

**UNITED STATES OF AMERICA
BEFORE THE 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.**

DOCKET NO. 9397

**COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION FOR SELF-IMPOSED CEASE-AND-DESIST ORDER**

Respondents' unusual request asks the Court to order them to discontinue apparently ongoing unlawful activity. However, for several reasons, the Court cannot enter the proposed voluntary, unilateral cease-and-desist order. As the Court is aware, it has only the authority the Commission has delegated. Although the Commission has delegated considerable power, it has not delegated the authority to issue cease-and-desist orders. *See* 16 C.F.R. § 0.14. In fact, the FTC Act, 15 U.S.C. § 45(b), prohibits the Commission from delegating that function. Furthermore, even assuming the Court has authority to enter cease-and-desist orders generally, neither the Court nor the Commission could enter this particular proposed order because it lacks the factual findings that 15 U.S.C. § 45(a) requires. Indeed, those necessary findings include jurisdictional facts, which Respondents' Answer deny.

To the extent Respondents' real audience is at least partly the Commission, or the Court of Appeals, there are two additional reasons why neither the Court nor the Commission should enter the proposed unilateral cease-and-desist order. First, the proposal's apparent purpose is to support a forthcoming mootness motion, but Respondents' voluntary decision to cease their unlawful activity will not deprive this Court (or the Commission) of the ability to resolve this

matter. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Put simply, Respondents’ proposal will not moot this case and the Court should not enter a pointless order (of course, nothing prevents Respondents from halting their illegal activity anyway).

Second, as explained below, a voluntary, unilateral cease-and-desist order likely cannot support future monetary redress under Section 19, 15 U.S.C. § 57b—which Congress authorized the Commission to seek if the facts otherwise warrant such relief. In fact, even if the proposed order could support a future Section 19 action, it would still deprive the Commission of its statutory right to issue factual findings entitled to deference. *See* 15 U.S.C. § 57b(c)(1). Because neither the Court nor the Commission should permit Respondents to negate deference to Commission factual findings and the ultimate right to bring a Section 19 action, Respondents’ motion must be denied.

Background

Nearly a decade ago, Respondents began pitching supplements they claimed would “reverse memory loss” (advertised with phony references to medical journals) or cause consumers to lose weight (advertised with bogus testimonials from people who “lost 20lbs by doing nothing”).¹ Rather than attempt to defend the indefensible when the FTC and Maine authorities sued, Respondents agreed to refund \$800,000 to consumers.² Through a stipulated order (“Final Order”), Respondents also agreed not to make certain claims without adequate substantiation.³

Rather than comply, Respondents resumed making unsubstantiated claims to sick and vulnerable consumers. Specifically, Respondents pushed pills that supposedly prevent or treat heart disease (“say goodbye to your heart surgeon and avoid an angioplasty”), and diabetic

¹ Complaint, *FTC v. Health Research Labs., LLC*, No. 17-cv-467 (D. Me. Nov. 30, 2017) at 8, 10.

² Stipulated Order, *FTC v. Health Research*, No. 17-cv-467 (D. Me. Jan. 16, 2018) (ECF No. 25) at 21.

³ *See id.* at 7-11.

neuropathy (“100% effective . . . [and] shown to help reverse damaged nerves”).⁴ Respondents have apparently sold more than \$2 million⁵ worth of these snake oil supplements including, almost certainly, to consumers whose diabetic or cardiovascular conditions have irreparably deteriorated in the absence of legitimate treatment.

The FTC and Maine moved to hold Respondents in contempt of Section II(H) of the Final Order, which, in the Plaintiffs’ view, imposed substantiation requirements for all disease-related claims Respondents might make. Respondents contended II(H) covered only claims related to certain specific diseases (conveniently, not heart disease or diabetic neuropathy).⁶ The court found the government’s position “supported by the plain text and purpose of the Judgment.”⁷ However, the court noted that the section heading appearing before section II mentioned only certain specific diseases.⁸ According to the court, this drafting error rendered Respondents’ interpretation “also reasonable,” and thus a technical defense to contempt under Section II(H).⁹ In fact, the court confirmed that the FTC’s position was “substantially justified,” and that it based its decision “solely on Section II’s heading.”¹⁰ The Court ultimately permitted the FTC to seek leave to file an amended contempt motion if it sought to proceed under another Final Order provision;¹¹ instead, the Commission issued the pending administrative Complaint.

Significantly, Respondents have used—and apparently continue using—so-called “continuity” programs.¹² In particular, once their deceptive ads lure consumers, Respondents

⁴ Complaint ¶¶ 11, 13.

⁵ Motion, *FTC v. Health Research*, No. 17-cv-467 (D. Me. Dec. 17, 2019) (ECF No. 21) at 21 n.17 (citing PX2).

⁶ Opposition, *Health Research*, No. 17-cv-467 (D. Me. Dec. 31, 2020) (ECF No. 30) at 10.

⁷ *FTC v. Health Research Labs, LLC*, No. 17-cv-467, 2020 WL 4431497, *7 (D. Me. July 31, 2020).

