PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

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 RESPONSE TO RESPONDENTS' SEPTEMBER 10, 2021 SUBMISSION

I. Introduction

The undisputed facts in this proceeding clearly establish Respondents' liability as well as the need for robust relief to prevent future violations. Respondents admitted all the material facts in the Complaint and conceded the additional facts proffered by Complaint Counsel on May 25. However, in their latest submission, Respondents attempt to largely withdraw their Rule 3.12(b)(2) admissions and introduce a host of unsupported,[1] erroneous, and irrelevant factual claims, which Complaint Counsel dispute. For the reasons explained below, the Commission should disregard Respondents' late factual contentions and issue a final decision based on the Complaint and its exhibits, the admissions in Respondents' Amended Answer, and the undisputed additional facts set forth in Complaint Counsel's May 25, 2021 submission.

II. Procedural History

A. Respondents Waived Opportunity To Present Facts Before the ALJ.

In response to the Complaint issued on November 13, 2020, Respondents filed their Answer denying most allegations and asserting various defenses. Answer (Dec. 4, 2020). However, after limited discovery,[2] Respondents changed course and filed a motion asking Judge Chappell to enter a narrow cease-and-desist order and terminate further proceedings. Respondents' Motion for Acceptance of Contested Stipulated Cease-and-Desist Order (Jan. 13,

[1] Respondents' factual claims rest almost entirely on a self-serving affidavit from Kramer Duhon that is full of irrelevant content and is plainly insufficient to create a genuine issue of material fact. 16 C.F.R. § 3.24(a)(3). Much of the affidavit's content is not based on Duhon's personal knowledge. *See, e.g.*, RX1 ¶¶ 8, 13, 16, 19-23, 25, 26, 34-35, n. 3, n.4, n.7, n.10. Other sections opine on scientific issues that Duhon is not competent to testify about. *Id.* ¶¶ 15, 17; *see also* 16 C.F.R. § 3.24(a)(3).

[2] Significantly, Respondents not only declined to present facts themselves, they did not fully comply with discovery requests. Judge Chappell denied Complaint Counsel's additional attempts to compel discovery on the basis that, given Respondents' admissions, "discovery is moot." Order (Apr. 20, 2021) at 5. Consequently, the proceedings below concluded without complete document discovery, any depositions, or any expert discovery.

2021). When this motion was denied, Respondents sought leave to amend their Answer to admit all material facts pursuant to 16 C.F.R. § 3.12(b)(2). Importantly, to facilitate the chances of their motion being granted, Respondents "unconditionally waive[d]" certain fact-based "affirmative defenses and agree[d] not to assert these particular affirmative defenses in any future answer." Waiver (Feb. 25, 2021). In particular, Respondents "unconditionally waive[d]" their "mootness" defense, which asserted that "all alleged conduct … referenced in the Complaint ceased more than a year prior to the filing of the Complaint and will not reoccur in the future." *Id.* On March 10, 2021, Judge Chappell granted Respondents' motion. Order (Mar. 10, 2021). Accordingly, on March 30, Respondents filed an Amended Answer admitting all material factual allegations in the Complaint were "true." Amended Answer. On April 20, 2021, Judge Chappell transferred this matter to the Commission. Order (Apr. 20, 2021).

B. Respondents Waived Opportunity To Present Facts Before Commission.

On May 14, 2021, the Commission explained Respondents' admissions did not "necessarily terminate all proceedings in the case." Order (May 14, 2021) at 2. The Commission further observed that because Respondents' Amended Answer reserved their "right[] to submit proposed findings of fact and conclusions of law" and they had filed a Stipulation related to relief, some uncertainty remained regarding "the issues in dispute." *Id.* Given this context, the Commission understandably concluded that, to "structure the next steps in this proceeding, it is important that we understand what, if any factual issues remain to be resolved." *Id.* Accordingly, the Commission ordered Complaint Counsel to identify additional material facts they "intend to assert, other than facts expressly alleged in the Complaint." *Id.* at 3. As relevant here, the Commission further ordered Respondents to (1) "state whether they dispute [each] asserted fact" and (2) "identify any additional material facts, other than those

alleged in the Complaint or asserted by Complaint Counsel, that Respondents intend to assert[.]" *Id.* The Commission thereby afforded Respondents another opportunity to present their factual case.

On May 25, 2021, Complaint Counsel identified thirty additional facts other than those alleged in the Complaint. Importantly, all thirty additional facts appeared to be undisputed and reflect information from only four sources: (1) Respondents' advertisements; (2) the Complaint and Stipulated Order in the Commission's first enforcement action against Respondents[3]; (3) documents Respondents created and produced to Complaint Counsel (generally discovery responses); and (4) emails between Kyle Duhon, Respondent Kramer Duhon's nephew who worked with Respondents, and Curtis Walcker, Respondents' consultant. *See* Statement of Additional Material Facts (May 25, 2021), Att. A. In response, Respondents asserted various legal arguments, but "did not specifically dispute any of the[se] individual asserted facts, nor did they identify additional material facts of their own." Order (July 30, 2021) at 2. Notably, Complaint Counsel's submission also identified facts Respondents had admitted in their Amended Answer (including the specific disease-related claims alleged and that these claims were unsubstantiated). *See* Statement of Additional Material Facts (May 25, 2021) at 1-3. In response, Respondents wrote: "Respondents do not respond to Complaint Counsel's recitation of what facts are allegedly included in the Complaint." Respondents' Response to Complaint Counsel's Statement of Additional Material Facts (June 1, 2021) at 6.

