

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
California Naturel, Inc.,)
a corporation,)
)
Respondent.)
_____)

Docket No. 9370

**COMPLAINT COUNSEL’S REPLY TO RESPONDENT’S OPPOSITION
TO MOTION FOR SUMMARY DECISION**

Pursuant to Commission Rule 3.22(d), 16 C.F.R. § 3.22(d), Complaint Counsel submits this Reply to the Respondent California Naturel, Inc.’s (“California Naturel”) Opposition to the Complaint Counsel’s Motion for Summary Decision (“Opposition”). As set out below, nothing in the Opposition prevents the Commission from granting Summary Decision and issuing an Order against California Naturel.

ARGUMENT

The Material Facts Are Established by Complaint Counsel in Their Motion Papers

The Complaint alleged that: (1) California Naturel represented a SPF 30 Sunscreen (“Sunscreen”) as “all natural;” and (2) this representation was false because the Sunscreen contains a synthetic ingredient, Dimethicone. Both California Naturel’s May 6, 2016, Response to the Complaint¹ and its Opposition admit these factual allegations. Therefore, there is no dispute that California Naturel’s “all natural” claim was false in violation of Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a) and 52.

¹ See Complaint Counsel’s Motion for Summary Decision at p. 2; Frisby Decl. and Attachment thereto.

California Naturel's Opposition Creates No Genuine Disputes as to Material Facts Which
Need to be Resolved at Trial

Commission Rule 3.24(a)(3), 16 C.F.R. § 3.24(a)(3), could not be more clear: “a party opposing the motion [for summary decision] may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits . . . ,² must set forth specific facts showing that there is a genuine issue of material fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.” *Id.* Any affidavits “shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Id.* Additionally, the party opposing summary decision “shall include a separate and concise statement of those materials facts as to which the opposing party contends there exists a genuine issue for trial.” Commission Rule 3.24(a)(2), 16 C.F.R. § 3.24(a)(2).

California Naturel's two-page Opposition is a letter directed to the Administrative Law Judge that merely “rest[s] upon the mere allegations . . . of [its] pleading.” It is not an affidavit, nor is it supported by admissible evidence. California Naturel also failed to submit any counter-statement of material facts that create genuine issues for trial. This is not surprising given California Naturel admits to all of the relevant facts material to this Summary Decision Motion.

Beyond Lacking an Appropriate Foundation to Create Any Genuine Factual Disputes, California
Naturel's “Substantive” Defenses are Baseless

Rather than challenge the substance of the Complaint or the instant Motion, California Naturel makes three legally irrelevant arguments.

First, the Opposition asserts that the Complaint addresses an “outdated” 2015 website and that it revised the website in early 2016 to address the FTC's allegations. However, the cessation

² In addition to using affidavits, a party can oppose a motion for summary decision using depositions or other discovery materials. Commission Rule 3.24(a)(4), 16 C.F.R. § 3.24(a)(4). No such materials exist in this matter.

of an unlawful practice is not a defense, nor does it preclude the issuance of an order, if there is a possibility of recurrence. *Allee v. Medrano*, 416 U.S. 802 (1974); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert denied*, 429 U.S. 818 (1976). Notably, however, California Naturel: (1) does not dispute that the 2015 webpage misrepresented the Sunscreen as “all natural;” and (2) does not provide any evidence that its current webpage no longer makes deceptive representations concerning the Sunscreen.

While Complaint Counsel need not show continuing violations of the FTC Act after 2015 for the Commission to issue the order sought here, the Commission could take official notice that California Naturel continues to maintain a product webpage for its Sunscreen.³ At the very top of both its home webpage and its Sunscreen product webpage, it continues to make a prominent “all natural” claim.⁴ This recalcitrance suggests that only the issuance of an order can compel California Naturel’s compliance with the FTC Act. At a minimum, California Naturel has failed to show that its violations will not persist or resume absent the issuance of an order. *See FTC v. American Std. Credit Sys.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994) (Defendants failed to show there is no possibility that the alleged violations will recur).