⁸ *Id.* at *6.

⁹ *Id.* at *7.

¹⁰ Order, *Health Research*, No. 17-cv-467 (D. Me. Jan. 20, 2020) (ECF No. 58) at 6-7.

¹¹ *Health Research*, No. 17-cv-467 (Aug. 12, 2020) (ECF No. 52) at 1.

¹² As the Court is aware, discovery commenced only a few weeks ago.

continue billing some of them automatically for additional shipments (sometimes without informed consent or even knowledge) until they cancel (which Respondents make difficult).¹³ After Respondents learned that the FTC had started investigating their ongoing misrepresentations, they stopped advertising the products at issue to new customers—although they continued auto-billing consumers that their deceptive marketing had already ensnared. In fact, this billing based on false claims has apparently continued through the present.

Respondents now volunteer to stop ongoing sales through a cease-and-desist order they have asked the Court to impose. Importantly, this represents only a portion of the relief potentially available, and necessary to protect the public. Among other things, given the substantial danger associated with selling fake treatments to consumers with diabetes or cardiovascular problems, Complaint Counsel seeks notice to consumers informing them Respondents deceptively advertised their products and strongly recommending that they seek legitimate treatment.¹⁴ In these proceedings, Complaint Counsel also seeks findings entitled to deference in a probable future action seeking refunds for injured consumers pursuant to Section 19 of the FTC Act.¹⁵

Argument

I. The Court Lacks Authority to Issue the Proposed Cease-And-Desist Order.

A. The Court Lacks Authority to Issue Cease-and-Desist Orders.

Pursuant to 16 C.F.R § 0.14, the Commission must form this Court through the Office of Administrative Law Judges and delegate to it “the initial performance of statutory fact-finding functions and initial rulings on conclusions of law[.]” The Commission has not delegated authority to issue cease-and-desist orders, nor could it do so. *See* 15 U.S.C. § 45(b) (providing only that “**the Commission**” may order a party “to cease and desist”) (emphasis added); *In the*

¹³ *See* Complaint, *FTC v. Health Research*, No. 17-cv-467 (D. Me. Nov. 30, 2017) (ECF No. 1) ¶¶ 24-25, 28, 54, 64, 66, 72 (allegations concerning pills sold before the Final Order).

¹⁴ *See* Complaint, Notice of Contemplated Relief ((e) and (m)).

¹⁵ *See* 15 U.S.C. § 57b(c)(1).

Matter of Axon Enter., Inc., No. 9389, 2020 WL 5406806, *4 (F.T.C. Sept. 3, 2020) (explaining that “[t]he Commission” is “responsible for all final agency decisions”) (citation omitted).

With no explanation, Respondents cite three provisions as purportedly giving the Court “the power to . . . enter the requested Cease-and-Desist Order.” Mtn. at 3 n.4. None, however, do. First, Respondents reference 16 C.F.R. § 3.42(c)(6), which affords authority “[t]o regulate the course of hearings[.]” Accordingly, § 3.42(c)(6) is inapplicable to Respondents’ voluntary, unilateral cease-and-desist order request. Second, Respondents cite § 3.42(c)(7), which governs “conferences for settlement” or other purposes, but this motion does not seek a “conference.” Finally, Respondents mention § 3.42(c)(12), which permits the Court to take actions “authorized by the rules in this part [16 C.F.R. part 3]” or the Administrative Procedure Act (“APA”). However, Respondents identify no APA provision authorizing the Court to issue a cease-and-desist order—and there is none. Furthermore, as discussed above, nothing in the Part 3 Rules provides such authority. In fact, both Part 3 and the FTC Act (“FTCA”) prevent such an order. *See* 15 U.S.C. § 45(a); 16 C.F.R. § 0.14. Because the Commission has not delegated to the Court authority to issue cease-and-desist orders, nor could it, the Court must deny Respondents’ motion.¹⁶

B. Respondents Fail To Include Required Factual Findings.

Even if the Commission had delegated its authority to issue cease-and-desist orders to this Court—and it has not—the Court still cannot enter the proposed unilateral cease-and-desist

¹⁶ Likely recognizing that the Court cannot enter cease-and-desist orders, Respondents include a footnote asking the Court, in the alternative, to “refer the Motion to the Commission[.]” Motion at 3 n.4. However, the Court only refers matters to the Commission if the Part 3 Rules provide for such a referral. *See, e.g.*, 16 C.F.R. § 3.22(a) (“[M]otions for summary decision shall be directly referred to the Commission[.]”). Notably, if the motion proposed a consent agreement, the Court could certify it to the Commission “upon a written determination that there is a reasonable possibility of settlement.” *See id.* at § 3.25(c). This provision is inapplicable because Respondents concede that their proposal “is not a settlement agreement,” Motion at 2, and settlement is not reasonably possible for many reasons (and Respondents do not argue otherwise). Because there is no applicable rule, the correct procedure is not to simply request that the Court refer the motion to the Commission. Rather, the correct procedure is to move the Court, as Respondents have done, and then attempt to pursue an interlocutory appeal to the Commission if they disagree with this Court’s determination. *See* 16 C.F.R. § 3.23.