The Commission then ordered the parties to submit proposed findings, proposed orders, "and briefs addressing liability, remedy and defenses." Order (July 30, 2021) at 4. In addition, the Commission directed that "if any party chooses to rely on facts outside of the Complaint," it

[3] *See FTC v. Health Research Laboratories, LLC, et al.*, No. 2:17-cv-467-JDL (D. Maine).

must also submit "a concise statement of the [additional] material facts as to which it contends there is no genuine issue for trial[.]" *Id.* On August 20, 2021, Complaint Counsel did this. Significantly, Complaint Counsel based their arguments exclusively on facts alleged in the Complaint that Respondents admitted through their Amended Answer, or the thirty additional facts that, as the Commission noted, "Respondents have not disputed[.]" Order (July 30, 2021) at 2. Put another way, Complaint Counsel's submission relied solely on admitted or conceded facts—the Rule 3.12(b)(2) admissions and the thirty additional, undisputed facts—and then asked the Commission to draw reasonable inferences and conclusions from those facts. *See* Complaint Counsel's Brief in Advance of Final Decision (Aug. 20, 2021) (relying exclusively on proposed findings of fact); Proposed Findings of Fact (identifying each proposed finding of fact as based on either a Rule 3.12(b)(2) admission or one of thirty undisputed additional facts).[4]

For their part, Respondents again did not comply with the Commission's direction. Instead, on August 20, 2021, Respondents submitted four proposed findings of fact and did not suggest that the Commission find any facts "outside the Complaint." Thus, even when the Commission provided Respondents with another opportunity to advance new facts, they once again chose not to.

III. The Commission Should Disregard Respondents' Alleged New Facts as Improper, Disputed, and Untimely, and Enter the Proposed Order.

A. Respondents' New Alleged Facts are Improper Because They Contradict Their Admissions.

Remarkably, given the procedural history detailed above, Respondents waited until their final submission to declare they are disputing a number of central factual allegations in the

[4] Out of an abundance of caution, Complaint Counsel also submitted three declarations to establish the authenticity of each document used to establish the thirty additional undisputed facts. *See* Proposed Findings of Fact (Aug. 20, 2021), CCX1-CCX3. In any event, Respondents have not disputed these documents' authenticity.

Complaint, including key factual issues related to claim interpretation and substantiation. Opp. at 13-14.[5] Put simply, Respondents improperly attempt to jettison their earlier admissions that the Complaint's factual allegations are "true" and to advance previously undisclosed factual defenses.

Respondents principally argue they have not actually admitted every material fact in the Complaint because various factual contentions "were included in the legal counts [in the Complaint], not the allegations of fact [in] the Complaint[.]" Opp. at 13. However, the Complaint does not distinguish between factual allegations and "legal counts"; in fact, it has only various "counts," not "legal counts." The presence of a factual allegation in, for instance, "Count I: Respondents' Unsubstantiated Claims Related To Black Garlic Botanicals" rather than an earlier section entitled "Black Garlic Botanicals" does not convert the allegation from factual to legal. *Cf. Benrose Fabrics Corp. v. Rosenstein*, 183 F.2d 355, 357 (7th Cir. 1950). Equally important, Rule 3.12(b)(2) applies to "the allegations of fact set forth in the complaint," not "part of the complaint," and the factual allegations at issue are plainly "in the complaint." 16 C.F.R. § 3.12(b)(2).

Furthermore, the factual allegations Respondents now deny admitting concern what claims Respondents' advertising conveyed or the absence of substantiation for those claims. Both issues are purely factual. Notably, a "conclusion of law" (rather than a finding of fact) is one that the factfinder makes "by the selection and application of a rule of law to the established facts." *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1108 (9th Cir. 1976)

[5] To provide one of several examples, the Complaint alleges Respondents' Black Garlic Botanicals ad claims "were not substantiated at the time [they] were made." Complaint ¶15. The absence of substantiation is plainly a material fact, and Respondents admitted that all material factual allegations in the Complaint were "true." *See* Amended Answer. Yet Respondents now claim "valid and reputable scientific studies . . . substantiated the health benefits of aged garlic," RX1 ¶16, and that "[t]here is no material difference in aged black garlic vs. aged garlic," Opp. at 5. Respondents also attach and discuss five garlic studies, *see* RX1 ¶17, and incorrectly contend the FTC's expert report from the earlier Maine proceeding supports their view, *see* Opp. at 4 n.3.

(citation omitted); *see also Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 959 (6th Cir. 1976) ("If a determination concerns whether the evidence showed that something occurred or existed, it is a finding of fact. However, if a determination is made by processes of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law.") (citation omitted). Whether an advertisement conveys a specific message to consumers is unquestionably factual. Similarly, whether Respondents possessed appropriate scientific evidence to substantiate their advertising claims is a factual issue. Because Respondents admitted all material facts "in the complaint" are "true," they admitted the factual contentions that happen to appear in the Complaint's counts.

B. Unlike Complaint Counsel's Proposed Findings, Respondents' New Allegations are Unsupported and Disputed.

Importantly, Respondents disregarded the procedure the Commission established to create a record of clearly-identified admitted or undisputed facts on which it would base its decision. That procedure defined a basic "universe" of facts the Commission would consider including: (1) facts Respondents admitted pursuant to Rule 3.12(b)(2); (2) additional facts that one party asserted and the other failed to contest; and (3) inferences that the Commission might draw from the first two categories of facts. This is consistent with the Commission's Rule providing that summary disposition is appropriate when the record reflects "no genuine issue as to any material fact" and the movant is entitled to the relief sought "as a matter of law." 16 C.F.R. § 3.24(a)(2). Respondents deviated from this framework by belatedly raising disputes concerning, among other things, the alleged import of disclaimers, the existence of substantiation related to black garlic, and various claimed mitigating circumstances. The primary source of Respondents' "evidence" is Kramer Duhon's self-serving affidavit, which is neither reliable nor

sufficient to create a genuine issue of material fact, even if it were proper to raise at this juncture.[6] *Jerk, LLC, et al.*, 159 F.T.C. 885, 2015 WL 13021976, at *4 (Mar. 13, 2015) ("Conclusory, speculative, and self-serving affidavits are insufficient to create a factual dispute.") (citing cases); 16 C.F.R. § 3.24(a)(3).

Further, Complaint Counsel disputes essentially all of Respondents' new factual assertions, putting them outside of the categories of evidence the Commission indicated it would consider. For example, Respondents claim their supposed "long history of compliance" with the agency's investigation counsels against strong injunctive relief. *See* Opp. at 1-3, 7, RX1 ¶¶ 24, 25. However, Respondents were *legally required* to comply with information requests from FTC staff, yet repeatedly failed to provide requested information during the investigation. *See* CCX4, Averill Aff., Att. G & H. Respondents also falsely claim the only "area of dispute" previously identified by FTC staff concerned whether aged black garlic and aged garlic extract are equivalent ingredients. In reality, staff identified multiple problems with Respondents' purported substantiation for advertising claims for each of the Challenged Products. *See* CCX4, Averill Aff., Att. H.[7]

Even with respect to the equivalent ingredient "area of dispute," Respondents' newly asserted "facts" are wrong. Specifically, relying solely on Duhon's affidavit, Respondents claim "[t]here is no material difference in aged black garlic vs. aged garlic extract." Opp. at 5. As Harvard Professor and cardiologist Frank M. Sacks has already explained, this is false. *See* Opp., RX2, Expert Report of Frank M. Sacks, at 8-9 (PDF 218-19).

