

**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 COMPLAINT COUNSEL’S MOTIONS TO COMPEL

I.

On March 24, 2021, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel, pursuant to FTC Rule 3.38(a), 16 C.F.R. § 3.38(a), filed two motions to compel discovery: a Second Motion to Compel Respondents to Produce Documents; and a Second Motion to Compel Respondents to Supplement Interrogatory Responses (collectively, “Motions to Compel”). The deadline for Respondents Health Research Laboratories, LLC (“HRL”), Whole Body Supplements, LLC (“WBS”), and Kramer Duhon (collectively, “Respondents”) to file any opposition to the Motions to Compel was April 1, 2021. Respondents have not filed any opposition.¹ For the reasons set forth below, Complaint Counsel’s Motions are GRANTED.

II.

This is Complaint Counsel’s second attempt to obtain the discovery requested herein by motion to compel. On March 1, 2021 an order was issued denying Complaint Counsel’s initial motions to compel without prejudice, on the grounds that there were then-pending both a motion

¹ Rule 3.38(a) requires that any response to a motion to compel must be filed within 5 days of receipt of service of the motion. 16 C.F.R. § 3.38(a). Rule 4.3(c) provides additional time of 1 day when the party is served by electronic delivery. 16 C.F.R. § 4.3(c).

to amend the Answer and a motion to amend the Complaint, the resolution of which might affect the scope of the pleadings and, therefore, the scope of permissible discovery. Orders were issued on March 10, 2021, granting Respondents' Motion to Amend Answer, and on March 12, 2021, denying Complaint Counsel's Motion to Amend the Complaint. Respondents filed their Amended Answer on March 30, 2021.

The Amended Answer 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.

Respondents now assert only one legal defense in their Amended Answer:

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.

In the instant Motions to Compel, Complaint Counsel seeks an order requiring Respondents to amend and supplement their Answers to Interrogatories 1 and 3 and, with respect to the Document Requests, an order requiring that Respondents (1) clearly identify any categories of documents responsive to Requests 1 and 2 in Complaint Counsel's First Requests for Production ("RFPs") withheld on grounds other than privilege or the work product doctrine; (2) promptly produce all non-privileged documents responsive to these Requests; and (3) produce a privilege log.

The Interrogatories at issue and Respondents' responses thereto are:

Interrogatory 1: Specify every Document that constitutes Substantiation Material including its Bates number and the date You first possessed the Document.

Response to Interrogatory 1: Pursuant to 16 C.F.R. § 3.31(c) and (d), Defendants object to this Request because it seeks to require Respondents to marshal all of their evidence and because it is unnecessarily burdensome. Respondents are in the process of producing "every Document that constitutes Substantiation Material." Complaint Counsel can answer this interrogatory by reviewing and compiling the information from the documents produced.

Interrogatory 3: Provide Basic Dissemination Data for each unique Advertisement for each Identified Product disseminated on or after January 17, 2018.

Response to Interrogatory 3: Please see Basic Dissemination Data spreadsheet in the document production.

The RFPs at issue and Respondents' responses thereto are:

RFP 1: Produce a copy of each unique Advertisement for every Identified Product disseminated on or after January 17, 2018, Documents sufficient to establish Basic Dissemination Data for each such Advertisement, and all Documents Related To the content, development, analysis, review or approval of such Advertisements.

Response to RFP 1: Respondents object to the request for "all Documents Related to the content, development, analysis, review or approval of such Advertisements" because this request is overly broad, because it fails to describe the documents sought with reasonable particularity, and because it seeks documents privileged by the attorney client privilege and the work product privilege. Non-privileged documents will be produced. Privileged attorney client communications and work product will not be produced.

RFP 2: Produce all Documents constituting or reflecting Communications Related To any Identified Product with any Subject Third Party.

Response to RFP 2: Respondents object to producing any privileged communications. Non-privileged documents will be produced.

III.

Rule 3.31(c)(1) provides "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). "Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied." *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at *2 (Jan. 9, 2009).

