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

In the Matter of	)	
DANIEL CHAPTER ONE, a corporation, and	)	DOCKET NO. 9329
JAMES FEIJO, Respondents.	)	

ORDER DENYING RESPONDENTS' MOTION TO AMEND ANSWER

I.

On February 10, 2009, Respondents submitted a Motion to Amend Answer and Memorandum in Support ("Motion to Amend"). Complaint Counsel submitted its Memorandum in Opposition to the Motion to Amend on February 20, 2009.

Having fully considered the Motion to Amend and Opposition, the Motion to Amend is DENIED.

II.

Respondents seek leave to amend paragraphs 3, 5 and 14 of their Answer to the Complaint pursuant to Commission Rule 3.15, 16 C.F.R. § 3.15. The relevant corresponding paragraphs of the Complaint, Respondents' answers to those paragraphs, and Respondents' proposed amended answers follow:

COMPLAINT ¶ 3

Respondents have advertised, promoted, offered for sale, sold, and distributed products to the public, including Bio*Shark, 7 Herb Formula, GDU, and BioMixx (collectively the "DCO Products"). The DCO Products are "foods" or "drugs" within the meaning of Sections 12 and 15 of the FTC Act.

ANSWER ¶ 3

Respondents answer the allegations in paragraph 3 of the Complaint as follows: admit that they distribute the named products but otherwise deny the allegations contained in paragraph 3 of the Complaint, and answer further that the products sold by Respondent Daniel Chapter One are dietary supplements within Section 201 (21 U.S.C. 321) of the 1938 Food Drug and Cosmetic Act as amended.

PROPOSED AMENDED ANSWER ¶ 3

Respondents answer the allegations in paragraph 3 of the Complaint as follows: admit that they distribute the named products but otherwise deny the allegations contained in paragraph 3 of the Complaint, including but not limited to a specific denial of the allegation that they offered for sale or sold products to the public, and answer further that the products sold by Respondent Daniel Chapter One are dietary supplements within Section 201 (21 U.S.C. 321) of the 1938 Food Drug and Cosmetic Act as amended.

COMPLAINT ¶ 5

Since 2005, Respondents have engaged in deceptive acts or practices in connection with the advertising, promotion, offering for sale, sale, and distribution of the DCO Products which purport to prevent, treat, or cure cancer or tumors, and other serious medical illnesses. Respondents operate linked web pages on the website, www.danielchapterone.com through which they advertise and sell the products at issue in this complaint.

ANSWER ¶ 5

Respondents answer the allegations in paragraph 5 of the Complaint as follows: admit they operate a website that provides information on the named products in a religious and educational context, but otherwise deny the allegations contained in paragraph 5 of the Complaint.

PROPOSED AMENDED ANSWER ¶ 5

Respondents answer the allegations in paragraph 5 of the Complaint as follows: admit they operate a website that provides information on the named products in a religious and educational context, but otherwise deny the allegations contained in paragraph 5 of the Complaint, including but not limited to a specific denial of any allegation or inference that they offered for sale, sold or advertised products to the public.

COMPLAINT ¶ 14

Through the means described in Paragraphs 6 through 13, including, but not limited to, the statements contained in the advertisements attached as Exhibits A through D, Respondents have represented, expressly or by implication, that:

a. Bio*Shark inhibits tumor growth;
b. Bio*Shark is effective in the treatment of cancer;
c. 7 Herb Formula is effective in the treatment or cure of cancer;
d. 7 Herb Formula inhibits tumor formation;
e. GDU eliminates tumors;
f. GDU is effective in the treatment of cancer;
g. BioMixx is effective in the treatment of cancer; and
h. BioMixx heals the destructive effects of radiation and chemotherapy.

ANSWER ¶ 14

Respondents answer the allegations in paragraph 14 of the Complaint as follows: while continuing to deny any allegations contained in paragraphs 6 through 13 that are denied in this Answer, Respondents admit making the representations contained in subparagraphs a through h of paragraph 14.

PROPOSED AMENDED ANSWER ¶ 14

In answering FTC Complaint paragraph 14, Respondents state that the express language actually used by Respondents speaks for itself, notwithstanding the implications attributed to that language by the FTC. Respondents otherwise deny paragraph 14 and its inferences.