Many other facts Respondents newly assert are wrong or misleading. For instance,

[6] Respondents baldly "aver" they now dispute various facts (Opp. at 13), which is plainly insufficient to create a genuine issue of material fact under Rule 3.24(a)(3).

[7] *See also* Opp., RX2, Expert Reports of Frank M. Sacks and Charles Burant (PDF 211-232, 283-306).

they suggest that "immediately after the FTC first raised its aged garlic extract argument," they stopped selling their black garlic products in September 2019. *See* Opp. at 5. In fact, Respondents stopped *advertising* the Challenged Products on their websites only after FTC staff raised concerns about their continued advertising and initiated final consent negotiations. CCX4, Averill Aff., Att. I & J. Further, Respondents informed FTC staff at that time they would continue *selling* the products to consumers enrolled in continuity programs, or those placing orders or reorders for the products, and they did so. CCX4, Averill Aff., Att. K, pp. 3-4.[8]

In contrast, all of the facts upon which Complaint Counsel relies are admissions, concessions based on Respondents' decisions not to dispute additional facts and supported by uncontested evidence, or inferences from those facts. Importantly, even if Respondents were allowed to belatedly contest facts, Respondents have not done so—nor could they. As explained above, Respondents admitted all facts in the Complaint by invoking Rule 3.12(b)(2), and the additional thirty facts proposed by Complaint Counsel are beyond dispute. First, Complaint Counsel offered the advertisements themselves, and Respondents have not contended, nor could they, that the advertisements are not theirs. Second, Complaint Counsel offered the Complaint and Stipulated Order in the Maine action, which Respondents do not, and cannot deny. Third, Complaint Counsel offered documents Respondents created and produced, and Respondents have not contended that they did not create and produce these documents. Fourth, Complaint Counsel offered emails between Kyle Duhon and Curtis Walcker, and again Respondents do not deny the authenticity of those emails, nor have they introduced any evidence contradicting

[8] In another clear-cut example of the many inaccuracies in the latest submission, Respondents now "estimate" their net profits were "less than $70,000" for *all of their products* from 2018-2020. RX1 ¶ 39; *see also* Opp. at 11. However, Respondents' earlier responses during the investigation and in discovery reported total revenues for the *four Challenged Products* in 2018 and 2019 of at least $2.7 million (after refunds), with net profits of at least $403,509 for the period after January 16, 2018. CCX4, Averill Aff., Att. L, M, N. Respondents have not provided specific sales information for the period after September 2019.

Complaint Counsel's proposed finding that Walcker provided feedback about the Black Garlic Botanicals mailer at issue in this proceeding, and Respondents chose not to make any changes.[9]

Consequently, with respect to facts offered after Respondents' Rule 3.12(b)(2) Answer, Complaint Counsel's additional facts were initially conceded and remain undisputed—and therefore are a valid basis upon which to enter the Proposed Order. In contrast, Respondents' belated facts are disputed and rest almost exclusively on Duhon's self-serving affidavit. Accordingly, they should not be considered.

C. Respondents Alleged New Facts are Untimely Because They Failed to Comply with the Procedure the Commission Established.

As discussed above, the Commission previously ordered Respondents to identify any new or additional facts they intend to assert, but they did not.[10] Considering Respondents' new or additional facts despite their clear and flagrant disregard for the Commission's procedure would prejudice Complaint Counsel and the public by allowing Respondents to abuse the Commission's Rule (*e.g.*, creating significant delay by asserting Rule 3.12(b)(2), then attempting to withdraw their admissions at the last minute, which would require Complaint Counsel to restart litigation from the beginning). Respondents' strategy in this proceeding makes a mockery

[9] Respondents object to Walcker's affidavit primarily on hearsay grounds, although pursuant to Rule 3.43, hearsay is admissible if it is "relevant, material, and reliable," which is the case here. *See, e.g.*, *Polypore Int'l, Inc.*, 2010 WL 3053866, at *3 n.4 (F.T.C. July 28, 2010). Regardless, Complaint Counsel offers Walcker's statements not for their truth, but to show knowledge and mindset (*i.e.*, that Respondents were informed by their own consultant that their advertising had significant problems, yet they made no changes), and to authenticate the associated emails. Further, Respondents' contention there is no evidence establishing dissemination dates of the mailers included in Complaint Ex. A and Walcker Affidavit, Att. B is simply incorrect. Opp. at 16. Respondents' interrogatory responses confirm only one version of the Black Garlic Botanicals mailer was circulated after January 17, 2018, and Walcker performed his review on May 29, 2018. *See* CCX1, Averill Aff., Att. D ¶ 3; CCX3. Tellingly, Respondents do not dispute the truth of proposed finding no. 95 or any fact in Walcker's affidavit.

[10] Moreover, as explained above, the Commission afforded Respondents an opportunity to contest the thirty additional facts Complaint Counsel identified, yet Respondents did not dispute them. Respondents' late attempt to advance new facts contradicting admitted or conceded factual contentions is improper and should be disregarded.

of the Commission's attempts, through its Orders and Rules, to create an orderly, fair process to adjudicate disputes.

IV. Respondents' Legal Arguments Against Relief Are Meritless.

Respondents advance new legal arguments in their Opposition based on estoppel and *res judicata* theories, as well as the contention their unlawful conduct is not likely to reoccur.[11] Opp. at 12-13, 18-19.

A. The Previous Contempt Action Does Not Bar This Proceeding.

Respondents cursorily argue the doctrines of collateral estoppel, quasi-estoppel,[12] or *res judicata* prevent the Commission from considering Respondents' violations of Section III of the Stipulated Order. Specifically, they argue "the issue of whether Respondents violated the Consent Judgment has been decided against the FTC." Opp. at 19. However, Respondents grossly misrepresent the issue decided in the contempt proceeding, and none of the asserted doctrines applies for the reasons explained below.