Complaint Counsel asserts that the Notice of Contemplated Relief in this case includes fencing-in provisions intended to prevent future violations.² Facts relevant to determining whether fencing-in relief is appropriate include: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violative conduct may be transferred to other products; and (3) whether there is a history of prior violations. *Telebrands Corp. v. FTC*, 457 F.3d 354, 358

² "'Fencing-in' relief refers to provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful." *In re Telebrands Corp.*, 2005 FTC LEXIS 178, at **4 n.3 (Sept. 19, 2005) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992)). "A common form of 'fencing-in' relief is a 'multiproduct' prohibition that bars the respondent from using its deceptive trade practice to sell not only the product that was the subject of the enforcement action, but all products sold by the respondent. Such multi-product orders are justified where the respondent's deceptive practice was serious or deliberate, easily transferrable to the sale of other products, and/or where there is a history of prior violations." *In re ECM BioFilms, Inc.*, 2015 FTC LEXIS 22, at *629-30 (Jan. 28, 2015) (collecting cases).

(4th Cir. 2006) (*quoting In re Stouffer Foods Corp.*, 1994 FTC LEXIS 196, *at 37 (Sept. 26, 1994)).

Complaint Counsel argues that even though Respondents have admitted all material allegations in the Complaint, the discovery it seeks is relevant to the appropriate scope of relief. Specifically, Complaint Counsel asserts that the information requested in Interrogatory 1 is relevant to evaluating the deliberateness of Respondents' unlawful conduct; the information requested in Interrogatory 3 is relevant to the seriousness of Respondents' violations; and the documents sought in RFPs 1 and 2 are relevant to evaluating the seriousness and deliberateness of Respondents' conduct, both of which are factors weighed in determining whether fencing-in relief should be included in a final cease and desist order.

Respondents failed to file any opposition to the Motions to Compel. Therefore, only their objections to the discovery requests are evaluated. "Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . an answer to any requests for admissions, documents, depositions, or interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a).

In their objection to Interrogatory 1, Respondents contend that "Complaint Counsel can answer this interrogatory by reviewing and compiling the information from the documents produced." When "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," Rule 3.35(c) provides that a party may answer an interrogatory by specifying "records from which the answer may be derived or ascertained." Any such "specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained." 16 C.F.R. § 3.35(c). Respondents did not specifically identify any documents in their answer to Interrogatory 1. Furthermore, the burden is not the same between the parties because Complaint Counsel cannot independently identify the documents Respondents relied on to substantiate their claims simply by reviewing Respondents' document production.

In their objection to Interrogatory 3, Respondents stated only: "Please see Basic Dissemination Data spreadsheet in the document production." Complaint Counsel asserts that Respondents have not produced a spreadsheet with such a title or identified any document with a Bates number to which the response might refer. Therefore, Respondents' objection is insufficient.

In response to RFP 1, Respondents produced advertisements, but did not produce business records containing dissemination information or any documents related to "the content, development, analysis, review or approval" of the advertisements. Respondents objected to this request on grounds that it was not stated with reasonable particularity and seeks privileged documents. Notably, Respondents did not object on the grounds of relevance. RFP 1 is stated with reasonable particularity. Respondents' privilege objection is addressed below.

In response to RFP 2, Respondents objected to producing any "privileged communications" and stated non-privileged documents "will be produced." Complaint Counsel

states that Respondents did not produce any responsive documents. Respondents did not interject any other objections.

To the extent there are documents responsive to RFP 1 and 2 that Respondents are withholding as privileged, Respondents shall comply with Rule 3.38A. 16 C.F.R. § 3.38A (providing that any person withholding material responsive to interrogatories or requests for production shall, if asserting privilege, “submit a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim”).

IV.

For the above stated reasons, Complaint Counsel’s Motions to Compel are GRANTED, and it is hereby ORDERED:

Within 5 days of the date of this Order, Respondents shall supplement their answers to Interrogatories 1 and 3 to provide full and complete answers, except Respondents shall not be required to provide the date of information requested in Interrogatory 1.

Within 5 days of the date of this Order, Respondents shall identify all categories of documents responsive to Complaint Counsel’s First Set of Requests for Production they are withholding on grounds other than privilege or the work product doctrine. If Respondents are withholding documents on privilege grounds, they shall produce a privilege log that complies with Rule 3.38A within 15 days of this Order.

Within 10 days of the date of this Order, Respondents shall produce all non-privileged documents that are responsive to Complaint Counsel’s First Set of Requests for Production.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 6, 2021