**PUBLIC**

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

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| In the Matter of<br><br>Health Research Laboratories, LLC,<br>a limited liability company,<br><br>Whole Body Supplements, LLC,<br>a limited liability company, and<br><br>Kramer Duhon,<br>individually and as an officer of<br>Health Research Laboratories, LLC,<br>and Whole Body Supplements, LLC,<br><br>Respondents. | ) | Docket No. 9397 |

**ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL**

**I.**

On March 29, 2021, Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed a Motion to Certify Rulings for Interlocutory Appeal, pursuant to Rule 3.23(b) of the Commission's Rules of Practice ("Motion"). Respondents Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC ("WBS"), and Kramer Duhon (collectively, "Respondents") filed a response opposing the Motion on March 30, 2021 ("Opposition"). The Motion is DENIED, as set forth below.

**II.**

Complaint Counsel seeks authorization for an interlocutory appeal of two rulings, summarized below.

**A. The 3.12(b)(2) ruling in the Order Granting Respondents' Motion for Leave to Amend the Answer**

The first ruling for which Complaint Counsel requests an interlocutory appeal is a ruling contained in an order issued March 10, 2021, which granted Respondents' Motion for Leave to Amend Answer ("Order Granting Leave to Amend Answer"). Specifically, Complaint Counsel challenges the ruling that an answer expressly electing not to contest the factual allegations of the Complaint, and admitting all material allegations to be true,

pursuant to Rule 3.12(b)(2), can still assert affirmative, or legal, defenses (the "3.12(b)(2) ruling").

Respondents moved to amend their Answer to make an "elect[ion] not to contest the allegations of fact set forth in the Complaint," pursuant to Rule 3.12(b)(2). Respondents' Motion for Leave to Amend Answer at 5. Rule 3.12(b)(2) states in pertinent part:

> If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such 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. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

16 C.F.R. § 3.12(b)(2).

Respondents' proposed amended answer stated:

> Pursuant to 16 CFR § 3.12(b)(2), Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true. Pursuant to 16 CFR § 3.12(b)(2), Respondents reserve the right to submit proposed findings of fact and conclusions of law.

Motion for Leave to Amend Answer, Exhibit 1.

Respondents also sought to amend their Answer to remove six of the nine affirmative defenses asserted therein, but to maintain three of those defenses in the proposed amended answer. Complaint Counsel opposed allowing the amended answer to assert any affirmative defenses. Complaint Counsel argued that Rule 3.12(b)(2) requires that the answer consist only of the statement of election and the admission of all material allegations, and that the assertion of legal defenses is inconsistent with such admissions, to the extent legal defenses imply a denial of facts.

After reviewing the proposed amended answer and applying the legal standard in Rule 3.15(a)(1),[1] the Administrative Law Judge ("ALJ") held that there was "little doubt" that amending Respondents' Answer to expressly elect not to contest any factual allegations, admit all material allegations to be true, and reduce asserted legal defenses

[1] Rule 3.15(a)(1) sets forth: "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 . . . ." 16 C.F.R. § 3.15(a)(1).

from nine to three, "will significantly narrow the issues in the case and thereby facilitate a determination of the merits. 16 C.F.R. § 3.15(a)(1)." Order Granting Leave to Amend Answer at 3. Complaint Counsel's argument that leave to amend must be denied because legal defenses cannot, as a matter of law, be included in an answer under Rule 3.12(b)(2), was rejected as unsupported. As set forth in the Order, Rule 3.12(b)(2) does not expressly bar legal defenses, the Rule's allowance for proposed findings of fact and conclusions of law is inconsistent with a conclusion that all legal defenses are barred in a 3.12(b)(2) answer, and the defenses proposed by Respondents did not implicate denial of factual allegations. *Id.* at 4.