Respondents contend that the proposed amendments to paragraphs 3 and 5 "facilitate the determination of this controversy and prevent prejudice to Respondents." Motion to Amend, p. 4. Respondents assert that they intend to prove that "their offering of the Challenged Products was on a donation basis as part of the ministry of Daniel Chapter One." Motion to Amend, p. 4. In addition, Respondents argue that the amended paragraph 14 "conforms to the evidence" adduced in deposition. Motion to Amend, pp. 4-5.

Respondents argue that the amendments "are necessary to accurately state" their position, and will facilitate the determination of the merits "because this controversy turns largely on the actual specific language on the one hand, and on the *alleged implications* that the FTC associates with that actual language on the other hand." Motion to Amend, p. 5 (emphasis in original). Respondents further contend that the amendments will not create the need for additional discovery, nor delay the proceedings,

because "the FTC has the evidence in hand from actual discovery." Motion to Amend, p. 6. Therefore, Respondents urge, Complaint Counsel will not be prejudiced by allowing the amendments.

Complaint Counsel asserts that Respondents unduly delayed seeking leave to amend the Answer, by waiting four months after submitting their original Answer and three weeks after the close of fact discovery, and that Respondents failed to provide any justification for such delay. Specifically regarding the proposed amendments to paragraphs 3 and 5 of the Answer, Complaint Counsel argues that Respondents should not be allowed to interpose specific denials that they offered for sale, or sold, the products because (1) Respondents did not cooperate in providing related discovery, necessitating a motion to compel, which was granted; and (2) discovery that was adduced contradicts Respondents' specific denials. Complaint Counsel contends that the amendment to paragraph 14 demonstrates that "Respondents are substantively changing their position after the close of discovery," and contends that Respondent Feijo admitted in deposition that the answer to paragraph 14 was correct when written. Complaint Counsel also argues that allowing Respondents to alter their position regarding their representations will be prejudicial.

III.

A. Standard for Evaluating Motion for Leave To Amend

Commission Rule 3.15(a) governs amendments to pleadings. That Rule states in pertinent part:

> (a) *Amendments*-- (1) *By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing . . . .
>
> (2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

16 C.F.R. § 3.15(a) (emphasis in original)

FTC decisions under the Rule do not define when "a determination of a controversy on the merits will be facilitated" by allowing an appropriate amendment. In the case of *Conley v. Gibson*, the Supreme Court explained the federal rule regarding leave to amend as follows: "The Federal Rules reject the approach that pleading is a

game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson,* 355 U.S. 41, 48 (1957).

Unlike Federal Rule 15, FTC Rule 3.15(a) does not require that leave to amend be "freely granted." Rather, the Rule provides "appropriate" amendments "may" be allowed, upon such conditions as will avoid prejudice to the parties and the public interest, if the amendments will facilitate a determination on the merits. 16 C.F.R § 3.15(a)(1). The federal courts exercise discretion to deny leave to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

B. Proposed Amendments to Paragraphs 3 and 5

In support of their motion to amend paragraphs 3 and 5 of their Answer, Respondents assert that in the February 2, 2009 Order denying Respondents' Motion to Dismiss, the Administrative Law Judge "inadvertently" stated that Respondents "admit that they offer the Challenged Products for sale." Motion to Amend, p. 4. According to Respondents, paragraphs 3 and 5 contain a denial of those allegations.

The portion of the Order to which Respondents apparently refer follows a recitation of allegations of the Complaint appearing in paragraphs other than 3 and 5, including allegations that Respondents' Website (1) offers Bio*Shark for $30.95, or $65.95, for a bottle of either 100 or 300 capsules, respectively, Complaint ¶ 6; (2) offers a 32 ounce bottle of 7 Herb Formula "liquid tea" for $70.95, Complaint ¶ 8; (3) offers GDU for $29.95, or $45.95, for a bottle of either 100 or 300 capsules, respectively, Complaint ¶10; and (4) offers BioMixx for $22.95, or $40.95, for either a 1 lb. or 3 lb. powder container, respectively. These allegations are admitted by Respondents. *See* Answer ¶¶ 6, 8, 10 and 12. The statement in the Order that Respondents "admit" they offer the products "for sale" was intended for background purposes only and was not, and should not be interpreted as, a decision, factual finding, or inference on any disputed issue of fact or law in this case. Moreover, the statement does not justify Respondents' belated Motion to Amend.