Collateral estoppel precludes a party from re-litigating in a second cause of action any factual or legal issue that was *actually* decided against it in a previous litigation. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). It is inapplicable here because Complaint Counsel is not re-litigating any issue decided in the contempt proceeding. The Court denied the earlier contempt motion based

[11] In Section III.E of their Opposition, Respondents also reassert several objections to the administrative process that Complaint Counsel previously addressed. *See* Complaint Counsel's Brief in Advance of Final Decision, 19-20; Complaint Counsel's Replies to Respondents' Findings of Fact and Conclusions of Law; *see also* Order (July 30, 2021).

[12] Throughout their brief, Respondents assert numerous arguments with limited or no explanation or supporting authority. For instance, Respondents generally reference the concept of "quasi-estoppel," *see* Opp. at 19, but they cite no authority or otherwise explain how they contend the concept might apply. Consequently, Respondents waived this argument, along with the many other undeveloped arguments that appear throughout their brief. *See*, *e.g.*, *LabMD, Inc.*, 2016 WL 4128215, at n.85 (F.T.C. July 28, 2016) (finding that an argument presented in a single sentence that included only one case citation, "no evidence in support," and "no explanation of the basis for [the] argument" was waived).

solely on ambiguity in the heading of Section II.H of the Stipulated Order. *See FTC v. Health Research Labs, LLC*, No. 17-cv-467, 2020 WL 4431497, at *7 (D. Me. July 31, 2020); 2020 WL 8679976, at *2 (D. Me. Aug. 12, 2020). It did not address whether Respondents' ad claims were false or deceptive, or whether Respondents violated Section III of the Stipulated Order. Further, the Court did not address *any* factual issues.

Under the doctrine of *res judicata*, "a final judgment on the merits precludes parties from re-litigating claims that were or could have been brought in a prior action." *Universal Ins. Co. v. Off. of Ins. Comm'r*, 755 F.3d 34, 37 (1st Cir. 2014); *see also McCurry*, 449 U.S. at 94. Again, this doctrine is inapplicable here. First, the Court did not treat its dismissal of the FTC's contempt motion as a final judgment, but rather ruled the FTC could file a motion seeking permission to file an amended contempt motion based on an alternative theory if it wished to do so. *See* Order on Defendants' Motion for Attorney Fees, *FTC v. Health Research Laboratories, LLC*, No. 2:17-cv-00467, Dkt. 58, slip op. at 7, n.5 (Jan. 20, 2021) (observing dismissals without prejudice with leave to amend are generally not treated as final judgments) (quoting *Lichoulas v. City of Lowell*, 555 F.3d 10, 13 (1st Cir. 2009)). Further, the FTC's decision not to file an amended contempt action in Maine was essentially a voluntary dismissal,[13] which does not have any preclusive effect. *See, e.g.*, *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (explaining that a dismissal without prejudice ordinarily does not bar the refiling of claims in the same court or different courts).

[13] *See Plumberman, Inc. v. Urban Sys. Dev. Corp.*, 605 F.2d 161, 162 (5th Cir. 1979) (holding that, where court gave plaintiff ten days to amend, and plaintiff did not, it was the equivalent of a voluntary dismissal without prejudice and had no *res judicata* effect).

Finally, even if Respondents could establish the elements of *res judicata*, the doctrine would not bar this action because the FTC could not have asserted claims based on violations of the FTC Act in the earlier contempt proceeding. *See* Restatement (Second) of Judgments § 26(1)(c); *Nabisco, Inc. v. Amtech Int'l, Inc.*, No. 95-Civ-9699, 2000 WL 35854, at *9 (S.D.N.Y. Jan. 18, 2000) ("Because Nabisco could not have brought its infringement claim in the contempt action, its apparent defeat with respect to [defendant] in that action does not bar subsequent prosecution of this claim.").

B. Undisputed Facts Demonstrate the Likelihood of Respondents' Future Violations.

Respondents argue Complaint Counsel must prove their unlawful practices are likely to reoccur in order to obtain relief, and that no such finding is possible when they "voluntarily" discontinued advertising for the Challenged Products in September 2019. Opp. at 12-13.[14] These arguments fail for several reasons.

First, Respondents "unconditionally waive[d]" their mootness defense, which asserted "all alleged conduct referenced in the Complaint ceased more than a year prior to the filing of the Complaint *and will not recur in the future*." Waiver (Feb. 25, 2021) (emphasis added). The Commission should not permit Respondents to defend against relief using a factual predicate that contradicts their express waiver.

Second, there is more than sufficient evidence to establish Respondents' deceptive advertising practices are likely to reoccur. Specifically, the undisputed evidence demonstrates: (1) the Stipulated Order did not deter Respondents from disseminating the deceptive ads in this

[14] Respondents also suggest, without explanation, that issuance of the Complaint was not "statutorily authorized" because the challenged advertising was discontinued. Opp. at 7. Respondents asserted a "mootness and lack of statutory authority" defense in their Answer, but subsequently waived it. *See* Waiver (Feb. 25, 2021); Answer, ¶ 24; Amended Answer.

proceeding; (2) this is the second enforcement action filed against Duhon and HRL in less than three years; (3) this case does not involve an isolated mistake, but challenges *four* different ads, each of which is packed with unsubstantiated disease-related claims; and (4) Respondents refuse to accept responsibility for their conduct and instead blame the agency for investigating and litigating to prevent their persistent violations of the law.[15] *See, e.g.,* Answer (Dec. 4, 2020) ("Respondents have done nothing wrong…[.]"). Moreover, Duhon's assertion that HRL's and WBS's business activities were shut down at some unspecified time and that the companies "have no intention of continuing any future business operations" does not mean they cannot easily resume operations or set up a new company peddling products with unsubstantiated disease claims. Opp., RX1 ¶ 39.

