity" to determine whether "special equities exempt a court from deferring to a first-filed action . . . ." Id. at 389-90. Thus, "[t]he question is not whether a state court has the power to exercise jurisdiction over a case filed within its jurisdiction, but whether the court should restrain itself and not exercise that power." Id. at 386-87 (citing O'Loughlin, 6 N.J. at 179).

The trial court found compelling reasons in the record to exercise its jurisdiction: plaintiffs' investigation into defendant's potential CFA violations;

defendant's race to the federal courthouse to file its action; and the strong potential for prejudicial delay to the fraud investigation. The court concluded defendant's actions and corresponding forum selection were part of a strategy designed to "create confusion and unnecessary lawsuits."

The existence of a tolling agreement between the parties does not change the calculus. While it may prevent discovery deadlines from expiring, or statutes of limitation from running, a tolling agreement cannot account for the spoliation of evidence, or the fading memories of witnesses.

We are unpersuaded by defendant's first-filed arguments. To accept defendant's position, any time the Attorney General's office issued a civil subpoena, the target of the investigation could sprint to the federal courthouse to quash it, effectively stopping a valid investigation in its tracks. See EEOC v. Univ. of Pa., 850 F.2d 969, 977 (3d Cir. 1988) (compiling cases and noting that the target's "conduct following the issuance of the EEOC's subpoena . . . created 'a lamentable spectacle,' which was 'tantamount to the blowing of a starter's whistle in a foot race'"); Tempco Elec. Heater Corp. v. Omega Eng'g, 819 F.2d 746, 750 (7th Cir.1987) (rigid first-filed rule "will encourage an unseemly race to the courthouse and, quite likely, numerous unnecessary suits . . . .").

Our application of the first to file rule here would halt future civil investigations in their formative stages, before issues of regulatory concern could be addressed on the merits. We decline to take such an approach, and we find no abuse of discretion in Judge Alper's order retaining jurisdiction.

B.

STANDARD OF REVIEW

We "review [a] trial court's decision to quash [a] subpoena pursuant to an indulgent standard of review." In re Subpoena Duces Tecum on Custodian of Recs., 214 N.J. 147, 162 (2013). Decisions regarding "discovery matters are upheld unless they constitute an abuse of discretion." Ibid. (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). Thus, a reviewing court "generally defer[s] to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Ibid. (alteration in original) (quoting Pomerantz, 207 N.J. at 371)). The court's legal interpretation, however, is subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Therefore, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Ibid.

C.

THE CONSUMER FRAUD ACT AND THE ATTORNEY GENERAL'S POWER TO ISSUE SUBPOENAS PURSUANT TO IT

The Legislature enacted the CFA in 1960. Sun Chem. Corp. v. Fike Corp., 243 N.J. 319, 329 (2020). The purpose of the "CFA and attendant regulations are '. . . designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services.'" Suarez v. E. Int'l Coll., 428 N.J. Super. 10, 32 (App. Div. 2012) (quoting Div. of Consumer Aff. v. Gen. Elec. Co., 244 N.J. Super. 349, 353 (App. Div. 1990)). Specifically, the CFA provides that:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice.
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> [N.J.S.A. 56:8-2.]

In short, the CFA is intended to "prevent deception, fraud or falsity, whether by acts of commission or omission . . . ." Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376-77 (1977). The CFA's history "is one of constant expansion of consumer protection[,]" Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997), and its "language . . . evinces a clear legislative intent

that its provisions be applied broadly." Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 264 (1997).

