

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

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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 IN PART AND DENYING IN PART
RESPONDENTS’ MOTION TO ENTER NEW SCHEDULING ORDER OR, IN THE
ALTERNATIVE, TO TRANSFER CASE TO THE COMMISSION**

I.

On March 31, 2021, Respondents Health Research Laboratories, LLC (“HRL”), Whole Body Supplements, LLC (“WBS”), and Kramer Duhon (collectively, “Respondents”) filed a Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission (“Motion”). Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed an opposition on April 9, 2021 (“Opposition”). For the reasons set forth below, Respondents’ request to transfer this matter to the Commission is GRANTED, and their request to enter an order for a schedule and other provisions for proposed findings of fact, conclusions of law and legal briefing before the Commission is DENIED.

II.

On March 30, 2021, Respondents filed an Amended Answer pursuant to FTC Rule 3.12(b)(2).¹ Rule 3.12(b)(2) states:

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

¹ Respondents’ motion under Rule 3.15(a) for leave to amend their Answer was granted on March 10, 2021.

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' 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' Amended Answer also includes one legal defense, which challenges the constitutionality of the FTC's administrative process.²

Respondents contend that, having admitted the allegations of the Complaint, pursuant to Rule 3.12(b)(2), the Complaint and the Amended Answer form the record for this case, no further discovery or expert reports are necessary, and the case is now ripe for decision. Respondents ask the Administrative Law Judge ("ALJ") to issue an amended Scheduling Order that eliminates all pending discovery and other pre-trial deadlines in the existing Scheduling Order and replaces them with a schedule and other conditions for submitting proposed findings of fact, proposed conclusions of law, and legal briefing. Respondents request in the alternative that the ALJ immediately transfer this case to the Commission for a final decision and order disposing of the matter, in accordance with Rule 3.12(b)(2).

Complaint Counsel asserts that Respondents' Amended Answer only narrows the disputed factual and legal issues in this case, that the issue of appropriate relief remains outstanding, and that an initial decision must be prepared. Complaint Counsel further argues that it is permitted to seek discovery relevant to scope of relief; specifically, "fencing-in"

² Respondents' legal defense 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.

relief,³ and notes that, on April 6, 2021, the ALJ ordered the Respondents to produce responsive documents, a privilege log, and supplemental interrogatory answers. *See* Order Granting Complaint Counsel’s Motions to Compel (Apr. 6, 2021). Complaint Counsel further notes that it has filed a motion with the Commission requesting that the Commission postpone the evidentiary hearing in this matter in order to allow Complaint Counsel additional time to conduct discovery.

Complaint Counsel argues that, under the circumstances, it is inappropriate to eliminate all discovery and prehearing deadlines and replace them with deadlines for proposed findings of fact and conclusions of law, as requested by Respondents. Complaint Counsel further argues that Respondents’ alternative request to immediately transfer the case to the Commission for final decision is contrary to the Rules of Practice and relevant precedent.

On April 13, 2021, after the Motion and Opposition herein were submitted, Respondents submitted a Stipulation as to Fencing-in Relief, which stated: “Respondents hereby stipulate and agree that the Initial Decision of the ALJ can include whatever ‘fencing in’ relief is permitted by statute and requested in the Complaint” (“Stipulation”).⁴ Respondents reiterated their position in a recent filing regarding the Order Granting Complaint Counsel’s Motions to Compel, issued April 6, 2021, stating: “Respondents have no objection to a *blanket* prohibition on disseminating or causing to be disseminated *any* advertising or promotional materials for *any* supplements that makes *any* representations regarding health or disease.” Respondents’ Motion to Partially Reconsider [April 6, 2021] Order Granting Complaint Counsel’s Motions to Compel at 7 (emphasis in original). Respondents have made the same statement directly to the Commission. *See* Respondents’ Motion to Extend Time to Respond to Complaint Counsel’s Motion to Reschedule Evidentiary Hearing Date, filed April 16, 2021, Exhibit A at 6 (“Respondents have agreed to a blanket prohibition on disseminating or causing to be disseminated any advertising or promotional materials for *any* supplements that makes *any* representations regarding health or disease” and that Respondents have decided to “give the FTC whatever permissible ‘fencing in’ relief has been requested in the Complaint”).

³ “‘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).

⁴ While Respondents’ Stipulation refers to relief that may be included in the “Initial Decision of the ALJ,” as discussed further *infra*, Rule 3.12(b)(2) contemplates expedited proceedings involving only a *final* decision and *final* order. The wording of the Rule does not contemplate an evidentiary hearing or fact-finding by an ALJ and does not contemplate or provide for an initial decision.

III.