Third, it is well established that mere discontinuance of an illegal practice does not preclude the issuance of a cease-and-desist order in an administrative case. *See, e.g.*, *Sears, Roebuck and Co., et al.*, 95 F.T.C. 406, 1980 WL 338970, at *85-86 (Apr. 28, 1980) (voluntary cessation of advertising campaign is "neither a defense to liability, nor grounds for omission of an order"); *Giant Food, Inc.*, 61 F.T.C. 326, 1962 WL 75443, at *23 (July 31, 1962) ("That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument.") (citation omitted).

Fourth, this proceeding does not involve long-past conduct. Respondents claim they discontinued advertising for the Challenged Products in September 2019, slightly more than one year before the Commission issued the Complaint. The three decisions Respondents rely on

[15] Respondents emphasize *Oregon-Washington Plywood Co. v. FTC*, 194 F.2d 48 (9th Cir. 1952), but there the Ninth Circuit specifically recognized the necessity of a cease-and-desist order following discontinuation depends on "a consideration of all the surrounding facts and circumstances ... [including] elements of time, volition, and general attitude of the respondents in respect of the cessation…[.]"). *Id.* at 50-51.

each involved substantially lengthier periods between discontinuation of the unlawful conduct and issuance of the order. *See New Standard Pub. Co., Inc. v. FTC*, 194 F.2d 181, 182-83 (4th Cir. 1952) (vacating order and remanding for fact-finding as to necessity of order when more than ten years elapsed between conduct and order); *Dejay Stores, Inc. v. FTC*, 200 F.2d 865 (2d Cir. 1952) (affirming order when at least five years elapsed between challenged activities and order); *Oregon-Washington Plywood Co. v. FTC*, 194 F.2d 48, 49 (9th Cir. 1952) (vacating order when more than six years elapsed between charged conduct and filing of administrative complaint).[16]

Finally, Respondents falsely portray themselves as *voluntarily* discontinuing their advertising "years ago." Opp. at 12. However, the undisputed facts show Respondents only stopped advertising the Challenged Products in September 2019 during final consent negotiations, *id.* at 5, *eighteen months* after FTC staff sent the first requests for information in the contempt investigation, Opp. at 3; CCX4, Averill Aff., Att. K, p. 3.[17] Such reluctant cessation in the midst of an investigation is not "voluntary" discontinuation and does nothing to dispel concerns about future reoccurrence. *See Diener's, Inc.*, 81 F.T.C. 945, 1972 WL 127481, at *29 (Dec. 21, 1972) ("Where, as here, the abandonment took place only after the Commission's hand was on the respondent's shoulder, the courts are clear that abandonment of the practices … will not support a conclusion that the practices will not be resumed.") (quoting *Zale Corp.*, 78 F.T.C. 1195, 1971 WL 128767, at *31 (1971)); *FTC v. Sage Seminars, Inc*., No. C 95-2854-SBA, 1995

[16] Respondents' reliance on *Dejay Stores, Inc. v. FTC*, 200 F.2d 865 (2d Cir. 1952) is particularly puzzling because the court affirmed a Commission order issued at least five years after respondents stopped mailing deceptive forms, reasoning it should "interfere with the Commission's discretion in making an order to prevent the resumption of a discontinued practice only when it appears that the practice has been 'surely estopped.'" *Id.* at 867.

[17] Respondents' assertion they stopped *selling* the challenged products in September 2019 is false, and tellingly unsupported by any evidentiary citation. Opp. at 5.

WL 798938, at *6 (N.D. Cal. Nov. 2, 1995) (finding "defendants' claimed cessation of conduct [which] occurred only after defendants learned that the FTC had commenced an investigation" could "hardly be considered 'voluntary'").

V. Respondents' Challenges to Specific Proposed Relief Provisions

A. Section I (Proposed Supplement Ban)

Respondents concede that, if the Commission issues any relief, the relief in Section I is appropriate. *See* Opp. at 20.

B. Section II (Proposed Disease Claim Ban)

Respondents advance several baseless arguments against the proposed disease claim ban. First, they contend the provision is "overbroad" because it could apply to "anything" from "sneakers" to "toothbrushes." Opp. at 21. Respondents confuse the fact that Section II is broad—and it is—with whether it is *over*broad, which it is not. As Complaint Counsel's opening brief explained, given Respondents' serious, deliberate, and highly transferable deceptive practices, the proposed relief can and should apply to any product for which Respondents make disease claims. *See* C.C. Br. at 8-13. Deceptive disease claims are a particularly serious form of wrongdoing because they can hurt consumers physically as well as financially. *See United States v. Rutherford*, 442 U.S. 544, 556 (1979) ("[I]f an individual suffering from a potentially fatal disease rejects conventional therapy in favor of a drug with no demonstrable curative properties, the consequences can be irreversible."). Additionally, the prior Stipulated Order shows Respondents knew about their obligation to have competent and reliable evidence to substantiate any health claims, and a consultant warned them about their advertising—both facts that establish deliberateness. *See* C.C. Br. at 11. Moreover, Respondents did not limit their deception to a single product, and deceptive disease claims are highly transferable. As

Respondents themselves observe, there are many products other than supplements about which they might make disease claims. These facts, along with others Respondents have admitted or conceded, *see* C.C. Br. at 8-13, establish the proposed relief is "reasonably related" to the wrongdoing.[18] *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

Second, Respondents contend Section II is "vague" because it applies to "any product" and covers claims about "any disease." However, Respondents conflate vagueness with alleged overbreadth. Respondents do not assert Section II is insufficiently "clear and precise." *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Rather, they argue a second time that it is too broad—which is wrong for the reasons already discussed.[19]

Third, Respondents raise cursory First Amendment arguments. Specifically, Respondents contend Section II is a prior restraint, but tellingly fail to address authority indicating that the

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[18] In a different subsection of their argument, Respondents briefly assert that the disease claim ban is overbroad because it applies to "Food" and "Drugs" yet Respondents did not make representations regarding food or drugs. Opp. at 23. As Complaint Counsel explained, *see* C.C. Br. at 7-19, broad fencing-in relief is appropriate here given Respondents' serious, deliberate and readily-transferable wrongdoing. *See* C.C. Br. at 7-19. The compelling reasons for banning Respondents from making disease claims concerning any product apply with particular force to food and drugs because Respondents can transfer their deceptive business model to such products very easily.

