Attachments

In re Health Research Laboratories, LLC, No. 9397

(1) Order Granting Respondents' Motion For Leave To Amend Answer (Mar. 10, 2021)

(2) Order Denying Complaint Counsel's Motion To Amend the Complaint (Mar. 12, 2021)

PUBLIC

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

In the Matter of	)	
Health Research Laboratories, LLC, a limited liability company,	)	Docket No. 9397
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,	)	
Respondents.	)	

ORDER GRANTING RESPONDENTS' MOTION FOR LEAVE TO AMEND ANSWER

I.

On February 12, 2021, Respondents Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC ("WBS"), and Kramer Duhon (collectively, "Respondents") filed a Motion for Leave to Amend the Answer in accordance with Rule 3.12(b)(2) ("Motion to Amend Answer"). On February 24, 2021, Federal Trade Commission ("FTC") Complaint Counsel filed an Opposition to the Motion to Amend Answer ("Opposition").[1]

On February 25, 2021, Respondents filed a Waiver of Affirmative Defenses of Mootness and Lack of Public Interest. Also on February 25, 2021, Complaint Counsel filed a motion for leave to respond to Respondents' waiver filing, which was granted on

[1] Complaint Counsel included within its Opposition to Respondent's Motion to Amend Answer a request for leave to amend the Complaint, pursuant to Rule 3.15(a), which Complaint Counsel referred to as a "Cross-Motion" ("Motion to Amend the Complaint"). An order on Complaint Counsel's Motion to Amend the Complaint will be issued on or before March 12, 2021.

March 1, 2021. As of this date, Complaint Counsel has not filed the allowed response.[2]

II.

The Complaint in this case was filed November 13, 2020 ("Complaint"). Respondents filed an answer to the Complaint on December 4, 2020 ("Answer"), denying a number of factual allegations and pleading nine legal defenses.

Pursuant to Rule 3.15(a)(1) the Administrative Law Judge "may allow appropriate amendments" to an answer "[i]f and whenever determination of a controversy on the merits will be facilitated thereby" and may impose "such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties." 16 C.F.R. § 3.15(a)(1).

Respondents seek to amend their Answer to elect not to contest the factual allegations of the Complaint, in accordance with Rule 3.12(b)(2), which 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, under a section titled, "Answer Pursuant to [Rule] 3.12(b)(2)," states:

> 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 to Amend Answer Ex. 1.

[2] On March 4, 2021, Complaint Counsel filed what it titled a "Supplemental Opposition" to its Opposition to the Motion to Amend Answer. The Commission's Rules do not provide for such a filing and Complaint Counsel did not seek leave to file the purported supplement. A cursory review of the filing shows that the supplement is little more than a regurgitation of the arguments made in Complaint Counsel's original Opposition. Moreover, Complaint Counsel's Supplemental Opposition does not present arguments in opposition to Respondents' Waiver filing, which response was permitted under the Order of March 1, 2021.

Respondents' proposed amended answer also includes a section titled "Legal Defenses," which asserted five of the nine legal defenses Respondents pled in their original Answer. Respondents subsequently filed a document titled, "Waiver of Affirmative Defenses of Mootness and Lack of Public Interest," pursuant to which Respondents waived those two defenses (the "Waived Defenses"), thereby leaving only three asserted "legal defenses": that the requested relief exceeds statutory authorization; that the FTC's administrative litigation process is unconstitutional; and that the Commission's *de novo* review of fact-findings by the Administrative Law Judge ("ALJ") on administrative appeals is unconstitutional and a violation of the Administrative Procedures Act. Respondents' original answer had asserted nine defenses.

Respondents argue that the amendments should be allowed because they do not add any allegations or defenses from their original answer. Rather, Respondents state, the proposed amended answer seeks to "admit the few material allegations that Respondents did not admit" in the original answer. Respondents further argue that Complaint Counsel is not prejudiced, and is in fact benefitted, by the proposed amended answer because Complaint Counsel will "not have to prove any disputed factual allegations." Motion to Amend Answer at 4.