Complaint Counsel's argument that Rule 3.12(b)(2) contemplates an evidentiary hearing and an initial decision by an ALJ is unsupported. Complaint Counsel cites cases in which, after submission of an answer under Rule 3.12(b)(2), an initial decision was issued by the ALJ, followed by a final decision and order from the Commission.⁵ However, Complaint Counsel overlooks the fact that these cases were decided under a previous version of Rule 3.12(b)(2) that is no longer applicable. In 2009, the Commission changed its Rules of Practice to "eliminate the ALJ's authority to render an initial decision when the allegations of the complaint are admitted or there is a default. In those cases, the Commission would issue a final decision on the basis of the facts alleged in the complaint." 74 Fed. Reg. 1804, 1808 (Jan. 13, 2009) (Interim final rules with request for comment). In addition, it should be noted that the exclusive use of the word "*final*" in the Rule, as in "*final decision*" and "*final order*," is contrary to a conclusion that an initial decision is necessary or even possible under the Rule. The clear wording and plain meaning of the Rule is that "the Commission shall issue a final decision." 16 C.F.R. § 3.12(b)(2).

Moreover, as noted above, Rule 3.12(b)(2) states that the 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" for the Commission's final decision and order. Although the language of the Rule does not expressly preclude consideration of evidentiary materials, the history of the Rule indicates an intent to limit the record to the pleadings. In explaining the 2009 amendments to Rule 3.12(b)(2), the Commission stated that "the Commission would issue a final decision on the basis of the facts alleged in the complaint." 74 Fed. Reg. at 1808. The Commission further noted that where the allegations are admitted pursuant to Rule 3.12(b), there would be no evidence to hear or "voluminous record" to review, and therefore, it would be more "efficient for the Commission to issue a final opinion and order without the intermediate step of an ALJ's initial decision." 73 Fed. Reg. 58832, 58836 (Oct. 7, 2008) (Proposed Rules). According to the Commission, these "cases can be resolved more expeditiously without the intermediate step of an ALJ's initial decision; the only issues in such cases are legal or policy ones" 74 Fed. Reg. at 1808-09.⁶

Furthermore, Complaint Counsel's assertion that the Amended Answer merely narrowed the issues in the case trivializes the significance of an answer under Rule 3.12(b)(2), which is a binding, judicial election not to contest any factual allegations of the Complaint and to admit all material allegations as true. In addition, to the extent that the scope of relief previously presented any factual dispute and justified an order compelling then-outstanding

⁵ See *In re Sir Carpet, Inc.*, 85 F.T.C. 190, 1975 WL 172194 (Feb. 6, 1975); *In re Auslander Decorator Furniture, Inc.*, 83 F.T.C. 1542, 1974 WL 175916 (Apr. 23, 1974); *In re New Home Sewing Center*, 76 F.T.C. 191, 1969 WL 101146 (Aug. 5, 1969); *In re Market Fur Dressing Corp.*, 76 F.T.C. 101, 1969 WL 101378 (July 24, 1969).

⁶ In permitting Respondents' Rule 3.12(b)(2) answer to include affirmative defenses, the ALJ reasoned in part that allowing an affirmative defense is not inconsistent with the Rule because, by definition, an affirmative defense admits underlying facts and presents only a question of law. See Order Granting Respondents' Motion to Amend Answer (March 10, 2021) at 4.

discovery to support such relief,⁷ the only relief that Complaint Counsel has identified as requiring factual support is fencing-in relief and Respondents have since effectively agreed to this. It is also noteworthy that fencing-in relief is clearly contemplated in the Notice of Contemplated Relief submitted with the Complaint.⁸

IV.

Based upon Respondents' Amended Answer, Respondents' Stipulation, and Respondents' further judicial affirmations that they do not object to fencing-in relief, this case is ripe for a final decision and order by the Commission under Rule 3.12(b)(2). The present record fails to demonstrate the existence of any factual issue requiring a determination. Therefore, discovery is moot. To retain the case under these circumstances would only cause delay and will frustrate the purpose of the Rule to expedite proceedings where, as here, the allegations of the Complaint are admitted.

For all the reasons set forth herein, Respondents' request to transfer this matter to the Commission for a final decision and order under Rule 3.12(b)(2) is GRANTED. The schedule and conditions for submission of proposed findings of fact and conclusions of law to the Commission, as permitted under Rule 3.12(b)(2), are matters for the Commission's discretion. Accordingly, Respondents' request for an order in that regard is DENIED.

Rulings on motions currently pending before the ALJ are hereby held in abeyance and any and all pending discovery in this case is STAYED pending further proceedings before the Commission.⁹

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 20, 2021

⁷ Respondents did not submit any opposition to Complaint Counsel's motions to compel, which was also material to the decision to issue an order compelling discovery.

⁸ The Notice of Contemplated Relief included with the Complaint sets forth, among other anticipated remedial provisions, prohibitions against Respondents' making any representation that their products "cure, treat, mitigate, prevent, or reduce the risk of any disease"; 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"; or any "misrepresentations regarding tests, studies, or other research." Complaint, Notice of Contemplated Relief at 14-15.

⁹ The motions pending before the ALJ are Respondents' Second Motion to Quash Subpoena to Former Legal Counsel, filed April 9, 2021, and Respondents' Motion to Partially Reconsider [April 6, 2021] Order Granting Complaint Counsel's Motions to Compel, filed April 13, 2021.