[19] Without developing the argument, Respondents also suggest Section II is problematic because it is "not contained in the Complaint." Opp. at 21. In fact, Respondents challenge numerous proposed findings and order provisions on this ground. Opp. at 14, 15, 16, 18, 26-27. However, as long as Respondents have notice and fair opportunity to respond, due process is satisfied. *See*, *e.g.*, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 353 (1938) (rejecting argument that the agency's "findings do not follow the pleadings" where the respondent "understood the issue and was afforded full opportunity" to litigate it); *see also Nat'l Realty & Const. Co. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) ("So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue."). Respondents had notice of what relief Complaint Counsel would seek and, in fact, they are responding now. Respondents also point to Rule 3.11, which requires that complaints contain "[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law" and a form proposed order "[w]here practical." 16 C.F.R. § 3.11(b)(2),(3); *see also Polypore Int'l, Inc*., 2008 WL 5195813, at *2 (F.T.C. Dec. 4, 2008) (ALJ order). But Rule 3.11 does not require the Complaint to contain all facts the Commission ultimately might find, and it recognizes that attaching a proposed order to the Complaint will not always be practical. Thus, neither due process nor Rule 3.11 prohibits the Commission from finding facts or ordering relief that the Complaint does not contain. *See also* Order (July 30, 2021) at 3 (explaining Rule 3.12(b) does not "prohibit[] the Commission from considering facts outside the pleadings but established in the record where appropriate").

presumption against the validity of prior restraints "does not apply in the commercial speech context." *Puerto Rico Tele-Com, Inc. v. Ocasio Rodriguez*, 747 F. Supp. 836, 842 (D.P.R. 1990); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 571 n.13 (1980) ("[C]ommercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.") (citations omitted); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (noting the unique attributes of commercial speech may "make inapplicable the prohibition against prior restraints") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)).[20] Respondents also ignore the fact that, even if the prior restraint doctrine did apply—and it does not—Section II is a "subsequent punishment," not a prior restraint in a First Amendment analysis. *See, e.g.*, *Nat'l Fed'n of the Blind v. FTC*, 303 F. Supp. 2d 707, 723 (D. Md. 2004) (holding that a TSR prohibition was a "typical subsequent punishment" rather than a prior restraint).

Additionally, Respondents assert, without explanation, Section II does not satisfy the *Central Hudson* test. However, and again tellingly, Respondents do not respond to Complaint Counsel's prior argument that, given the admitted and conceded facts, the proposed bans clearly satisfy *Central Hudson*. *See* C.C. Br. at 22-24. The only specific argument Respondents make is that Section II does not advance the governmental interest in consumer protection because Respondents have stopped the challenged practices. Even assuming that Respondents fully halted their deceptive practices when the FTC started investigating—which they did not—a

[20] Respondents cite a single case, *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123 (2d Cir. 1988), for the notion that prior restraint doctrine applies to commercial speech. However, *New York Magazine* involved mixed commercial and political advertising "and evidence that the [government] was targeting the political element of [the] advertisement." *Infinity Outdoor, Inc. v. City of N.Y.*, 165 F. Supp. 2d 403, 427-28 (E.D.N.Y. 2001) (distinguishing *New York Magazine* on multiple grounds including that it involved a political component that the government had targeted); *see also Bellion Spirits, LLC v. United States*, 393 F. Supp. 3d 5, 30 (D.D.C. 2019) (distinguishing *New York Magazine* on similar grounds), *aff'd*, 7 F.4th 1201 (D.C. Cir. 2021).

wrongdoer's cessation of unlawful conduct when caught does not weigh against broad relief. Furthermore, Respondents' willingness to flout the Stipulated Order in the first place suggests they may resume at some point. Protecting the public from that risk substantially advances the government's interest in consumer protection. In short, none of Respondents' challenges to Section II has any merit.

C. Sections III, IV, and V

Respondents' brief addresses the next three proposed order sections collectively but does not contain argument other than asserting that the Commission should reject them "for the same reasons" as Section II. Opp. at 23. As discussed above, however, Section II is a lawful and appropriate use of the Commission's authority.

D. Sections VI Through XII

Respondents scattershot several different meritless arguments with respect to remaining provisions in the Proposed Order. First, they contend the proposed scofflaw requirements are unauthorized because the Commission lacks the power to order affirmative relief. However, Respondents do not address the text of the FTC Act itself (which refers to "affirmative relief provision[s]" in Commission orders, *see* 15 U.S.C. § 45(b)) or decisions holding that the Commission "may order affirmative acts," *Heater v. FTC*, 503 F.2d 321, 324 n.7 (9th Cir. 1974). *See also Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756-57 (D.C. Cir. 1977). Respondents cite only *LabMD, Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018), but *LabMD* had nothing to do with the Commission's authority to issue affirmative relief. *See id.* at 1236 (finding order unenforceable because it required respondent to meet "an indeterminate standard of reasonableness" rather than requiring "a specific act or practice"). Put simply, the Commission has the power to require affirmative acts, including appropriate scofflaw provisions.

Second, Respondents complain the Proposed Order governs their conduct for twenty years. A twenty-year duration reasonably relates to Respondents' wrongdoing because Respondents are recidivists who made unsubstantiated disease claims despite a federal court order expressly requiring substantiation. *See* C.C. Br. at 12-13. Indeed, that Stipulated Order's key provisions—which already failed to restrain Respondents—has no duration at all. *See* Stipulated Order, *FTC v. Health Research Laboratories, LLC*, No. 2:17-cv-467, Dkt. 15 (D. Me. Jan. 16, 2018). Furthermore, because unsubstantiated disease claims can harm consumers physically as well as financially, the risks associated with further recidivism are high. *See Daniel Chapter One*, 2009 WL 5160000, at *4 (F.T.C. Dec. 24, 2009) (ordering twenty-year duration for most provisions in matter involving deceptive health claims made by supplement manufacturer). Given the nature of Respondents' wrongdoing, another indefinite order would be appropriate, but the Commission's regulations limit orders to twenty-year durations. *See* 16 C.F.R. § 3.72(b)(3)(i).[21]

Third, Respondents argue various scofflaw provisions were "unpled." Opp. at 26. However, due process requires only that Respondents have notice and an opportunity to respond, not that the relief ultimately issued appear in the complaint. *See*, *e.g.*, *Mackay Radio*, 304 U.S. at 353; *Nat'l Realty*, 489 F.2d at 1264. Through the Proposed Order, Respondents received notice of what Complaint Counsel proposes, and they have had an opportunity to respond.