The act empowers "the Attorney General to combat the increasingly widespread practice of defrauding the consumer." Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994) (quoting S. Comm. Statement to S. 199 (1960)). "In so doing, the Legislature 'intended to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public.'" Sun Chem., 243 N.J. at 329 (quoting Kugler v. Romain, 58 N.J. 522, 537 (1971)). Thus,

> [the CFA] authorizes the [Attorney General] to issue subpoenas, "which shall have the force of law," [N.J.S.A.] 56:8-4, when [they] believe[]someone has violated the [a]ct or "when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in[,] or is about to engage in, any such practice," [N.J.S.A.] 56:8-3. The Attorney General may request orders from New Jersey courts: "(a) Adjudging [a subpoena violator] in contempt of court; (b) Granting injunctive relief without notice restraining the sale or advertisement of any merchandise by [a subpoena violator]; or (c) Vacating, annulling, or suspending the corporate charter of a corporation." [N.J.S.A.] 56:8-6.
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> [Smith & Wesson, 27 F.4th at 889 (fifth, sixth, and seventh alterations in original).]

Under the CFA, "the Legislature [also] conferred upon the Attorney General . . . the authority to 'promulgate such rules and regulations, and

prescribe such forms as may be necessary, which shall have the force of law.'" Perez v. Pro. Green, LLC, 215 N.J. 388, 400 (2013). Hence, "[t]he violation of such regulations gives rise to a discrete category of CFA violations." Ibid; see also Cox, 138 N.J. at 17 (explaining that "[u]nlawful practices fall into three general categories: affirmative acts, knowing omissions, and regulation violations[;]" the latter of which "is based on regulations enacted under N.J.S.A. 56:8-4").

A subpoena issued by the Attorney General under the CFA is subject to our court rules. Rule 1:9-2 confers the authority on the trial courts to quash or modify any subpoena it finds to be "unreasonable or oppressive." The standard for testing the validity of a subpoena is reasonableness. State v. Cooper, 2 N.J. 540, 556 (1949). More specifically, whether the subject matter in the subpoena is specified "with reasonable certainty." Ibid. "[T]here must be a substantial showing that [the records] contain evidence relevant and material to the issue." Ibid. Thus, "[i]f the specification is so broad and indefinite as to be oppressive and in excess of the demandant's necessities, the subpoena is not sustainable." Ibid.

III.

A.
THE DOCTRINE OF STRICT NECESSITY

We next consider defendant's wide-ranging constitutional arguments, which posit that plaintiffs' civil subpoena is invalid on its face. "Generally, [New Jersey] courts will adjudicate the constitutionality of legislation only if a constitutional determination is absolutely necessary to resolve a controversy between parties." Bell v. Twp. of Stafford, 110 N.J. 384, 389 (1988). "This doctrine of 'strict necessity,' articulated by the United States Supreme Court in Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947), is well-recognized." Ibid. Thus, "we do not address constitutional questions when a narrower, non-constitutional result is available[.]" United States v. Scurry, 193 N.J. 492, 500 n.4 (2008) (citing Randolph Town Ctr., L.P. v. Cnty. of Morris, 186 N.J. 78, 80 (2006)); see also Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971) (holding that "a court should not reach and determine a constitutional issue unless absolutely imperative in the disposition of litigation").

Similarly, our Court has warned that:

> even if we entertained a doubt of constitutionality . . . we would be equally bound, by judicial precedents since the earliest days of our nation, to eschew judicial interference with the legislative will. Chief Justice John Marshall indeed counseled the courts to avoid, where at all possible, confrontation with constitutional issues. Sitting at circuit in Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558), he stated:

> No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.
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> [N.J. Ass'n on Correction v. Lan, 80 N.J. 199, 218, (1979).]

It follows that when we consider defendant's constitutional arguments, we do so through the lens of strict necessity.

B.
NAACP V. ALABAMA

Defendant first argues that NAACP v. Alabama stands for the proposition "that the 'indispensable liberties' of the First Amendment, 'whether of speech, press, or association,' cannot be abridged by the government unless the state articulates compelling interests." According to defendant, NAACP protects not only freedom of association, but also governmental trespass of "fundamental freedoms" and "indispensable liberties." We are not persuaded.