Respondents filed their Amended Answer on March 30, 2021 ("Amended Answer"). Respondents opted to assert only one legal defense, alleging that the FTC's administrative litigation process is unconstitutional.[2]

### B. The Order Denying Leave to Amend the Complaint

The second ruling for which Complaint Counsel requests an interlocutory appeal is an order issued on March 12, 2021 denying Complaint Counsel's Motion for Leave to Amend the Complaint ("Order Denying Leave to Amend Complaint"), which Complaint Counsel included as part of its written response to Respondents' Motion for Leave to Amend Answer. Complaint Counsel's proposed amendments centered on a consent judgment entered into by the parties in 2018 to settle previous litigation in the United States District Court for the District of Maine (the "Maine Litigation"), which arose from alleged unsubstantiated claims for certain dietary supplement products. *E.g.*, proposed amendment to Complaint ¶ 4 ("The FTC and Respondents HRL and Kramer Duhon signed a Stipulated Final Judgment and Order ('Order') entered by U.S. District Judge Jon D. Levy on January 16, 2018 in *FTC and State of Maine v. Health Research Laboratories, et al.*, 2:17-cv-00467" which prohibited unsubstantiated representations regarding certain supplement products); ¶ 8 (amendments in italics) ("HRL began selling Black Garlic Botanicals in November 2016 *and continued to sell it following entry of the Order and after the filing of a contempt motion against Respondents in FTC and State of Maine v. Health Research Laboratories, LLC, et al., 2:17-cv-00467-JDL."*). The reference to a "contempt motion" in the proposed amended complaint is to a motion filed by the FTC in late 2019 in the Maine Litigation, in which the FTC alleged Respondents were in violation of the consent judgment and moved to hold Respondents in contempt. The FTC's contempt motion was ultimately denied by the district court.

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[2] Respondents' asserted legal defense, titled "Violation of the United States Constitution" states:

> The FTC's administrative process violates the Fifth Amendment to the United States Constitution because it seeks to deny Respondents of property and rights without due process of law. Further, the FTC receives its authority through Article II of the United States Constitution. The FTC's structure violates and is inconsistent with Article II of the United States Constitution because the Commissioners and the Administrative Law Judges ("ALJs") can only be removed by the President for 'inefficiency, neglect of duty, or malfeasance in office,' which means that the Commissioners and the ALJs are not subject to the supervision and authority of the President.

Amended Answer at 1-2.

Again applying the standards of Rule 3.15(a)(1), the ALJ held that Complaint Counsel's proposed amendments would not facilitate a determination on the merits. The Order noted that to the extent Complaint Counsel intends to rely on the amended allegations to prove that Respondents' conduct alleged in this case violated the consent judgment, the amendments risked interjecting the merits of the consent judgment into the instant case, which would complicate resolution. The ALJ further observed that the timing of Complaint Counsel's effort to amend the Complaint and interject the Maine Litigation into this case implied a strategic purpose, more designed to thwart Respondents' efforts to amend their Answer to admit all factual allegations, than to facilitate a determination of the merits of this case. Among other points, it was noted that, although Complaint Counsel contended that the proposed amended allegations derived from recent discovery in the case, the facts concerning the Maine Litigation, the consent judgment, and the denied contempt motion, were known to the FTC well before the Complaint was issued in 2020.

## III.

Complaint Counsel's request for interlocutory appeal is governed by Rule 3.23(b), which states:

> Other interlocutory appeals. A party may request the Administrative Law Judge to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

16 C.F.R. § 3.23(b).

Interlocutory appeals are disfavored because they are intrusions on the orderly and expeditious conduct of the adjudicative process. *In re Bristol-Myers Co.*, 1977 FTC LEXIS 83, at *1 (Oct. 7, 1977); *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 32, at *2 (Feb. 7, 2011). Accordingly, pursuant to Rule 3.23(b), the movant must satisfy a very stringent three prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; and (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *N.C. Dental*, 2011 FTC LEXIS 32, at *2-3.

When a request under Rule 3.23(b) is denied by the ALJ, interlocutory appeal is not permitted. *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 185, at **4 (Feb. 9, 2011) (denying motion for interlocutory appeal where ALJ denied request under Rule 3.23(b), noting that Commission Rule 3.23(b) permits "interlocutory appeals to the Commission from ALJ rulings on such motions but only when (1) the ALJ *fails to rule* on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take

an interlocutory appeal") (emphasis in original). *See* 74 Fed. Reg. 1804, 1810 (Interim final rules with request for comment) (Jan. 13, 2009) (noting that "applications for interlocutory review [under Rule 3.23(b) are allowed] *only on a determination* that the ruling 'involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy'" (emphasis added)).