Finally, Respondents disingenuously assert various provisions are "vague." For example, Respondents feign confusion over the purported requirement Respondents "somehow create records 'that tend to show any lack of compliance by Respondents with this Order.'" Opp. at 25. Respondents excise this language from Section XI, which identifies categories of records

[21] Notably, Respondents concede that, if any relief is appropriate—and it is—the supplement ban (Section I) is appropriate. It has a twenty-year duration, and the scofflaw provisions operate in part to ensure compliance with that ban.

Respondents must "create and retain." In context, it is clear the Proposed Order would require Respondents to *retain* such records, not create them (by way of further illustration, Section XI requires Respondents to "retain" consumer complaints, but no one would think it also requires Respondents to "create" such complaints).

Respondents also claim that Section VII's requirement that they authorize Commission representatives to interview "anyone affiliated" with Respondents means that they would have to direct their "spouses" or "priests" to appear. *See* Opp. at 25-26. This is an insincere reading of unambiguous language; "spouses" and "priests" are plainly not commercial "affiliates."

VI. Conclusion

For the reasons set forth above, Respondents' belated effort to abandon and contradict their previous Rule 3.12(b)(2) admissions should be rejected as untimely and improper. Further, most of the new additional facts Respondents proffer are unsupported, irrelevant, and disputed by Complaint Counsel. In contrast, Complaint Counsel has proffered findings of fact, based on Respondents' admissions as well as additional facts undisputed by Respondents, which are sufficient to establish liability and the necessity of the Proposed Order. Accordingly, the Commission should issue its final decision and enter the Proposed Order.

However, in the event the Commission were to determine that Respondents be permitted to withdraw or limit their Rule 3.12(b)(2) admissions, Complaint Counsel requests permission to file a motion to amend the Complaint with the Commission.[22] Following the Commission's resolution of that motion, a remand for additional fact and expert discovery may be

[22] The Rules of Practice did not provide any way for Complaint Counsel to appeal Judge Chappell's denial of their Motion to Certify Rulings for Interlocutory Appeal related to Complaint Counsel's earlier Motion to Amend the Complaint. *See* Order Denying Motion for Interlocutory Appeal (April 2, 2021).

appropriate.[23]

Dated: October 8, 2021

Respectfully submitted,

s/ Elizabeth J. Averill
Elizabeth J. Averill
Jonathan Cohen
Federal Trade Commission
600 Pennsylvania Ave, NW, CC-9528
Washington, DC 20580
(202) 326-2993 (Averill); -2551 (Cohen)
Eaverill@ftc.gov; Jcohen2@ftc.gov
(202) 326-3197 (facsimile)

Complaint Counsel

[23] Issues for discovery in any future remand could include substantiation or lack of substantiation for the challenged advertising claims, facts relevant to the deliberateness and seriousness of Respondents' conduct, development and approval of the challenged products and advertisements, Respondents' marketing and advertising strategy, when Respondents stopped selling the challenged products, Kramer Duhon's current and previous business activities, as well as Respondents' knowledge of, and compliance or lack of compliance with, the Stipulated Order.

PUBLIC

CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Response to Respondents' September 10, 2021 Submission and supporting attachments today via electronic mail.

Joel Reese
Joshua Russ
Reese Marketos LLP
750 N. Saint Paul St., Suite 600
Dallas, TX 75201
Joel.reese@rm-firm.com
Josh.russ@rm-firm.com

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**:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave, N.W., Room H-110
Washington, DC 20580

s/ Elizabeth J. Averill
Elizabeth J. Averill
Federal Trade Commission
600 Pennsylvania Ave, NW, CC-9528
Washington, DC 20580
(202) 326-2993; eaverill@ftc.gov

CCX4 – Averill Affidavit

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

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

AFFIDAVIT OF ELIZABETH J. AVERILL

I, Elizabeth J. Averill, hereby state that I have personal knowledge of the facts set forth below. If called as a witness, I could and would testify as follows:

1. I am a United States citizen and am over eighteen years of age. I am employed by the Federal Trade Commission ("FTC") as an attorney in the Division of Enforcement, Bureau of Consumer Protection. I am acting as Complaint Counsel in the above-captioned matter. I also worked on the investigation and the FTC's previous contempt proceeding against Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC, and Kramer Duhon.

2. On July 1, 2019, my co-counsel, Robert Frisby, and I sent a letter to Andrew Lustigman, former counsel representing HRL and Kramer Duhon, outlining deficiencies in their

previous responses to information requests during our compliance investigation. A true and correct copy of this letter is attached as **Attachment G**.

3. On June 6, 2019, Robert Frisby and I sent a letter to Andrew Lustigman. A true and correct copy of this letter is attached as **Attachment H**.

4. On September 4, 2019, Robert Frisby and I sent a letter to Andrew Lustigman notifying him we planned to recommend that the Commission initiate a contempt proceeding. A true and correct copy of this letter is attached as **Attachment I**.

5. On September 19, 2019, I sent an email to Andrew Lustigman regarding various issues, including staff concerns about his clients' continued website advertising for The Ultimate Heart Formula, Black Garlic Botanicals, BG-18, and Neupathic. A true and correct copy of this email is attached as **Attachment J**.

6. On September 27, 2019, Andrew Lustigman sent me a letter. A true and correct copy of this letter is attached as **Attachment K**.

7. On August 8, 2019, HRL and Kramer Duhon produced to Robert Frisby and I, in response to our requests for information during the contempt investigation, a document spreadsheet containing revenue information for Black Garlic Botanicals, BG-18, The Ultimate Heart Formula, and Neupathic for the period 1/1/18 to 5/31/19. This document was Bates stamped HRL008148, and a true and correct copy is attached as **Attachment L**.

8. On September 27, 2019, HRL and Kramer Duhon produced to Robert Frisby and I, in response to our requests for information during the contempt investigation, a document containing additional revenue information for Black Garlic Botanicals, BG-18, The Ultimate Heart Formula, and Neupathic for the period from 6/1/19 to 9/24/19. This document was Bates stamped HRL008163, and a true and correct copy is attached as **Attachment M**.

