

ORIGINAL



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

In the Matter of)
)
)
GEMTRONICS, INC.,)
a corporation, and)
)
WILLIAM H. ISELY,)
Respondents.)
_____)

DOCKET NO. 9330

ORDER DENYING RESPONDENTS' MOTION FOR SANCTIONS

I.

On February 26, 2010, Respondents submitted their Motion to Sanction Complaint Counsel for Her Improper Actions in the Matter of Gemtronics, Inc. and William H. Isely, Respondents ("Motion for Sanctions"). At the status hearing held on March 2, 2010, Complaint Counsel made an oral motion for an extension of time of ten days to respond to Respondents' Motion for Sanctions, which was granted. Complaint Counsel submitted its Response to Respondents' Motion for Sanctions on March 18, 2010. For the reasons set forth below, Respondents' Motion for Sanctions is DENIED.

Respondents submitted a Reply to Complaint Counsel's Response on April 2, 2010. After submitting their proposed Reply, Respondents submitted a Motion for Leave to File a Reply on April 5, 2010.¹ Under Rule 3.22(c) of the Commission's Rules of Practice, "[t]he moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission." 16 C.F.R. § 3.22(c); *In re Campbell Soup Co.*, No. 9223, 1989 FTC LEXIS 139 (April 19, 1989). Respondents' Motion for Leave to File a Reply does not include any proper basis that would necessitate the need for a reply, such as new developments or controlling authority that could not have been raised in their opening brief. A reply brief may not be used to raise issues that could have been, but were not, raised in an opening brief. Accordingly, Respondents' Motion for Leave to file a Reply is DENIED.

¹ Respondents' Motion for Leave to File a Reply was submitted after 5:00 p.m. Eastern time on April 2, 2010. Pursuant to Commission Rule 4.3(d), "[a]ny documents received by the agency after 5:00 p.m. will be deemed filed the following business day."

II.

Respondents seek sanctions against Complaint Counsel in the amount of ten thousand dollars (\$10,000) for each of five counts alleged by Respondents, as set forth verbatim below:

(1) Not following FTC law, which would have required Complaint Counsel to seek a remedy against www.agaricus.net, a foreign owned and operated website, utilizing the US Safe WEB Act.

(2) Shifting the target of the investigation away from G. Otto, against whom all the evidence pointed, and even to whom a warning letter had been sent, instead to the Respondents, based on no valid evidence against them, but because no assets of G. Otto could be located in the US. Concealing the exculpatory evidence, that an investigation of G. Otto had been mounted as the prime suspect, and its only coming to light in the questioning at [t]rial of her Senior Investigator, Mr. Liggins. Continuing to pursue the Respondent after being presented with a letter from DomainDiscover absolving Respondent of liability for the operations of www.agaricus.net.

(3) Requiring in proposed Orders that the Respondent, William H. Isely, produce and sign a letter containing false statements, including the letter be on the letterhead of a fictitious entity, "Gemtronics, Inc./ www.agaricus.net," and for Respondent to sign for this fictitious entity.

(4) Not providing any information on the G. Otto investigation when in Discovery Complaint Counsel was requested to provide the following information: a. "Identify to Counsel for Representative the existence of any evidence which tends or may tend to negate the guilt of the Respondents, mitigate the degree set forth in the complaint herein, or reduce the requested penalty and/or punishment." b. "Identify to Counsel for Respondents any and all exculpatory and impeaching evidence or information."

(5) Participating in contumacious behavior by disobeying a direct order of the [Administrative Law Judge ("ALJ")], for violating the procedural order, for disregarding protection of confidential information, and in bad faith reporting incorrect information regarding the respondent to the ALJ.

Motion for Sanctions at 2-3.

As authority for their motion, Respondents rely on Rule 11 of the Federal Rules of Civil Procedure which allows a party in a federal civil case to file a motion for sanctions and a court to impose an appropriate sanction on an attorney if it is determined that the attorney is responsible

for a violation of Rule 11(b) of the Federal Rules of Civil Procedure.² In addition, Respondents cite to Rules 37(a)(3) and (c)(1) of the Federal Rules of Civil Procedure which address sanctions for not complying with the rules of discovery and argue that Complaint Counsel's responses to discovery requests were deficient.³ Because Respondents seek monetary sanctions, and discovery sanctions would not be available at this point in the proceedings, only the request for monetary sanctions is addressed.

