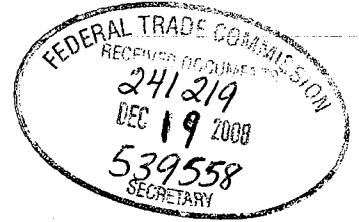


ORIGINAL

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



In the Matter of)
)
)

NATIVE ESSENCE HERB COMPANY,)
a corporation, and)

DOCKET NO. 9328

MARK J. HERSHISER, and)
)
)

MARIANNE HERSHISER)
Respondents.)
_____)

ORDER REQUIRING SUPPLEMENTAL BRIEFING

I.

On December 11, 2008, Respondents filed a Motion to Withdraw the Matter from Adjudication and Request for Stay of Proceedings, pursuant to Commission Rule 3.25(b) and (d) (“Motion”). On December 12, 2008, the parties filed a Joint Motion for Stay of Proceedings Pending Decision on Respondents’ Motion to Withdraw Matter from Adjudication. By Order dated December 12, 2008, the joint motion to stay was granted. The proceedings in this matter have been stayed pending the decision on Respondents’ motion to withdraw this matter from adjudication.

On December 15, 2008, Complaint Counsel filed its Response to Respondents’ Motion to Withdraw Matter from Adjudication (“Response”). On December 16, 2008, Respondents’ served a Reply to Complaint Counsel’s Response without seeking leave to file a reply. *See* 16 C.F.R. § 3.22(c) (“The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.”). Accordingly, that reply has not been considered.

For the reasons set forth below, Complaint Counsel is ORDERED to provide supplemental briefing on the matters indicated herein.

II.

Respondents’ motion is filed pursuant to Commission Rule 3.25(b) and (d). Commission Rule 3.25(b) sets forth: “[a] proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose

of considering the proposed consent agreement.” 16 C.F.R. § 3.25(b). Commission Rule 3.25(d) sets forth: “[i]f the proposed consent agreement accompanying the motion [to withdraw the matter] has not been executed by complaint counsel, the Administrative Law Judge may certify the motion and agreement to the Commission together with his recommendation if he determines, in writing, that there is a likelihood of settlement.” 16 C.F.R. § 3.25(d).

In their motion, Respondents represent that they have “agreed to execute a proposed consent decree identical in substance to the proposed order attached to the complaint in this case.” Motion at 1. Respondents further represent that the proposed “consent order is identical as far as terms, conditions and reporting requirements to the proposed order attached to the complaint.” Motion at 2. Respondents argue that they believe that the Commission might look favorably on a settlement of this matter based on a consent order which gives the Commission all the relief it sought and has a right to seek in this administrative action. Motion at 2.

Complaint Counsel opposes Respondents’ motion and does not support Respondents’ proffered consent agreement. Complaint Counsel states that, although the proposed consent agreement conforms with the provisions of the Notice Order issued with the Complaint, the proposed consent agreement “fails to include monetary relief for consumers, a remedy that the Notice Order states the Commission might seek pursuant to Section 19 of the FTC Act.” Response at 1. Complaint Counsel also states that “because Respondents’ proposed consent agreement contains no findings of fact or admissions (other than jurisdictional admissions), it could preclude the Commission from bringing a separate Section 19 action at a later time.” Response at 1.

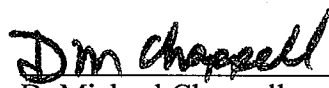
III.

Complaint Counsel has not adequately explained or provided sufficient legal authority to support its position that this proposed consent agreement should not be accepted. Complaint Counsel shall provide the following:

- legal authority for a consent decree or an order in the settlement of a Part III proceeding that requires monetary relief for consumers or any monetary provision;
- legal authority for a consent decree or an order in the settlement of a Part III proceeding that includes any relief beyond the relief sought in the notice order issued with the complaint;
- whether and how the proposed consent agreement varies from consent decrees previously accepted by the Commission in similar consumer protection cases (including, but not limited to, Docket 9317 and Docket 9325); and
- whether Complaint Counsel opposes the changes described by Respondents as a “few non-substantive, minor stylistic changes to the letter to consumers,” and if so, an explanation of which changes are objected to and why.

Complaint Counsel shall have until January 6, 2009, to provide supplemental briefing on these matters. Respondents shall have until January 13, 2009, or seven calendar days after Complaint Counsel's brief is filed, whichever is sooner, to file a response to Complaint Counsel's supplemental briefing.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: December 19, 2008