In their answer to paragraph 3, Respondents "admit that they distribute the named products but otherwise deny the allegations contained in paragraph 3 of the Complaint." Answer ¶3. Similarly, in paragraph 5, Respondents "admit they operate a website that provides information on the named products in a religious and educational context, but otherwise deny the allegations contained in paragraph 5 of the Complaint." Answer ¶ 5. Respondents' general denial is sufficient to encompass the specific denials Respondents seek to set forth by amendment. To the extent the allegations are already denied, the additional language, "including but not limited to a specific denial..." is surplusage, is unnecessary, and does not facilitate a determination of the controversy on the merits. 16 C.F.R. § 3.15(a)(1).

Accordingly, Respondents' Motion to Amend their answers to paragraphs 3 and 5 is denied.

C. Proposed Amendment to Paragraph 14

Paragraph 14 of the Complaint alleges that Respondents' statements concerning the products represent "expressly or by implication" that:

a. Bio*Shark inhibits tumor growth;
b. Bio*Shark is effective in the treatment of cancer;
c. 7 Herb Formula is effective in the treatment or cure of cancer;
d. 7 Herb Formula inhibits tumor formation;
e. GDU eliminates tumors;
f. GDU is effective in the treatment of cancer;
g. BioMixx is effective in the treatment of cancer; and
h. BioMixx heals the destructive effects of radiation and chemotherapy.

Respondents' amendment would change their original answer to state that the "express language actually used by Respondents speaks for itself, notwithstanding the implications attributed to the language by the FTC. Respondents otherwise deny paragraph 14 and its inferences." While Respondents' original answer to paragraph 14 admits "making the representations" in subparagraphs a.-h., Respondents did not specifically admit whether the representations were made "expressly" or "by implication." In this regard, the requested changes are unnecessary, and Respondents have therefore failed to demonstrate that such changes constitute an "appropriate amendment" that would "facilitate a determination" on the merits. Rule 3.15(a)(1)

To the extent Respondents' original answer to paragraph 14 could be interpreted as an admission of "implied" representations set forth in subparagraphs a.-h., and the proposed amended answer interpreted as a denial of such implications, Respondents' proposed amendment would constitute a substantive change in position. Such a change, coming four months after the original Answer, after the close of discovery, and with the April 23, 2009 trial date fast approaching, would come far too late in the proceedings.

Respondents contend this change will "accurately state Respondents' position." Motion to Amend, at p. 5. Once again, Respondents do not contend that they discovered new evidence, or provide any other justification for their undue delay in seeking to amend. While it has been held that undue delay is insufficient by itself to justify denying a motion to amend, *e.g., Reiffin v. Microsoft Corp.*, 270 F. Supp. 2d 1132, 1160 (N.D. Cal. 2003), it has also been held that "[u]ndue delay 'might give rise to an inference of bad faith, justifying denial of leave to amend.'" *Wimm v. Jack Eckerd Corp.*, 3 F.3d at 140. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d at 599 (stating that absent special circumstances, a party's awareness of facts and failure to include them in pleading might give rise to the inference that the party was engaging in tactical maneuvers). Moreover,

the burden is on the party who wishes to amend to provide a satisfactory explanation for the delay, . . ." *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990) (citations omitted) (affirming lower court's denial of leave to amend complaint to add statutory claim, six months after plaintiffs submitted a prior amended complaint, and after the close of discovery). Respondents have failed to meet that burden.