Complaint Counsel contends that Respondents' proposed amended answer is improper under Rule 3.12(b)(2) because, according to Complaint Counsel, the amended answer does not unequivocally admit "all" material facts; and denies or challenges the facts through positing legal defenses. Complaint Counsel argues in the alternative that certain conditions should attach to allowing the amended answer, including requiring Respondents to provide a paragraph-by-paragraph statement admitting (or denying) each allegation of the Complaint and ordering discovery as to issues that remain in dispute.

III.

As further explained below, leave to file Respondents' proposed amended answer, without the now-waived defenses of mootness and lack of public interest, will be allowed. There can be little doubt that Respondents' admissions, made pursuant to Rule 3.12(b)(2), will significantly narrow the issues in the case and thereby facilitate a determination of the merits. 16 C.F.R. § 3.15(a)(1). Moreover, Respondents' proposed amended answer contains an appropriate election and statement of admission under Rule 3.12(b)(2). As noted above, Rule 3.12(b)(2) allows a respondent to elect "not to contest the allegations of fact" in a complaint by submitting an answer "consist[ing] of a statement that the respondent admits all of the material allegations to be true." Respondents' proposed amended answer includes the express and unequivocal statements: "Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true." Motion to Amend Answer Ex. 1. Complaint Counsel complains about Respondents' use of the phrase "material allegations" as inserting unknown limitations and equivocation into Respondents' admissions because Respondents do "not specify which allegations they consider material." However, the language used by Respondents is that which is provided in Rule 3.12(b)(2). Indeed, Respondents' language tracked the language of the Rule

precisely. Under these circumstances, which allegations Respondents "consider" material appears to be irrelevant.

Complaint Counsel also contends that Respondents' proposed amended answer is improper under Rule 3.12(b)(2) because it includes affirmative defenses. Complaint Counsel first argues that Rule 3.12(b)(2) bars the assertion of legal defenses by providing that an answer under the Rule "shall consist of" the statement admitting all material allegations to be true. However, the Rule does not state that such an answer "shall consist *only*" of the required statement of admission, and this limitation will not be implied. In addition, the Rule expressly allows the answering party to submit both proposed findings of fact and proposed conclusions of law, which is inconsistent with a conclusion that a Rule 3.12(b)(2) answer prohibits presentation of legal arguments that may bar liability or the requested relief, notwithstanding the admission of all material allegations.

Next, Complaint Counsel argues Respondents' legal defenses necessarily implicate a denial of alleged facts, which would be contrary to the purpose of an answer under Rule 3.12(b)(2). Complaint Counsel's examples include Respondents' defenses of mootness and lack of public interest, but Respondents have waived those defenses and Respondents will not be permitted to include them in the amended answer allowed under this Order. Complaint Counsel fails to demonstrate how Respondents' remaining legal defenses in the proposed amended answer challenge or deny the material allegations of the Complaint. Indeed, the nature of an affirmative defense is that it defeats the plaintiff's claim even assuming the allegations are true. Thus, Respondents can, for example, challenge the scope of remedy, while still admitting the underlying factual allegations supporting liability. *See, e.g.*, *In re Auslander Decorator Furniture Inc.*, 83 F.T.C. 1542, 1974 FTC LEXIS 213, *47-48 (Apr. 23, 1974) (accepting Rule 3.12(b)(2) answer that "admitted all the material allegations" of the complaint and resolving remaining issue of scope of remedy). Ultimately, the risk that Respondents' admissions of fact will undermine their legal defenses is Respondents' to bear, and is not a reason to disallow either the admissions or the legal defenses.

