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

In the Matter of **HEALTH RESEARCH LABORATORIES, LLC,** **a limited liability company,** **WHOLE BODY SUPPLEMENTS, LLC,** **a limited liability company, and** **KRAMER DUHON,** **individually and as an officer of HEALTH RESEARCH LABORATORIES, LLC and WHOLE BODY SUPPLEMENTS, LLC**	**DOCKET NO. 9397**

RESPONDENTS' EXPEDITED MOTION TO PARTIALLY RECONSIDER MAY 6, 2021 ORDER GRANTING COMPLAINT COUNSEL'S MOTIONS TO COMPEL AND STATEMENT OF IMPASSE

Respondents respectfully request that the Court reconsider its Order Granting Complaint Counsel's Motions to Compel. Respondents offer an alternative that efficiently provides the requested "fencing in" relief without the unnecessary cost and expense of additional discovery. Because of the current pending requirements of the April 6, 2021 Order, Respondents respectfully request that the ALJ consider this motion on an expedited basis.

I. BRIEF RESPONSE

Within two months of losing its motion for contempt in *FTC and State of Maine v. Health Research Laboratories, LLC, et al.*, 2:17-cv-00467-JDL ("Maine Action"), the

FTC filed this action and has undertaken a course of action to destroy Respondents' business. Under the FTC Act, this action is limited to a cease-and-desist order to prevent Respondents from "disseminat[ing] or caus[ing] to be disseminated advertising and promotional materials"[1] for four supplements that the Commission contends were "not substantiated at the time the representations were made."[2] Complaint Counsel has used this proceeding not as a means to obtain a cease-and-desist order—which is the only remedy available—but as a means to exact revenge and to harass Respondents.

In an effort to drive Respondents from business, the FTC served 14 subpoenas on every vendor and business partner connected to Respondents for the last decade, including a subpoena to the law firm that represented Respondents against the FTC. The FTC also served interrogatories and requests for production that would take hundreds of hours to answer.

Respondents' business is a small operation that originally had three employees and now has none. It is easier for vendors and business partners to elect not to do business with Respondents than face harassment from the government. It is against this backdrop that Respondents decided that they could not continue to fight the FTC. Rather than continue a fight that has been ongoing for more than six years, Respondents elected to admit all material facts in the Part III Administrative Complaint–an action expressly permitted by 16 C.F.R. § 3.12.

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[1] *See* Complaint, ¶¶ 7, 9, 11, and 13.

[2] *See* Complaint, ¶¶ 15, 17, 19, and 21.

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On March 23, 2021, the FTC filed its Second Motions to Compel Answers to Interrogatories and Responses to Requests for Production. The *only* stated justification for this discovery after all facts in the Complaint had been admitted was that the discovery was relevant to potential "fencing in" relief.[3]

On April 6, 2021, the ALJ granted Complaint Counsel's Motions to Compel and ordered Respondents to supplement their answers to Interrogatories Nos. 1 and 3 to provide more complete answers, to identify all categories of documents Respondents are withholding on grounds other than privilege or the work-product doctrine, and to produce a privilege log. The ALJ noted that the discovery may be relevant to "fencing-in" relief and that "a common form of 'fencing-in' relief is a 'multiproduct' prohibition that bars the respondent from using its deceptive trade practice to sell not only the product that was the subject of the enforcement action, but all products sold by the respondent."[4]

Respondents have provided supplemental answers to Interrogatories Nos. 1 and 3 and are in the process of providing a privilege log, but, for the reasons set forth below, Respondents advise the ALJ that the Respondents do not intend to produce documents. As set forth in more detail below, Respondents propose an alternative under which Respondents stipulate to the "fencing in" relief, as described by the ALJ.

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[3] See Motion to Compel Respondent to Supplement Interrogatory Responses, p. 2 and Motion to Compel Respondents to Produce Documents, p. 3.

[4] Order, p. 3, fn 2 (quoting *In re ECM BioFilms, Inc.*, 2015 FTC LEXIS 22, at *629-30 (Jan. 28, 2015)).

