PUBLIC

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**

RESPONSE TO COMPLAINT COUNSEL'S MOTION
TO CERTIFY RULINGS FOR INTERLOCUTORY APPEAL

Complaint Counsel's Motion to Certify Rulings for Interlocutory Appeal should be denied because Complaint Counsel's motion fails to meet the standards necessary to certify this matter for an interlocutory appeal and because the requested appeal will accomplish nothing but further delay.

I. SUMMARY

There is only one remaining affirmative defense, which is that the FTC's administrative process and structure violates the United States Constitution.[1] Considering

[1] Respondents filed their Amended Answer on March 30, 2021. The proposed Answer included two other defenses that were dropped from the filed Amended Answer, including the defense that the requested relief exceeds the statutory authority. Even without these defenses, Respondents have the right to propose conclusions of law and challenge on legal grounds whatever relief the FTC seeks in the final order. Further, the FTC, not the Respondents, have the burden of proving

the Commission's prior decisions, Respondents do not anticipate the ALJ or the Commission will rule that the FTC's administrative process or the structure of the FTC violates the United States Constitution, but Respondents would like to preserve this issue for anticipated later proceedings.[2] However, this one issue—a purely legal issue—does not justify an interlocutory appeal to Commission. More importantly, allowing interlocutory appeals for discretionary procedural rulings, like whether to permit an amendment to a complaint that "just adds details" or to permit a respondent to amend its answer to admit all material facts, would set a bad precedent. If these types of procedural rulings were subject to interlocutory appeals, nothing could be decided by the ALJ without an interlocutory appeal to the Commission.

II. ARGUMENT

"Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process." *In re Daniel Chapter One*, Docket No. 9329, 2009 WL 1353465, at *1 (May 5, 2009) (Chappell, J.); *see, e.g., Gillette Co.*, 98 F.T.C. 875 (1981). "Accordingly, the movant must satisfy a very stringent three-prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy;

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the appropriate relief sought by the FTC so the two other "affirmative defenses" were deemed not true affirmative defenses and were dropped.

[2] This issue was recently addressed in *Axon Enterprise, Inc. v. Federal Trade Commission*, 986 F.3d 1173, 1177 (9th Cir. 2021), but the Ninth Circuit dismissed the appeal for lack of subject matter jurisdiction. In *Axon Enterprise*, the respondents made the mistake of not preserving or raising the constitutional challenges first through the administrative process—a mistake that Respondents do not want to repeat. *Id.* In a prior Seventh Circuit case, another respondent failed to properly preserve and assert the issue. *Hospital Corp. of Am. v. F.T.C.*, 807 F.2d 1381, 1393 (7th Cir. 1986).

(2) there is substantial ground for difference of opinion as to that controlling issue; and (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." *Id.* (citing 16 C.F.R. § 3.23(b)).

A. Ruling on Amendment of the Answer should not be certified.

1. There is no "controlling question of law."

The "controlling question" standard "forecloses interlocutory appeals in situations in which the law is well settled and the dispute arises in the application of the facts attached to that law." *Int'l Assoc. of Conf. Interp.*, No. 9270, 1995 F.T.C. LEXIS 452, at *4 (Feb. 15, 1995) (citation omitted). Instead, a question is deemed controlling "only if it may contribute to the determination, at an early stage, of a wide spectrum of cases" and not merely "a question of law which is determinative of a case at hand." *Rambus Inc.,* No. 9302, 2003 F.T.C. LEXIS 49, at *9, (Mar. 26, 2003) citing *Automotive Breakthrough Sciences, Inc.*, 1996 F.T.C. LEXIS 478 at *1 (Nov. 5, 1996).

Complaint Counsel's suggested issue for appeal—whether Rule 3.12(b)(2) requires a waiver of all legal defenses—is not controlling question of law. It is a question of procedure. It is well-settled that "[p]rocedural disputes and discovery disputes do not amount to controlling questions of law." *In re N. Carolina Bd. of Dental Examiners*, Docket No. 9343, 2011 WL 822921, at *3 (Mar. 1, 2011) (Chappell, J.). Further, this procedural question is answered by the rule itself. Rule 3.12(b)(2) states that "[i]f the respondent elects not to content 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." Nothing in the Rule states that Respondents must waive all legal defenses and agree to whatever legal remedy Complaint Counsel seeks, regardless of the law. Such a rule would make no sense and would add requirements to the rule. If Complaint Counsel's argument was correct, then Rule 3.12(b)(2) would not specifically reference "allegations of fact." There is no ambiguity or confusion regarding the rule. Rule 3.12(b)(2) provides a method for a respondent to admit allegations of fact and then the ALJ, the Commission, and the federal courts can determine the appropriate questions of law.