In addition, Complaint Counsel argues that even if the proposed amended answer is allowed, certain conditions are necessary to prevent prejudice to Complaint Counsel. The notion that Complaint Counsel is prejudiced by Respondents' admission of all material allegations of the Complaint and the reduction of Respondents' asserted legal defenses defies credulity. The effect of a Rule 3.12(b)(2) answer is to "waive [all] hearings" and, as Respondents state in their Motion, Complaint Counsel will "not have to prove any disputed factual allegations." Motion to Amend Answer at 4. That Respondents have reserved the right to file proposed findings and conclusions, as outlined in Rule 3.46 and expressly allowed by Rule 3.12(b)(2), also does not create a risk of prejudice as Respondents will be bound by the admissions of fact in their amended answer.

Moreover, Complaint Counsel's proposed condition that Respondents provide a paragraph-by-paragraph response to each allegation of the Complaint is not contemplated by Rule 3.12(b)(2) and could create ambiguity, when the proposed amended answer

already expressly admits "all material allegations" of the Complaint. Complaint Counsel's request that the ALJ order discovery to continue "concerning all remaining issues," as a condition of Respondents' amending their Answer, is unnecessary. Although Complaint Counsel's most recent motions to compel discovery from Respondents were denied without prejudice until the resolution of the motions to amend the Answer and the Complaint, there is nothing in Rule 3.12(b)(2) or the Scheduling Order issued in this case that prohibits Complaint Counsel from pursuing discovery regarding issues that remain relevant after these motions are resolved.

Complaint Counsel also requests it be permitted to amend the Complaint as a condition for permitting Respondents to amend their Answer. Complaint Counsel fails to explain how amending the Answer is prejudicial to Complaint Counsel's case or to persuade that such amendment operates to avoid such alleged prejudice. Accordingly, Complaint Counsel's request to amend the Complaint as a condition for allowing Respondents to amend the Answer is rejected.

IV.

For all the foregoing reasons, Respondents' Motion for Leave to Amend the Answer is GRANTED, and it is hereby ORDERED that Respondents may file an Amended Answer to the Complaint, in the form proposed by Respondents, except that Respondents may not include the Waived Defenses.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 10, 2021

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF 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, Respondents.	Docket No. 9397

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO AMEND THE COMPLAINT

I.

On February 24, 2021, Federal Trade Commission ("FTC") Complaint Counsel filed a Cross-Motion for Leave to Amend the Complaint ("Motion to Amend").[1] Respondents Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC ("WBS"), and Kramer Duhon (collectively, "Respondents") filed a Response to the Cross-Motion to Amend the Complaint on February 26, 2021.[2]

As set forth below, the Motion to Amend the Complaint is DENIED.

[1] The Motion to Amend the Complaint was filed as a "Cross-Motion" as part of Complaint Counsel's Opposition to Respondents' Motion for Leave to Amend the Answer, which Respondents had previously filed on February 12, 2021. By Order issued March 10, 2021, Respondents' Motion for Leave to Amend the Answer was granted ("March 10 Order").

[2] Also on February 26, 2021, Respondents filed a motion to exceed the word limits applicable to their response to the Motion to Amend, which Complaint Counsel opposed on March 2, 2021. Respondents' motion to exceed the word limits for their response is GRANTED.

II.

The Complaint in this matter, issued November 13, 2020, alleges that Respondents "disseminated or caused to be disseminated advertising and promotional materials" for four supplements that the FTC contends were "not substantiated at the time the representations were made," and that such unsubstantiated representations constitute deceptive advertising in violation of sections 5 and 12 of the FTC Act. Complaint ¶¶ 7, 9, 11, 13, 15, 17, 19 and 21.

The notice of contemplated relief in the Complaint states that Complaint Counsel will seek an order that will, among other things: prohibit any representations that any of Respondents' products "cure, treat, mitigate, prevent, or reduce the risk of any disease"; prohibit any representations "about the health benefits, safety, efficacy, or the performance" of Respondents' products "unless those representations are supported by competent and reliable scientific evidence"; and, prohibit any "misrepresentations regarding tests, studies, or other research." Complaint at 14-15.