The foregoing principles are applied to the two challenged rulings, below.[3]

### A. The 3.12(b)(2) ruling in the Order Granting Respondents' Motion for Leave to Amend the Answer

Demonstrating that a ruling involves a "controlling question of law" consists of two elements: First, the ruling must present a question of law, meaning a "pure" question of law rather than merely "an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case." *N.C. Dental*, 2011 FTC LEXIS 32, at *7. Second, the question of law must be "controlling," meaning the resolution of the question by appeal would be determinative in the case at hand, as well as determinative of "a wide spectrum of cases." *In re Hoechst Marion Roussel Inc.*, 2000 FTC LEXIS 155, at *19 (Oct. 17, 2000) (quoting *In re Automotive Breakthrough Sciences, Inc*., 1996 FTC LEXIS 478, *1 (Nov. 5, 1996)). *See also Va. ex rel. Integra Rec LLC v. Countrywide Secs. Corp.*, Civil Action No. 3:14cv706, 2015 U.S. Dist. LEXIS 71944, at *17 (E.D. Va. June 3, 2015) (stating that "[c]ontrolling questions include those 'whose resolution will be completely dispositive of the litigation . . . .'") (quoting *Fannin v. CSX Transp., Inc.*, 1989 U.S. App. LEXIS 20859, 1989 WL 42583, at *5 (4th Cir. 1989)). In the instant case, Complaint Counsel urges a more relaxed definition of a "controlling" question, requiring a showing only that "resolution of the issue on appeal could materially affect the outcome of litigation . . . ." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).

Even if the question of whether Rule 3.12(b)(2) allows assertion of affirmative defenses is a "pure" question of law, the ruling is not fairly deemed determinative of this case, and therefore the question is not "controlling." Arguably, the 3.12(b)(2) ruling was not even determinative of Respondents' Motion for Leave to Amend Answer. The operative legal standard in determining whether to grant leave to amend is whether the proposed amendments will facilitate a determination of the case on the merits. 16 C.F.R. § 3.15(a)(1). The Order Granting Leave to Amend Answer held that Respondents' express election not to contest the factual allegations of the Complaint and to admit all material allegations as true, as well as substantially reducing the number of affirmative

[3] Federal case authorities are also included herein as relevant guidance. "In the federal courts, interlocutory appeals are governed by 28 U.S.C. § 1292(b) and the language of this statute mirrors that of Rule 3.23(b). Federal case law provides guidance on the scope of Rule 3.23(b)." *In re Int'l Ass'n of Conference Interpreters*, 1995 FTC LEXIS 452, at *1-2 n.2 (Feb. 15, 1995).

defenses, would facilitate a resolution of this case on the merits. The omission of all affirmative defenses would not have altered this conclusion.

In any event, even if the 3.12(b)(2) ruling were considered to be a controlling question of law, Complaint Counsel has failed to demonstrate any substantial ground for difference of opinion as to whether an answer purporting to be filed pursuant to Rule 3.12(b)(2) can include any affirmative defenses. In order to establish that there is substantial ground for difference of opinion as to a controlling question of law, it must be demonstrated that the controlling legal question "involves novel or unsettled authority." *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 33, at *8-9 (Mar. 1, 2011). "[O]ne method for demonstrating a substantial ground for difference of opinion is 'by adducing conflicting and contradictory opinions of courts which have ruled on the issue.'" *FEC v. Club for Growth, Inc.*, 2006 U.S. Dist. LEXIS 73933, at *8 (D.D.C. Oct. 10, 2006) (quoting *Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 86 (E.D. Pa. 1983)). Complaint Counsel does not cite any case holding that Rule 3.12(b)(2) precludes legal defenses, and acknowledges that there is no governing precedent. Still, Complaint Counsel maintains that the Commission could disagree with the ALJ's ruling. This is little more than speculation and is clearly not sufficient to establish substantial grounds for difference of opinion so as to justify an interlocutory appeal. Interlocutory appeal "was not intended merely to provide an avenue for review of difficult rulings in hard cases, and the mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute." *Federal Deposit Ins. Corp. v. First Nat'l Bank*, 604 F. Supp. 616, 620 (E.D. Wis. 1985).

Lastly, Complaint Counsel has failed to demonstrate that subsequent review of the 3.12(b)(2) ruling will be inadequate. Complaint Counsel can pursue its claim via a motion to strike Respondents' asserted legal defense from the Amended Answer pursuant to Rule 3.22(a), or in proceedings before the Commission for a final order pursuant to Rule 3.12(b)(2), through proposed findings of fact, conclusions of law and related briefing before the Commission.

