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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE 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

RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR ACCEPTANCE OF
CONTESTED STIPULATED CEASE AND DESIST ORDER

SUMMARY

Pursuant to Section 5 of the FTC Act, Complaint Counsel filed an Administrative Complaint seeking a cease and desist order prohibiting Respondents from advertising or promoting four supplements. Respondents have *agreed* to the entry of a cease and desist order that tracks the exact language in the Administrative Complaint. Remarkably, Complaint Counsel argues that a cease and desist order should not be entered because (a) this Court does not have the authority to issue a cease and desist order; and (b) the entry of such an order is improper because it would not “affect the outcome of this proceeding” and because it would “wrongfully foreclose” the FTC from “using Section 19’s monetary recovery tools.” Response, pp. 4, 7.

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The issue before the Court is whether the Court can recommend entry of a cease and desist order that prohibits Respondents from participating in certain “acts or practices” specifically identified in the Administrative Complaint. This Court has the authority to recommend entry of a cease and desist order, and it should do so.

FACTS

In an attempt to sway the Court against Respondents, Complaint Counsel recites false allegations—not from the pleadings in this proceeding—but from the FTC’s federal court lawsuit that Respondents settled in 2018. Almost all of the “Background” is not in the Administrative Complaint and relates solely to allegations that were settled without any finding of liability. Further, this is not a proceeding to enforce the 2018 Stipulated Consent Judgment. The FTC lost that effort.

The Administrative Complaint *in this case* alleges that Respondents have “disseminated or [have] caused to be disseminated advertising and promotional materials”¹ for four supplements that the Commission contends were “not substantiated at the time the representations were made.”² Because Respondents stopped this alleged “act or practice” more than a year ago—prior to the filing of the Administrative

¹ See Complaint, ¶¶ 7, 9, 11, and 13.

² See Complaint, ¶¶ 15, 17, 19, and 21.

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Complaint—and have no intention of ever selling these supplements again, Respondents seek entry of a voluntary cease and desist order.³

ARGUMENT

I. The Court has authority to recommend issuance of the proposed cease and desist order.

The FTC filed this administrative action pursuant to Section 5 of the FTC Act, which allows the FTC to issue “an order requiring [Respondents] to cease and desist from using such method of competition or such act or practice.” *See* 15 U.S.C. § 45(b). Respondents are admittedly seeking relief that is “unusual.” Most Respondents do not voluntarily seek an order prohibiting them from the “act or practice” listed in the FTC’s administrative complaint. Respondents are tired of fighting with the FTC (a fight that has now lasted more than six years).

Respondents initially filed the Motion with the Commission and the filing was “returned” with the notation that it was “[a]ddressed to the wrong decision-maker.” *See* Ex. A (January 13, 2021 email from FTC Apps). Considering that Respondents had no ability to file this Motion with the Commission, Respondents re-filed the Motion before the Office of the Administrative Law Judges. In their Motion, Respondents requested that the Administrative Law Judge and/or the Commission enter a binding cease and desist Order and noted that, if the Court did not have the authority to enter the Order,

³ Complaint Counsel alleges that Respondents want to continue billing customers for the four supplements at issue. This statement is not accurate. The requested order prohibits not only all marketing, but also all sales of the products.

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the Court should refer the Motion to the Commission. Admittedly, Respondents' initial request was slightly imprecise. To clarify, Respondents seek to have this Court "recommend" (not refer) entry of requested cease and desist order to the Commission and seek to have the Commission immediately enter the order.

Complaint Counsel's first argument is that the Court has no authority to issue cease and desist orders provided by Section 5 of the FTC Act. To be clear, Respondents are seeking the entry of a cease and desist order and, if this Court does not have the authority to enter such a motion, then Respondents request that the Court recommend entry of such an order and refer the motion to the Commission for final entry. The FTC does not argue that the Court does not have authority, after a final hearing, to recommend entry of a cease and desist order. Clearly, if the party against whom the cease and desist order stipulates to the entry of such an order, then this Court should have the authority to enter an order without conducting a full administrative hearing.