Respondents filed their Answer to the Complaint on December 4, 2020, which denied they made unsubstantiated representations or that their conduct violated the FTC Act. Answer ¶¶ 13, 15, 17, 19 and 21. Respondents also raised nine affirmative defenses, including, among others: that Complaint Counsel's requested relief exceeds the Commission's authority; that the case is moot; that the filing of the action is not in the public interest; that the FTC's administrative process is unconstitutional; and the Commission's *de novo* review on appeal of the fact findings of the Administrative Law Judge ("ALJ") violates the Administrative Procedures Act. Answer at 3-4.

On February 12, 2021, pursuant to Rule 3.15(a)(1), Respondents filed a Motion for Leave to Amend their Answer seeking to file an answer pursuant to Rule 3.12(b)(2), which provides:

> 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). In accordance with the foregoing Rule, 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.

Respondents' proposed amended answer reduced their legal defenses from nine to the five defenses summarized above that had been included in the original Answer to the Complaint. Respondents subsequently waived two of the five defenses. *See* Waiver of Affirmative Defenses of Mootness and Lack of Public Interest, filed February 25, 2021. Over Complaint Counsel's opposition, Respondents' Motion for Leave to Amend their Answer was granted on March 10, 2021, allowing Respondents to file an Amended Answer to the pending Complaint, in the form proposed by Respondents, except that Respondents were not permitted to include the two waived defenses in the Amended Answer. The remaining three legal defenses in Respondents' proposed Amended Answer are: that the requested relief exceeds statutory authorization; that the FTC's administrative litigation process is unconstitutional; and that the Commission's *de novo* review of fact-findings by the ALJ on administrative appeals is unconstitutional and a violation of the Administrative Procedures Act.

In its Motion to Amend the Complaint, Complaint Counsel asserts that even under Respondents' proposed Amended Answer, the parties will litigate the scope of relief.[3] Complaint Counsel argues that the amendments seek to add new factual allegations to support the broad relief that Complaint Counsel seeks.

Complaint Counsel's proposed amendments highlight certain events that took place in other litigation between the FTC and Respondents, in the United States District Court for the District of Maine (the "Maine Litigation"), which culminated in a consent judgment and permanent injunction barring certain product claims by Respondents. *See* Proposed amended 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 (Dkt. 15)"). The FTC filed a motion for contempt in that case, contending that Respondents had made unsubstantiated claims regarding certain supplements in violation of the consent judgment. The contempt motion was ultimately denied. The issuance of the Complaint in this case followed.

In summary, the proposed amendments to the Complaint primarily allege that Respondents made the unsubstantiated representations alleged in this case after the entry of the consent judgment and the filing of the FTC's contempt motion in the Maine Litigation. *See, e.g.*, ¶ 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. HRL continued to sell the product to consumers through at least January 2021 . . .*"); ¶ 10 (amendments in italics) ("HRL has disseminated or has caused to be disseminated advertising and promotional materials for Black Garlic Botanicals in multi-page mailers sent to consumer residences and on company websites. *Following entry of the Order, HRL disseminated or has caused to be disseminated more than 800,000 mailers to consumer residences in the United States and Canada. HRL continued to disseminate these mailers as late*

[3] Complaint Counsel's argument that the parties will litigate the Respondents' defenses of mootness and lack of public interest is now moot, as Respondents have waived those defenses and agreed not to assert these particular affirmative defenses in any future answer.

as August 2019 despite Respondents' awareness that the FTC was investigating whether advertising for Black Garlic Botanicals violated the Order.").

Complaint Counsel argues that: (1) the proposed amendments add only details, not new theories, counts or defendants, and therefore fall reasonably within the scope of the original complaint; (2) the proposed amendments will facilitate a determination on the merits because they provide greater notice; and (3) because Respondents have not served any discovery, the proposed amendments are not unduly prejudicial. Respondents argue that: (1) the proposed amendments impermissibly add a new theory; (2) Complaint Counsel does not explain how the proposed amendments will facilitate a determination on the merits; and (3) changing the material facts, theories, and allegations in a case that is set for trial on a tight schedule is prejudicial.