II. ARGUMENT AND AUTHORITIES

A. Reasons for Reconsideration.

Respondents respectfully request that the ALJ reconsider its April 6, 2021 Order based on the fact that Respondents have now unequivocally agreed that the ALJ's Initial Decision should include whatever permissible fencing in relief is allowed by law. This stipulation allows the ALJ to determine the case as expeditiously as possible without the need for the discovery that is the subject of the April 6, 2021 Order. *See In the Matter of Louisiana Real Estate Appraisers Board,* Dkt. No. 9374, 2018 WL 2122823, at *3 (April 26, 2018); See also Rule 3.1 ("[T]he Commission's policy is to conduct [adjudicative] proceedings expeditiously."); Rule 3.41(b) ("Hearings shall proceed with all reasonable expedition ...."); Rules of Practice Amendments, 61 Fed. Reg. 50,640 (FTC Sept. 26, 1996) ("[A]djudicative proceedings shall be conducted expeditiously and ... litigants shall make every effort to avoid delay at each stage of a proceeding."). After Respondents have admitted all material facts in the Complaint and agreed to the "fencing in" relief, it would be manifestly unjust to force Respondents to continue to spend time and money providing additional discovery.

B. Cease-and-Desist Order.

The appropriate relief in this case is dictated by statute. The Commission filed its Administrative Complaint alleging that Respondents have "disseminated or [have] caused to be disseminated advertising and promotional materials"[5] for four supplements that the

[5] *See* Complaint, ¶¶ 7, 9, 11 and 13.

Commission contends were "not substantiated at the time the representations were made."[6] The *only* relief permitted by Section 5 of the FTC Act is an order requiring Respondents to cease and desist from the allegedly deceptive act or practice—which is the dissemination of advertising and promotional materials regarding the four supplements. As Respondents have stated over and over, Respondents have no problem—and have never had any problem—with providing this relief because Respondents ceased all such complained-of conduct long before the Complaint was filed.

C. Amended Answer under 16 C.F.R. § 3.12(b)(2).

As noted by the Court in its March 12, 2021 Order, Respondents' Answer under Rule 3.12(b)(2) "has the effect of dispensing with a hearing and removing proceedings to the Commission for determination of an appropriate final order."[7] Rule 3.12(b)(2) provides that "[s]uch an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint **will provide a record basis** on which the Commission **shall issue** a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding."[8] If the hearing is waived—as stated by Rule 3.12(b)(2)—when does Complaint Counsel plan on adding the anticipated new discovery to the record? How would the anticipated new discovery be added to the record? As stated by Rule 3.12(b)(2), the record in this case is the Complaint and the

[6] *See* Complaint, ¶¶ 15, 17, 19, and 21.

[7] March 12, 2021 Order (citing 16 C.F.R § 3.12(b)(2)).

[8] 16 C.F.R. § 3.12(b)(2) (emphasis added).

Amended Answer. Rule 3.12(b)(2) does not state that the record is the Answer and the Complaint *and any other information and documents that the FTC wants to add*.

D. Fencing-In Relief Alternative.

Responding to the two requests for production have required Respondents to spend tens of thousands of dollars and it is anticipated that future discovery fights with the FTC will lead to additional costs.[9] Complaint Counsel has already tried to argue that "newly discovered facts" justified an amendment to the Complaint. It does not matter what facts, if any, are disclosed in discovery. Respondents predict that Complaint Counsel will use the discovery as an excuse to further expand this case and to cause Respondents to spend additional time and money. For Complaint Counsel, obtaining document provides another excuse to further delay and expand this case. Spending hundreds of hours in the future on the discovery defeats the purpose of admitting all material facts in the Complaint. For that reason, Respondents offer an alternative that (a) provides the fencing-in relief that is the subject of the ALJ's April 6, 2021 Order; and (b) satisfies the Commission's policy to conduct these proceedings expeditiously.[10]

In the April 6, 2021 Order, the ALJ noted that the discovery may be relevant to "fencing-in" relief and that "a common form of 'fencing-in' relief is a 'multiproduct' prohibition that bars the respondent from using its deceptive trade practice to sell not only the product that was the subject of the enforcement action, but all products sold by

[9] *See* Ex. A (Declaration of Joel W. Reese).