In NAACP, the U.S. Supreme Court was confronted with a challenge to an order requiring the production of the NAACP's membership list in response to a subpoena issued by the Alabama state Attorney General in 1955. 357 U.S.

at 451. The state's asserted interest in the membership information was to "determine whether [the NAACP] was conducting intrastate business in violation of the [state's] foreign corporation registration statute." Id. at 464. The Court, however, rejected the state's purported interest after finding that it was "unable to perceive that the disclosure of the names of [NAACP's] rank-and-file members has a substantial bearing on" determining whether the defendant had violated the state's statute. Ibid. Indeed, the Court noted:

> [The NAACP] has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of [its] Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw [their membership] and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.
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> [Id. at 462-63.]

The Court also noted it was of no moment that the state did not take any "direct action . . . to restrict the right of [NAACP's] members to associate freely." Id. at 461. It observed "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court

recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." Ibid. The Court stated it was:

> important to bear in mind that [NAACP] asserts no right to absolute immunity from state investigation, and no right to disregard [the state's] laws. As shown by its substantial compliance with the production order, [it] does not deny [the state's] right to obtain from it such information as the [s]tate desires concerning the purposes of [NAACP] and its activities within the State.
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> [Id. at 463-64.]

The Court distinguished its holding in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928), where it upheld a New York statute requiring a local chapter of the Ku Klux Klan to disclose, among other things, a roster of its membership. NAACP, 357 U.S. at 465. In Bryant, the Court reasoned that the state met the burden of demonstrating a compelling subordinating interest "based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence. . . ." Ibid. However in NAACP, the Court held that the state did not demonstrate a compelling subordinating interest "for the deterrent effect on the free enjoyment of the right to associate . . . ." Id. at 466.

One year prior to its holding in NAACP, the Court confronted the "constitutional limits of legislative inquiry" in Sweezy v. New Hampshire, 354

U.S. 234, 235-36 (1957). In that case, the state legislature empowered the New Hampshire Attorney General to investigate on its behalf "violations of the subversive activities act of 1951" within the state. Id. at 236. "The legislature [also] conferred upon the Attorney General the further authority to subpoena witnesses or documents." Id. at 238. The Attorney General, armed with his broad investigative powers, summoned Sweezy, a college professor and self-described Marxist-socialist, to testify under oath regarding a number of topics, including the Progressive Party and its members. Id. at 243-44, 248. He refused to answer questions about other members, even though he answered many other questions concerning other topics. Id. at 243. Sweezy was later found in contempt of court and incarcerated after raising his First Amendment privilege and refusing to answer some of the New Hampshire Attorney General's questions. Id. at 244-45.

The United States Supreme Court reversed the contempt order after finding the state legislature empowered the Attorney General with a "sweeping and uncertain mandate[,]" which left the Court uncertain as to whether "the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which [Sweezy] was interrogated." Id. at 253. Indeed, it found that "neither [the Court] nor the state courts ha[d] any assurance that the questions [Sweezy] refused to answer [fell] into a category of matters upon

which the legislature wanted to be informed when it initiated this inquiry." Id. at 254. Consequently, the questions posed to Sweezy served no valid legislative purpose, which as a result, infringed upon constitutional rights. Id. at 254-55.

We find Judge Alper did not err in her narrow reading of NAACP, and our analysis leads us to same outcome.

C.
DEFENDANT'S CONSTITUTIONAL CLAIMS

Defendant raises multiple constitutional objections in support of its motion to quash, contending the trial court erred by not addressing each constitutional argument on its merits. Taking the position that NAACP requires all of defendant's constitutional objections to be resolved before production of the sought-after documents can be compelled, defendant contends: its commercial speech is protected under the First Amendment; the Attorney General's public statements and actions prior to issuance of the subpoena constitute viewpoint discrimination and have a chilling effect on defendant's speech; defendant's rights under the Second Amendment [6] bars production because its commercial speech is protected; defendant's rights

[6] At oral argument, defendant contended that it had standing to assert the Second Amendment rights of its individual customers. Defendant cited no precedent for the argument. Because we do not reach the Second Amendment issue, we express no opinion on defendant's standing to raise the Second Amendment as a defense to plaintiffs' subpoena enforcement action.

under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment were violated by plaintiffs' actions; and finally, plaintiffs violated defendant's Fourth Amendment rights by employing an unconstitutional regulation and failing to identify any offending commercial speech that justifies a subpoena. We disagree, as these theories are premised upon the argument that the United States Supreme Court's holding in NAACP permits them. We have already rejected that argument.