2. Complaint Counsel has not met their burden to show that there is a substantial ground for a difference of opinion.

"A party seeking certification must make a showing of a likelihood of success on the merits." *Int'l Ass'n of Conf. Interp.*, No. 9270, 1995 F.T.C. LEXIS 452, at *4-5 (Feb. 15, 1995) (emphasis added); *see BASF Wyandotte Corp.*, No. 9125, 1979 F.T.C. LEXIS 77, at *3 (Nov. 20, 1979). Complaint Counsel have utterly failed to adduce facts or legal argument to make this showing. Complaint Counsel argues that the Commission *might* or *could* disagree with the Court's opinion so, therefore, there must be "a substantial ground for difference of opinion." *Complaint Counsel's Motion*, p. 6. Complaint Counsel has not made a proper showing that there is "substantial ground for difference of opinion" with the Court's interpretation of Rule 3.12(b)(2).

3. **Subsequent review affords Complaint Counsel an adequate remedy.**

It is Complaint Counsel, not the Respondents, who have repeatedly delayed the resolution of this case. Complaint Counsel created every possible roadblock to resolution. Instead of proceeding to final hearing before the Commission, Complaint Counsel sought to prevent Respondents from admitting to all material facts and, then, sought to amend the Complaint to add unnecessary facts that *do not change any of the requested relief*. If Complaint Counsel truly cared about the possible delay that the case will cause to "consumer health risks," Complaint Counsel would seek a cease-and-desist order instead of seeking to further extend and delay this case.[3]

Respondents only have one remaining affirmative defense.[4] If the Commission disagrees the ALJ's decision to permit this affirmative defense, the Commission can strike it. Further, if the Commissions decides that the FTC administrative process and the FTC structure are constitutional, this issue is resolved without two appeals to the Commission.

[3] In a March 22, 2021 email, Complaint Counsel told Respondents' Counsel that Complaint Counsel intended to seek an extension of the evidentiary hearing by an additional ten weeks because of delays in completing discovery and motion practice. It is remarkable that the FTC would now attempt to use the self-inflicted delays as grounds for an appeal.

[4] Respondents may also assert legal challenges and objections to whatever relief Complaint Counsel seeks in the final order.

B. **Ruling on Amendment of the Complaint should not be certified.**

1. There is no controlling question of law.

Respondents' Counsel does not understand Complaint Counsel's argument regarding why the Court's decision denying the amendment of the Complaint is a controlling question of law. In requesting the Amended Complaint, Complaint Counsel told the ALJ that the "amendment falls 'within the scope of the original complaint'" and that it "adds details, not new theories or practices." *Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint*, p. 6 (filed February 23, 2021). It is unclear how the denial of leave to file an amended complaint that is within the scope of the original complaint and just adds details, not new theories or practices, is a ruling on a controlling question of law. The ruling concerns a procedural issue, not a controlling question of law. *See In re N. Carolina Bd. of Dental Examiners*, Docket No. 9343, 2011 WL 822921, at *3 (Mar. 1, 2011) (Chappell, J.).

2. Complaint Counsel has not met their burden to show that there is a substantial ground for a difference of opinion.

If Complaint Counsel's logic were correct, anytime the Commission *might* or *could* disagree with the ALJ, then there would be a right to an interlocutory appeal. This is not the standard and would set an ambiguous and dangerous precedent. Anytime Complaint Counsel or a respondent disagreed with an ALJ ruling, they could seek an interlocutory appeal because the Commission *might* disagree with the ruling.

The Court's denial of the request to amend the complaint was correct and harmless. There is no material harm to the FTC in denying an amendment that "adds details" but no new claims and requests *no additional relief* other than what was included in the original complaint. If an interlocutory appeal of this ruling is permissible, then every single ruling by the ALJ is subject to an interlocutory appeal.

3. Subsequent review is available.

With little explanation, Complaint Counsel concludes that "a subsequent appeal is likely impossible" and that a subsequent review is inadequate because it will require a remand. Complaint Counsel's three conclusory sentences do not meet the burden to show that subsequent review will be inadequate. *See In the Matter of 1-800 Contacts, Inc.*, Docket No. 9372, 2017 WL 104384 (Jan. 4, 2017) (Chappell, J.) ("To successfully demonstrate that subsequent review will be an inadequate remedy, the movant cannot rely on conclusory assertions but must provide supporting facts or legal authority. Bare assertions in this regard are 'insufficient to override the policy disfavoring interlocutory appeals.'").

CONCLUSION

For the reasons set forth herein, the Court should deny Complaint Counsel's Motion to Certify Ruling for Interlocutory Appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2021, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification to:

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