[10] *See* 16 C.F.R. § 3.1.

the respondent."[11] This action is to prohibit Respondents from "disseminat[ing] or caus[ing] to be disseminated advertising and promotional materials"[12] for four supplements that the Commission contends were "not substantiated at the time the representations were made."[13] Respondents have no objection to a *blanket* prohibition on disseminating or causing to be disseminated *any* advertising or promotional materials for *any* supplements that makes *any* representations regarding health or disease.[14] In other words, rather than trying to force Respondents to spend hundreds of hours responding to discovery and fighting about those issues in the coming months, let's cut to the chase and give the FTC whatever permissible "fencing in" relief has been requested in the Complaint.[15]

E. Respondents intend to try to comply.

Respondents have done everything possible to make this proceeding move as expeditiously as possible. Complaint Counsel has fought Respondents at every step. Respondents want to finish this action and move on to whatever fight is next with the

[11] Order, p. 3, fn 2.

[12] *See* Complaint, ¶¶ 7, 9, 11, and 13.

[13] *See* Complaint, ¶¶ 15, 17, 19, and 21.

[14] To confirm this agreement, which was not before the ALJ when the April 6, 2021 Order was issued, Respondents have filed a stipulation regarding "fencing in" relief.

[15] Respondents believe that the FTC's "fencing in" argument is an excuse to force Respondents to spend more money on discovery and that the requested discovery has nothing to do with obtaining "fencing in" relief. If the FTC truly just wants the discovery for "fencing in" relief, then the ALJ should provide whatever permissible "fencing in" relief has been requested by the FTC. Of course, the remedy must be "reasonably related" to the unlawful acts which form the basis of the order. *See In the Matter of Mutual Construction Co., Inc.*, 87 F.T.C. 621, 1976 WL 180691 (March 30, 1976).

FTC. Respondents are working diligently on producing a privilege log and producing non-privileged documents.[16]

III. CONCLUSION

It is unclear what, if anything, the Respondents can do to appease the FTC. Angry that it lost the Maine Action, the FTC has tried to make this action as difficult as possible for Respondents. The FTC subpoenaed all of Respondents' vendors, issued discovery requests that require the production of thousands of documents, and repeatedly tried to prevent any end to this case, even after Respondents admitted all material facts in the Complaint. The FTC took these actions knowing at all times that the acts or practices that are the subject of this proceeding *ceased more than a year prior* to the filing of the Complaint and that the entire administrative action for a cease-and-desist order was a farce. The manner in which the FTC has acted in this case is not what Congress intended when it granted a federal agency the right to issue administrative cease-and-desist orders.

[16] This case presents novel legal issues that have not been resolved by the United States Supreme Court, including the extent to which a federal agency can rule upon, and order the production of, privileged documents. The lack of complete clarity in this area is demonstrated by several cases, including *In the Matter of Gemtronics, Inc.*, Dkt. No. 9330 (Order Denying Respondents' Motion for Sanctions, dated April 27, 2010) (recognizing that neither the ALJ nor the Commission has the authority to award sanctions); *N.L.R.B. v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999) (recognizing that "the district court, not the ALJ, must determine whether any privileges protecte[d] the documents from production"); and *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 500 (4th Cir. 2011)(recognizing the division of power between a federal administrative agency and the judicial power of Article III courts). Respondents believe this issue should be resolved by the United States Supreme Court so that businesses, like Respondents, have a clear understanding of the permissible authority of the FTC in administrative "cease-and-desist cases" like this one.

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For the reasons set forth herein, Respondents respectfully request that the ALJ vacate its April 6, 2021 Order and enter an Order that provides that the ALJ's Initial Decision shall include all permissible "fencing in" relief that has been requested by Complaint Counsel in its Complaint.

Dated: April 13, 2021

Respectfully submitted,

REESE MARKETOS LLP

By: */s/ Joel W. Reese*

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF CONFERENCE

I hereby certify that on April 11, 2021, I sent an email to Complaint Counsel for the FTC, Elizabeth Averill and Jonathan Cohen, regarding this Motion and requested to confer. On April 12, 2021, we have a telephone conference where Complaint Counsel advised me that Complaint Counsel opposes the motion.

/s/ Joel W. Reese
Joel W. Reese

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2021, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification to:

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