III.

The operative FTC 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: Provided, however, That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

16 C.F.R. § 3.15(a)(1).

"[A] motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice." 16 C.F.R. § 3.15(a)(1). Thus, the ALJ has authority to order amendments which clarify the allegations of a complaint or which merely add examples of practices already challenged." *In re Champion Home Builders Co.*, 1982 FTC LEXIS 52, at *2-3 (Mar. 9, 1982). "Where a proposed amendment alters the 'underlying theory' of the original complaint, however, the Commission must make the determination whether to amend the complaint because only the Commission is authorized to determine whether there is reason to believe that the law has been violated and whether a proceeding on those amended charges would be in the public interest." *Id.*

Complaint Counsel asserts that the proposed amendments fall "'within the scope of the original complaint,' because [they add] details, not new theories or practices." Motion to Amend at 7-8. Having reviewed the redlined amended complaint attached to the Motion to Amend, the allegations comprising the proposed amendments do not appear to add any new legal theories or allege new or different violations of the FTC Act. Although Complaint Counsel states that it has informed Respondents that Complaint Counsel "will seek to ban Respondents from the supplement industry," Motion to Amend at 7-8 n.3, Complaint Counsel's proposed amendments do not include any proposed changes to the Notice of Contemplated Relief. Based on the foregoing, Complaint Counsel's proposed amendments are not outside the reasonable scope of the Complaint, and are therefore within the authority of the ALJ to allow. 16 C.F.R. § 3.15(a)(1).

To resolve the merits of the Motion to Amend, it must now be determined if the proposed amendments constitute "appropriate amendments" which will facilitate a "determination of a controversy on the merits." 16 C.F.R. § 3.15(a)(1).

Complaint Counsel has failed to show that the proposed amendments should be allowed. With respect to whether the proposed amendments will "facilitate a determination on the merits," Complaint Counsel's only argument is that the amendments will provide "greater notice regarding what Complaint Counsel will prove." Motion to Amend at 7-8. The proposed amendments appear designed to support an argument that Respondents knowingly violated a court order when making the alleged misrepresentations challenged in this case, so as to justify broad fencing in relief. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992) ("In determining whether a broad fencing-in order bears a 'reasonable relationship' to a violation of the [FTC] Act, the Commission considers (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations."). To the extent that Complaint Counsel's amendments are intended for that reason, allowing the proposed amendments risks interjecting into this case the merits of whether Respondents' conduct violated the Maine consent judgment, which would complicate resolution of the case on the merits.

In addition, Respondents have elected not to contest the allegations of fact set forth in the pending Complaint and to admit all of the material allegations of the Complaint to be true, pursuant to Rule 3.12(b)(2). *See* March 10 Order. Such an answer has the effect of dispensing with a hearing and removing proceedings to the Commission for determination of an appropriate final order. 16 C.F.R § 3.12(b)(2) ("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."). Complaint Counsel's seeking the proposed amendments, in reaction to Respondents' election under Rule 3.12(b)(2), appears to be more of a strategic effort to counter Respondents' efforts to bring this case to a resolution, than an effort to facilitate a determination of this case on the merits. Furthermore, by interjecting additional factual allegations, which Respondents state they view as "inflammatory," Complaint Counsel's proposed amendments could make it less likely that, in answering the amended Complaint, Respondents will elect not to contest the material allegations under Rule 3.12(b)(2). Under these circumstances, allowing the proposed amended complaint would not serve the purpose of Rule 3.15(a)(1) and would also unnecessarily frustrate the right to obtain expedited proceedings under Rule 3.12(b)(2).[4]

[4] Complaint Counsel contends that the proposed amendments derive from recent discovery; however, the substance of the Maine consent judgment and the FTC's motion for contempt have been known since 2019.

IV.

For all the foregoing reasons, the Motion to Amend the Complaint is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 12, 2021