For all the foregoing reasons, Complaint Counsel's Motion has not met the required burden for obtaining an interlocutory appeal of the 3.12(b)(2) ruling.

### B. The Order Denying Leave to Amend the Complaint

Whether to grant or deny leave to amend is governed by Rule 3.15(a)(1), which sets forth the operative legal question as whether the "determination of a controversy on the merits will be facilitated" by the proposed amendments. 16 C.F.R. § 3.15(a)(1). Even if the resolution of that question could be construed as material to the outcome of this case, there is no basis for concluding that the application of Rule 3.15(a)(1) in this case would be determinative of any other case, and for this reason is not properly deemed a controlling question of law. *Hoechst*, 2000 FTC LEXIS 155, at *19.

Furthermore, so long as "the amendment is reasonably within the scope of the original complaint . . . ," whether to grant leave to amend a complaint is a discretionary decision. 16 C.F.R. § 3.15(a)(1) ("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") (emphasis added). Discretionary decisions are not suitable for interlocutory appeal. *N.C. Dental*, 2011 FTC LEXIS 32, at *13. As the court explained in *Stanley v. St. Croix Basic Services*, the decision whether to grant a motion to amend a complaint is "committed to the district court's sound discretion." 2008 U.S. Dist. LEXIS 90024, at *6 (D.V.I. Oct. 31, 2008):

> Decisions committed entirely to the district court's discretion rarely present "a controlling issue of law" and are generally not appropriate for certification under §1292(b). *See Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 863 (3rd Cir. 1977); *see also* 16 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3930 ("Ordinarily district courts should refuse to certify [matters that lie within the discretion of the court], not only because of the low probability of reversal, but also because the recognition of discretion results from a studied determination that appellate courts should not interfere"); *Schine v. Schine*, 367 F.2d 685, 688 (2d Cir. 1966) (holding that issue regarding whether the district judge abused his discretion in granting or denying a separate trial "may rarely, if ever, involve 'a controlling question of law'"); *Atlantic City Elec. Co. v. A.B. Chance Co.*, 313 F.2d 431, 434 (2d Cir. 1963) (finding that questions involving the discretion of the district judge should not be reviewed by an appellate court during interlocutory appeal except where there has been a manifest abuse of discretion).

*Id*. at *6-7. *See also Millenkamp v. Davisco Foods Int'l, Inc.*, No. CV03-439-S-EJL, 2009 U.S. Dist. LEXIS 138816, *7 (D. Idaho Nov. 10, 2009) (denying interlocutory appeal of order denying the plaintiffs' motion for leave to amend, holding *inter alia* that the ruling was discretionary and did not present a substantive legal question).

Moreover, even if a decision to grant or deny a motion for leave to amend pleadings is deemed to present a controlling issue of law, there is no substantial ground for difference of opinion as to what constitutes the controlling legal standard, which is whether a "determination of a controversy on the merits will be facilitated" by the amendments. Complaint Counsel does not assert an alternative applicable standard. In addition, Complaint Counsel does not, and cannot, deny that this is the standard that was applied. Rather, Complaint Counsel disagrees with the result of applying the law to the record presented, and posits that the Commission could reasonably determine otherwise. Motion at 8. A disagreement with the application of law to facts and conjecture regarding how the Commission may decide the issue are not the standards for allowing an interlocutory appeal. "Rule 3.23(b) does not provide for 'early resolution of disputes concerning whether the trial court properly applied the law to the facts.'" *Conference Interpreters*, 1995 FTC LEXIS 452, at *3-4 (quoting *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364, 366 (S.D.N.Y. 1982)).

Because Complaint Counsel has failed to demonstrate that the Order Denying Leave to Amend Complaint involved a controlling question of law as to which there is substantial ground for difference of opinion, the Motion must fail, and it is not material or determinative whether subsequent review of the Order will be an adequate remedy.

For all the foregoing reasons, Complaint Counsel has not met the required burden under Rule 3.23(b) for obtaining an interlocutory appeal on the Order Denying Leave to Amend Complaint.

**IV.**

Complaint Counsel has failed to meet the requirements of Rule 3.23(b). Based upon full consideration of Complaint Counsel's Motion, the Opposition, the arguments and contentions therein, Complaint Counsel's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: April 2, 2021