Second, the Opposition also appears to contend that a reasonable consumer could determine the falsity of the “all natural” representations by researching the issue. In support of this contention, California Naturel refers to commentary by a Wall Street Journal reporter who

³ The website is *available at* <http://www.california-naturel.com/sunscreen-spf-30>. Judicial notice is possible here because the content of California Naturel’s webpage is “capable of accurate and ready determination by resort to sources [here, California Naturel’s publicly available webpage] whose accuracy cannot reasonably be questioned.” Rule 3.43(f), 16 C.F.R. § 3.43(f).

⁴ At the bottom of the webpage, below the visible portion of the screen and after the consumer purchase button, California Naturel states, “The FTC requires us to add the following: Dimethicone, a synthetic ingredient, is 8% of the sunscreen formula, the remaining 92% are natural products.” This statement is wholly inadequate based on its placement at the bottom of the webpage not in close proximity to the “all natural” claim near the top of the page.

visited the website. The reporter supposedly read on the website that the Sunscreen contains “Dimethicone” and determined, after conducting “three minutes” of research, that Dimethicone is a synthetic ingredient. Even if true, the reporter must have seen the website *after* California Naturel revised it in early 2016 by adding a statement that the Sunscreen contains the synthetic ingredient Dimethicone. Furthermore, the reporter’s comments are hearsay and California Naturel has not showed that they are admissible under Rule 3.43(b).

Assuming, *arguendo*, that the reporter’s statements are accurate, admissible, and legally relevant, a reporter seeking to determine if any of the ingredients in the Sunscreen are synthetic does not mean that most consumers would do the same. Indeed, consumer reliance on express and unqualified claims such as the “all natural” claim made by California Naturel is presumptively reasonable, and it is reasonable to interpret such statements as intending to say exactly what they say. *FTC v. Int’l Computer Concepts, Inc.*, 1994 WL 730144 at *12 (N. D. Ohio 1994), citing *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff’d on other grounds*, 791 F.2d 189 (D.C.Cir.1986), *cert. denied*, 479 U.S. 1086 (1986); and *FTC v. Skybiz.com, Inc.*, 2001 WL 1673645 at *9 (N.D. Okla. 2001) (It is reasonable to expect that consumers could rely on the express claims of the representatives of the SkyBiz Program, citing *FTC v. Five-Star Auto Club, Inc.*, 97 F.Supp.2d 502, 528 (S.D.N.Y.2000)). The fact that one non-consumer was able to conduct research to uncover the truth does not rebut the presumption of reliance. *FTC v. Bluehippo Funding, LLC*, 762 F.3d 238 at 246 (2d Cir. 2014) (defendants have opportunity to rebut the presumption of consumer reliance by introducing evidence that individual consumers not misled or injured).

Third, California Naturel suggests the relief sought here is not appropriate or necessary because it no longer sells its Sunscreen due to “bad publicity” resulting from the Complaint.

However, California Naturel provides no evidence it has stopped sales. Even if this assertion were true, granting Summary Decision and issuing an order would still be appropriate to deter future consumer deception. Complaint Counsel has established that California Naturel made deceptive representations concerning its Sunscreen in violation of Section 5(a) of the FTC Act and disseminated false advertisements in violation of Section 12 of the FTC Act. California Naturel only revised its webpage after Commission staff advised it that the “all natural” claim was deceptive and, even then, its revisions did not bring it into compliance with the requirements of the FTC Act. This failure only underscores the necessity for the Commission to issue an order crafted to prevent future deception. Indeed, courts have upheld orders prohibiting conduct that ceased well before the initiation of an FTC enforcement action. *See C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273 (3d Cir. 1952); and *Spencer Gifts Inc. v. FTC*, 302 F.2d 267 (3d Cir. 1962).

For the reasons set forth in its original motion papers and above, Complaint Counsel respectfully requests that the Commission grant this Motion for Summary Decision and issue an Order against Respondent California Naturel, Inc.

Dated: October 5, 2016

Respectfully submitted,



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Notice of Electronic Service

I hereby certify that on October 05, 2016, I filed an electronic copy of the foregoing Complaint Counsel's Reply to Respondent's Opposition to Motion for Summary Decision, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Donald Clark
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I hereby certify that on October 05, 2016, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Reply to Respondent's Opposition to Motion for Summary Decision, upon:

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I hereby certify that on October 05, 2016, I served via other means, as provided in 4.4(b) of the foregoing Complaint Counsel's Reply to Respondent's Opposition to Motion for Summary Decision, upon:

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