order because it contains no findings of fact. Specifically, the FTCA provides that the Commission “shall state its findings as to the facts” with respect to any cease-and-desist order. *See* 15 U.S.C. § 45(a); *FTC v. Raladam Co.*, 316 U.S. 149, 150 (1942) (explaining that the FTCA “authorizes the Commission after hearings **and findings of fact** to issue orders requiring violators to cease and desist”) (emphasis added); *cf.* 16 C.F.R. § 2.32 (requiring that all proposed consent orders contain either proposed findings from Complaint Counsel or an “admission of all jurisdictional facts and an express waiver of the requirement that the Commission’s decision contain a statement of findings of fact and conclusions of law”).¹⁷

Significantly, however, Respondents’ order neither proposes findings of fact nor waives such findings. Indeed, through their Answer, Respondents affirmatively deny the conduct they propose to cease, rendering any possible factual findings that would support their proposal inconsistent with their position. *See* Answer (Dec. 4, 2020) at 1-3 (denying numerous factual allegations and asserting, incorrectly that “all alleged conduct . . . ceased more than a year [ago]”).¹⁸ Additionally, Respondents deny the jurisdictional facts upon which any cease-and-desist order would rest. *See id.* at 4 (denying that “the contemplated relief is in the public interest as required by 15 U.S.C. § 45”); *id.* at 2 (denying that the acts at issue “have been in or affecting commerce”). Put simply, jurisdictional and substantive factual findings are mandatory, but Respondents propose none, nor could they without abandoning their defenses. Even if the Commission delegated cease-and-desist authority to this Court—which it did not—no statute or regulation permits a cease-and-desist order without factual findings.

¹⁷ The proposed voluntary, unilateral cease-and-desist order is also deficient because it contains no conclusions of law.

¹⁸ Respondents incorrectly assert that the only alleged conduct is “marketing and advertising,” rather than ongoing sales based on earlier wrongful marketing and advertising. *See* Answer at 3. In any event, the proposed voluntary, unilateral cease-and-desist order prohibits “advertising” that Respondents’ Answer denies they are currently conducting. *See id.* at 2-3.

II. If the Court Reaches the Issue, or if the Commission Reviews the Matter, Neither the Court Nor the Commission Should Issue the Proposed Order.

A. Respondents' Proposal Will Not Affect the Outcome of This Proceeding.

Even if the Court could do what Respondents ask, it should deny their request because it will not affect the outcome of these proceedings.¹⁹ Commission authority “holds that voluntary discontinuance of practices by respondents—particularly when that occurs only in the face of an investigation or lawsuit—does not exonerate respondents or render the proceeding moot.” *In the Matter of Sw. Sunsites, Inc.*, 105 F.T.C. 7 (1985); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (“[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.”).²⁰ Thus, Respondents’ post-investigation, post-litigation voluntary cessation of their unlawful practices does not render this case moot.

B. Respondents' Proposal Would Wrongfully Foreclose Section 19 Relief.

Congress enacted Section 19 of the FTCA partly as means to enable the FTC to recover monetary redress following administrative proceedings, *see* 15 U.S.C. § 57b, and receive deference to the factual findings administrative proceedings produce, *see id.* at § 57b(c)(1). Importantly, entering a unilateral, voluntary cease-and-desist order likely would foreclose the FTC from using Section 19’s monetary recovery tools. In particular, Section 19 applies only when “the Commission has issued a final cease and desist order.” 15 U.S.C. § 57b(a)(1). However, the Commission would not issue the proposed order.²¹ Additionally, even if it is possible to file a future Section 19 action based on a voluntary, unilateral cease-and-desist

¹⁹ Nothing prevents Respondents from halting apparently ongoing auto-bill sales without a cease-and-desist order.

²⁰ Respondents may cite various exceptions, none of which apply here.

²¹ Notably, even assuming the proposed order qualifies as one issued by “the Commission,” it would not become “final” until “the expiration of time allowed for filing a petition [the Court of Appeals] for review,” 15 U.S.C. § 45(g)(1). However, there is no such period because there is no mechanism for Respondents to appeal a cease-and-desist order they begged the Court (or the Commission) to enter. This underscores that what Respondents propose is not cognizable under the FTC Act.

order—which is uncertain at best—the proposed order would deprive the Commission of its power to make factual findings entitled to deference. In short, permitting Respondents to choose their own remedy unilaterally would effectively nullify Section 19’s applicability in administrative proceedings in direct contradiction of the FTCA. For this reason as well, Respondents’ request is improper.

Conclusion

For all the aforementioned reasons, the Court should deny Respondents’ motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Opposition on counsel for the Respondents on January 25, 2021 via electronic mail.

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I also served one electronic copy via the Administrative E-Filing System and one electronic courtesy copy to the **Office of the Secretary** via email to ElectronicFilings@ftc.gov.

I served one electronic courtesy copy via email to the **Office of the Administrative Law Judge:**

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