The case of *Crest Hill Land Dev., LLC v. City of Joliet,* No. 03 C 3343, 2004 U.S. Dist. LEXIS 9453 (N.D. Ill. May 24, 2004), *aff'd* 396 F.3d 801 (7th Cir. 2005), is instructive. In *Crest*, five months after submitting its original answer, and after conclusion of discovery, defendants sought leave to file an amended answer that denied a material fact previously admitted. The defendant contended that the change merely clarified its long-held position. The district court denied leave to amend and the circuit court of appeals affirmed. The court stated:

> Leave to amend a pleading is to be "freely given when justice so requires." *Fed. R. Civ. P.* 15(a). Even so, leave to amend is not automatically granted, and may be properly denied at the district court's discretion for reasons including undue delay, the movant's bad faith, and undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). This court will overturn a district court's denial of a motion to amend only if the district court has abused its discretion by not providing a justifying reason for its decision. *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991).
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> Here, the district court provided ample justification for denying the City's motion to amend its answer. The court acknowledged the delay and prejudice to Crest that would result if the City were permitted to amend its answer five months after its original answer and one month after discovery had closed. *Crest Hill Land Dev., LLC v. City of Joliet*, 2004 U.S. Dist. LEXIS 9453, No. 03 C 3343, 2004 WL 1375385, at *7 (N.D. Ill. May 25, 2004). It reasonably found that the City was attempting amendment of its answer to "change [its] position in regards to paragraph 45 of the complaint in order to allow the City to pursue new arguments against Crest." 2004 U.S. Dist. LEXIS 9453, [WL] at *6-7.

Crest Hill Land Dev., LLC v. City of Joliet, 396 F.3d 801, 803-804 (7th Cir. 2005) (footnote omitted)

In this case, allowing Respondents to change their answer at this point in the proceedings, after the close of discovery and approximately two months before trial, would be unduly prejudicial to Complaint Counsel. While theoretically such prejudice could be mitigated by allowing additional discovery, and/or delaying the hearing in this matter, such remedies are themselves prejudicial – not just to Complaint Counsel, but also to the adjudicative process, and consequently, the public interest. As the district

court noted in *Crest*:

> To allow the City to make such a material amendment to its answer that is directly opposite to the original answer after discovery was completed and after Crest filed its motion for summary judgment would have been prejudicial to Crest and to the judicial system. *See Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379-80 (7th Cir. 1990) (stating that "it is wholly within a district court's discretion to deny an amendment to the pleadings for delay and prejudice to the opposing party. . . [and that] beyond prejudice to the parties, a trial court can deny amendment when concerned with the costs that protracted litigation places on the courts [because] delay impairs the 'public interest in the prompt resolution of legal disputes [and] the interests of justice go beyond the interests of the parties to the particular suit [and] extreme, 'delay itself may be considered prejudicial.") (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 838 F.2d 904, 909 (7th Cir.1988)); *Jupiter Aluminum Corp. v. Home Ins. Co.*, 181 F.R.D. 605, 609 (N.D. Ill. 1998) (stating that "an amendment should not be denied merely due to the passage of time between the original filing and the attempted amendment," but should be denied if there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party" or "futility of the amendment.") (quoting *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)).

Crest Hill Land Dev., LLC v. City of Joliet, 2004 U.S. Dist. LEXIS 9453, at *8-9.

Finally, Respondents' contention that the amendment is appropriate under Rule 3.15(a)(2) "so that the pleadings conform to the evidence," has no merit. Motion to Amend, p. 4. Under the clear language of Rule 3.15(a)(2), "conformance to the evidence" applies "[w]hen issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are *tried* by express or implied *consent of the parties.*" 16 C.F.R. § 3.15(a)(2) (emphasis added). *See In Re Horizon Corporation*, No. 9017, 97 F.T.C. 464, 1981 FTC LEXIS 47, at *50 (May 15, 1981) (citing Rule 3.15(a)(2) and holding that where claimed section 5 violation was not within the scope of complaint, and was not tried by the express or implied consent of the parties, no such violation could be found); *In Re Chrysler Corporation*, No. 9072, 1979 FTC LEXIS 420, at *2-3 (April 24, 1979) (denying request to amend complaint to add new theory of liability, allegedly to "conform the pleadings to the evidence already admitted," because theory was not "reasonably within the scope of the original complaint or notice" and was not tried by express or implied consent of the parties). Rule 3.15(a)(2) does not apply here and does not provide a basis for granting Respondents' Motion to Amend.

Accordingly, Respondents' Motion to Amend paragraph 14 of their Answer is denied.

IV.

After full consideration of Respondents' Motion to Amend, and Complaint Counsel's Opposition thereto, and having fully considered all arguments and contentions therein, Respondents' Motion to Amend their answer is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: March 4, 2009