Complaint Counsel argues that the Court and the Commission cannot enter the proposed cease and desist order because it does not include findings of fact. Findings of fact are intended to aid reviewing courts by providing a clear understanding of the basis of a decision. *See generally F.T.C. v. Burke*, 617 Fed.Appx. 667, 668 (9th Cir. 2015) *Wynn Oil Co. v. Purolator Chemical Corp.*, 536 F.2d 84, 85 (5th Cir. 1976). When the basis of the decision is the *consent* of the party against whom the order is entered, findings of fact should be unnecessary. However, to the extent that findings of fact are necessary, Respondents request the proposed order include the following finding of fact:

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“The Court finds that Respondents consented, and stipulated, to the entry of this cease and desist order.”

Complaint Counsel argues that “Respondents’ order neither proposes findings of fact nor waives such findings.” Response, p. 6. Respondents assumed that, by requesting entry of a cease and desist order, Respondents were waiving any requirement that the order be expressly supported by factual findings. But, to the extent that waiver is not clear, Respondents hereby expressly waive the requirement that the cease and desist order include factual findings. Further, Respondents expressly consent to the Court and the Commission’s jurisdiction to enter the requested order.

II. The Court and the Commission should enter the proposed order.

A. The proposed order will affect the outcome of this case.

Complaint Counsel argues that the Court should deny the Motion because entry of the proposed order would not affect the outcome of these proceedings. The proposed order is directly relevant to one of Respondents’ primary defenses. In their Answer, Respondents allege:

The causes of action alleged in the Complaint are barred by mootness because all alleged conduct (i.e., marketing and advertising) referenced in the Complaint ceased more than [a] year prior to the filing of the Complaint and will not reoccur in the future. The FTC has alleged no fact regarding a likelihood of reoccurrence. Further, the FTC Act does not grant the FTC the authority to seek a cease and desist order for conduct that ceased prior to the Administrative Complaint without evidence that the conduct will likely reoccur in the future.⁴

⁴ Answer, ¶ 24.

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Immediately after the Answer was filed, Complaint Counsel represented the following to Respondents' counsel:

Your Answer also asserts that “[t]he FTC has alleged no facts regarding the likelihood of recurrence.” *Id.* at 3. Again, we disagree and we further disagree that such an allegation must be included in the Complaint. *See* 16 C.F.R. § 3.11(b). Nevertheless, we intend to prove a likelihood of recurrence as part of the administrative case. **As such, you should prepare an appropriate defense.**⁵

Respondents took Complaint Counsel's advice. The proposed cease and desist order would prohibit a future “recurrence” of the alleged act or practice. This is the essence of the relief that the FTC seeks in this administrative proceeding. The FTC cannot reasonably argue that the requested relief simply has no effect on the outcome of this case. Further, the cease and desist order is not intended to be a “voluntary discontinuance” of the alleged “act or practice.” Response, p. 7. Unlike voluntary discontinuance, non-compliance with the cease and desist order comes with substantial penalties. *See* 15 U.S.C. 45(l) (monetary violations for each violation of a cease and desist order).

B. A potential future Section 19 action is irrelevant to this proceeding.

Finally, Complaint Counsel argues that the proposed cease and desist order may negatively affect a future action that the FTC may file someday under Section 19 of the FTC Act. The FTC has filed no action under Section 19, nor has it stated that it will file an action under Section 19. Refusing to enter the proposed cease and desist order in this case simply because the FTC may someday file a separate action in federal court against

⁵ *See* Ex. B (Dec. 14, 2020 letter from Jonathan Cohen) (emphasis added).