Complaint Counsel responds by stating that neither the Commission nor the Administrative Law Judge ("ALJ") has the authority to impose monetary sanctions and that the ALJ was divested of jurisdiction to consider the motion after issuance of the Initial Decision. Complaint Counsel further contends that Complaint Counsel has immunity from any personal sanctions because the alleged improper conduct occurred in the course of her official government duties. Lastly, Complaint Counsel argues that Respondents' allegations regarding Complaint Counsel's conduct are wholly without merit.

III.

A. Jurisdiction

The initial matter to be determined is whether the Administrative Law Judge has jurisdiction to resolve this motion, filed after the issuance of the Initial Decision, which was filed on September 16, 2009, and released on October 2, 2009. Pursuant to Rule 3.51(a)(2) of the Commission's Rules of Practice: "Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section." 16 C.F.R. § 3.51(a)(2). Paragraph (c)(1) sets forth that the initial decision "shall include a statement of findings . . . and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . and an appropriate rule or order." 16 C.F.R. § 3.51(c)(1).

² Rule 11(b) of the Federal Rules of Civil Procedure states that by presenting to the court a pleading, written motion, or other paper, an attorney certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, it is not being presented for any improper purpose; the claims and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information. Fed. R. Civ. Pro. 11(b).

³ Rule 37(a)(3) of the Federal Rules of Civil Procedure provides that if a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. Fed. R. Civ. Pro. 37(a)(3). Rule 37(c)(1) of the Federal Rules of Civil Procedure provides that if a party fails to provide information or identify a witness, the court may order payment of the reasonable expenses, including attorney's fees, caused by the failure; and may impose other appropriate sanctions. Fed. R. Civ. Pro. 37(c)(1).

The issues raised in Respondents' Motion for Sanctions are not among the issues decided in the Initial Decision in this matter. *Cf. In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2006 FTC LEXIS 15 (Jan. 31, 2006) (certifying motion to the Commission on grounds that the ALJ no longer had jurisdiction to rule on a consent motion to waive *in camera* treatment where rulings on *in camera* treatment had been made prior to the issuance of the Initial Decision and incorporated into the Initial Decision). Thus, pursuant to Rule 3.51(c), the jurisdiction of the ALJ was not terminated upon the filing of the Initial Decision with respect to the issues raised by Respondents' Motion for Sanctions.

B. Authority

Seeking sanctions in the amount of \$50,000, Respondents bring their motion under Rule 11 of the Federal Rules of Civil Procedure. Respondents fail to cite any Commission Rule authorizing the requested relief. Indeed, the Commission's Rules of Practice do not contain a rule analogous to Rule 11 of the Federal Rules of Civil Procedure. Instead, the Commission's rule on sanctions, Rule 3.38, provides only:

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take [certain actions specified in the rule].

16 C.F.R. § 3.38(b). None of those specified actions include an award of monetary sanctions. Rule 3.38 continues as follows:

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order, he shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

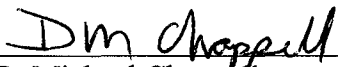
16 C.F.R. § 3.38(c).

Clearly, the Commission's Rules of Practice do not authorize sanctions analogous to those contemplated by Rule 11 of the Federal Rules of Civil Procedure. Where the Federal Rules

of Civil Procedure are similar to the Commission's Rule of Practice, those rules and case law interpreting them may be useful in adjudicating a dispute. *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962). However, "the Federal Rules [of Civil Procedure] do not control Commission proceedings." *Id.* Thus, Rule 11 of the Federal Rules of Civil Procedure does not provide authority for Respondents' motion.

Respondents fail to cite any statute or administrative provision authorizing an ALJ or the Commission to assess monetary sanctions. Indeed, in *Basic Research*, the Commission expressly held that it lacked the authority to award monetary sanctions for improper conduct by Complaint Counsel, even where Complaint Counsel acknowledged that he or she had engaged in conduct in violation of the Commission's Rules. *In re Basic Research*, No. 9318, 139 F.T.C. 601, 609 n.6 (June 17, 2005). Accordingly, because neither the ALJ nor the Commission has the authority to award the sanctions sought by Respondents, Respondents' motion is DENIED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: April 27, 2010