Even if we were persuaded that NAACP opened the door to constitutional defenses outside of freedom of association, we would find these federal constitutional claims not ripe for our consideration.

Such claims are ripe for adjudication "only when there is an actual controversy, meaning the facts present 'concrete contested issues conclusively affecting' the parties' adverse interests." Matter of Firemen's Ass'n Oblig., 230 N.J. 258, 275 (2017) (citing N.J. Turnpike Auth. v. Parsons, 3 N.J. 235, 241 (1949)). "There is a two-part test to determine ripeness of [a] controversy: '(1) the fitness of issues for judicial review; and (2) the hardship to the parties if judicial review is withheld at this time.'" K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'l. Prot., 379 N.J. Super. 1, 9-10 (App. Div. 2005) (quoting 966 Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp, 299 N.J. Super. 501, 515-16 (Law. Div. 1955)).

In determining whether an issue is fit for judicial review, we consider whether additional factual development is required. We find that to do so on this record would be improper, where there are few actual facts. Defendant has offered nothing in support of its motion but selected quotes from the Attorney General's public statements, outside the context of a fulsome discovery process. While we need not reach the second element in the ripeness analysis, we note there is no hardship to the parties by declining to address defendant's constitutional arguments now. Defendant has preserved its claims, and the parties, in conjunction with the trial court, can take steps to protect any proprietary materials identified during discovery. Because ripeness allows courts to avoid "premature adjudication" which would entangle them in "abstract disagreements[,]" we end our analysis of defendant's sweeping constitutional claims here. Firemen's Ass'n, 230 N.J. at 275.

D.
THE VALIDITY OF THE SUBPOENA

Having disposed of defendant's federal constitutional arguments at this preliminary stage of the litigation, we turn to our review of the subpoena.

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative

> agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.
>
> [In re Addonizio, 53 N.J. 107, 121 (1968) (quoting United States v. Morton Salt Co., 338 U.S. 632, 641-643 (1950)).]

Plaintiffs have the power, delegated to them by the Legislature under the CFA, to investigate defendant for potential violations of the act and its regulations. See N.J.S.A. 56:8-3. That investigatory power, labeled the "power of inquisition" by the Addonzio Court, includes the power to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Addonzio, 53 N.J. at 121.

Defendant's theories suggest we should ignore the Legislature's clear delegation of investigatory power under the CFA. We disagree, as our jurisprudence and this record leads us to the opposite conclusion. See Sun Chem., 243 N.J. at 329 (noting that the Legislature intended to "confer" the "broadest kind of power" to protect New Jersey consumers); see also Exxon

Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 713 (S.D.N.Y. 2018) ("agencies—and by extension, state officers like the [Attorney General]—are afforded latitude to conduct their investigations without interference . . . .").

The subpoena, a primary investigative tool identified by the Legislature to assist the Attorney General with investigations into potential CFA violations, is valid. See N.J.S.A. 56:8-4. Its subject matter is clear, and the information sought by plaintiffs is spelled out in a manner that is sufficiently well-defined. Contrary to defendant's position, the investigation does not need to be limited by "forecasts of the probable result of the investigation . . . ." Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946) (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).

We remain mindful that subpoenas must not be issued "arbitrarily or in excess of . . . statutory authority. . . ." Ibid. However, defendant has not presented anything beyond mere supposition and premature constitutional objections to support the proposition that plaintiffs' subpoena is not valid or overbroad in scope.

For the reasons set forth, we find Judge Alper did not abuse her discretion when she granted plaintiffs' motion to enforce its October 13, 2020 subpoena and denied defendant's motion to stay, quash, or dismiss same.

Affirmed.