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the Respondents is not a legal basis for denying the stipulated relief. Nothing in Section 5 or 12 of the FTC Act—the sections that govern this proceeding—state that this Court should enter only those findings that may be beneficial to the FTC in later actions. Further, there is a strong argument that the language of Section 19 requires a *violation* of the cease and desist order for the FTC to commence a civil action under Section 19. *See* 15 U.S.C. §57b(a)(2) (“If any . . . corporation engages in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order which is applicable to such . . . corporation, then the Commission may commence a civil action against such . . . corporation.”).

CONCLUSION AND PRAYER

Respondents request that the Administrative Law Judge recommend to the Commission, and the Commission enter, a binding order, that provides as follows:

The Court finds that Respondents consented, and stipulated, to the entry of this cease and desist order.

Pursuant to the stipulation requested by Respondents, Respondents shall cease and desist from disseminating or causing to be disseminated all advertising or promotional materials for Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic, as well as any substantially similar products.

Pursuant to the Respondents’ request, Respondents shall cease and desist from selling or causing to be sold all dietary supplement products referenced in the Complaint (i.e., Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic), as well as any substantially similar products.

Respondents also request such other relief to which Respondents may justly be entitled.

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Dated: January 27, 2021

Respectfully submitted,

REESE MARKETOS LLP

By: /s/ Joel W. Reese

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ATTORNEYS FOR RESPONDENTS

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification to:

April J. Tabor
Acting Secretary
Federal Trade Commission
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Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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COMPLAINT COUNSEL

/s/ Joel W. Reese
Joel W. Reese

EXHIBIT A

From: FTC Apps no-reply@apps.ftc.gov 
Subject: Re: D09397 Health Research Laboratories - A filing submission has been returned
Date: January 13, 2021 at 8:33 AM
To: joel.reese@rm-firm.com



The Respondent Counsel under Docket Number: D09397 and Health Research Laboratories, EFiled has been uploaded to the system by Joel Reese on 2021-01-12 16:42:45 EST and is Returned. File(s) included in this submission: Respondents' Motion for Acceptance of Contested Stipulated Case-and-Desist Order.

2021-01-13 09:33:37 EST - Sherri Harris (Comments) Addressed to the wrong decision-maker.)

Please do not reply to this message as this email address is not monitored.

For Procedural Matters contact: DocumentProcessing@ftc.gov

For Technical Matters contact: support.adminefiling@ftc.gov

EXHIBIT B



United States of America
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVE. NW, CC-9528
WASHINGTON, DC 20580

Division of Enforcement
Bureau of Consumer Protection

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December 14, 2020

VIA ELECTRONIC MAIL

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**RE: *In re Health Research Laboratories*, No. 9397 (F.T.C.)
Scope of Complaint**

Counsel,

This correspondence confirms our conversation last week clarifying the scope of the Complaint in the above-captioned matter and addressing certain issues your Answer raises. Among other things, your Answer suggests or implies that the Complaint improperly encompasses wrongful conduct that took place prior to January 16, 2018. We disagree, as your clients disseminated all four of the advertisements attached to the Complaint as Exhibits after entry of Stipulated Order. Although what transpired before January 16, 2018 may be relevant to what subsequently occurred, or what might occur in the future, the Complaint does not allege (and Complaint Counsel will not seek to prove) that conduct prior to January 16, 2018 violated the FTC Act.

Your Answer also asserts that “[t]he FTC has alleged no facts regarding a likelihood of recurrence.” *Id.* at 3. Again, we disagree, and we further disagree that such an allegation must be included in the Complaint. See 16 C.F.R. § 3.11(b). Nevertheless, we intend to prove a likelihood of recurrence as part of the administrative case. As such, you should prepare an appropriate defense.

As we indicated, this correspondence renders a potentially time-consuming or burdensome formal amendment unnecessary, and we appreciate your willingness to accept it. Accordingly, you may rely on this correspondence regarding the Complaint’s scope.

Very truly yours,



Jonathan Cohen
Complaint Counsel