9. During the course of discovery in this proceeding, I received a document production from Respondents in January 2021 that contained, among other things, an Excel spreadsheet file entitled HRLAC_03394. The data from this Excel spreadsheet is included in **Attachment N**. However, the Excel spreadsheet's formatting has been adjusted by Complaint Counsel to make the data legible in a one-page exhibit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on: October 8, 2021 /s/ Elizabeth J. Averill

Alexandria, VA

Averill Affidavit – Attachment G

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Robert M. Frisby
Attorney

Email: rfrisby@ftc.gov
Direct Dial: 202-326-2098

July 1, 2019

VIA ELECTRONIC MAIL

Andrew B. Lustigman, Esq.
Olshan Frome Wolosky LLP
1325 Avenue of the Americas
New York, NY 10019
ALustigman@olshanlaw.com

Re: *FTC and State of Maine v. Health Research Laboratories, LLC*, FTC No. X180007

Dear Mr. Lustigman:

We are writing in response to your letter of June 20, 2019. Your letter asserts that you have provided "numerous and robust responses" to the "Commission's multiple requests for additional information." You further state that you "object to the Commission's premise that our prior response was somehow deficient." We have sent you multiple letters seeking information from defendants in part because your responses have failed to provide all of the documents or information specified in our letters.

Specifically, the defendants have failed to comply fully with section XIX of the Order in the following respects:

1. As I reminded you in my June 6, 2019 letter, section XIX requires the defendants to provide true, accurate, and complete responses under penalty of perjury in compliance with 28 U.S.C. § 1746. Defendants have failed to comply with this requirement with respect to all of their responses that we have received during 2019. Statements by counsel do not suffice under section XIX.

2. My June 6 letter (as well as my December 2018 letter) sought the revenue figures for Black Garlic Botanicals, BG-18, Ultimate Heart Formula, and Neupathic since entry of the Order. On June 21, defendants only provided revenue figures for these

products related to "US mailers." It thus appears that the defendants have yet to provide complete revenue figures for these four products. Please provide complete revenue figures for these four products immediately. If they wish, Defendants may elaborate on how they generated the revenue or explain the percentage of revenue attributable to American customers or recipients of brochures mailed in the United States.

3. As explained in more detail in my June 6 letter, we have not identified in your submissions any human clinical testing of Black Garlic Botanicals, BG-18, Ultimate Heart Formula, Neupathic, or any essentially equivalent product as defined in the Order, satisfying the requirements of section II of the Order with respect to the diseases listed in my letter. My last letter directed the defendants to identify any human clinical studies satisfying the section II requirements. Defendants have yet to identify any such studies or concede that none of the studies they submitted satisfy the section II requirements. If defendants contend that any of the studies they submitted satisfy the requirements of section II, please identify the specific studies that do so. If you do not contend that any of the submitted studies satisfy the section II requirements, please so state.

4. You also failed to provide an adequate response to the final question posed in my June 6 letter. We asked you to verify whether defendants disseminated the attached brochure (FTC0001-FTC0016) after entry of the January 2018 order. Your response stated that the defendants mailed the brochure "on a sporadic and irregular basis and in a small amount." Please verify whether the defendants disseminated the brochure attached to our June 6 letter, marked as FTC0001-FTC0016, after entry of the Order in January 2018.

5. My December 2018 letter sought from defendants "The chargeback, return, and refund volume and rate for each product listed in item one above, and the overall chargeback, return, and refund volume and rate, since entry of the Order in January 2018." We also demanded that defendants produce "[a]ny complaint received by the defendants from a consumer, the Better Business Bureau, or any law enforcement agency referring or relating to the defendants' 'free trial guarantee,' any other refund offer, or any failure to provide a refund since entry of the Order in January 2018." Subsequently, in March 2019, we narrowed this latter item to any "complaint or other correspondence received by the defendants from a consumer since entry of the Order in January 2018 either: (1) inquiring about, questioning, or disputing a credit card or other charge or account debit; or (2) asserting that defendants: (A) misrepresented, failed to disclose, or failed to disclose adequately the terms of its "free trial guarantee" or any other refund offer, or (B) failed to provide a refund."

   Although defendants eventually submitted documents related to Better Business Bureau complaints and other documents relating to individual chargebacks and refunds, they did not submit any aggregate data showing chargeback rates and refund volume. Nor did they offer any valid explanation for their failure to provide this data.

Defendants also failed to provide any documents reflecting complaints made directly by consumers to HRL or its agents (*i.e.*, business records related to complaints that consumers submitted by email, mail, or by phone).

If you have any questions, please contact me at (202) 326-2098 or rfrisby@ftc.gov, or Elizabeth Averill at 202-326-2993 or eaverill@ftc.gov.

Sincerely,

/s/ Robert M. Frisby
Robert M. Frisby

CC: DEbrief@ftc.gov

Averill Affidavit – Attachment H

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Robert M. Frisby
Attorney

Email: rfrisby@ftc.gov
Direct Dial: 202-326-2098

June 6, 2019

VIA ELECTRONIC MAIL

Andrew B. Lustigman, Esq.
Olshan Frome Wolosky LLP
1325 Avenue of the Americas
New York, NY 10019
ALustigman@olshanlaw.com

Re: *FTC and State of Maine v. Health Research Laboratories, LLC*, FTC No. X180007

Dear Mr. Lustigman:

As you know, in our letter of December 19, 2018, we advised that we had identified a number of representations raising concerns under the Order, including disease cure, mitigation, or treatment representations covered by section II.H. We also sought defendants' substantiation for a number of their advertising statements for several products, including Black Garlic Botanicals, BG-18, Ultimate Heart Formula, and Neupathic. Pursuant to section XIX of the Order, please provide the following documents and information by June 20, 2019:

(1) We have reviewed the purported substantiation submitted by defendants in response to our December 2018 letter, and did not identify any human clinical testing of Black Garlic Botanicals, BG-18, Ultimate Heart Formula, or any essentially equivalent product as defined in the Order, showing that the three products cure, mitigate, or treat heart disease, atherosclerosis, or hypertension. Regardless of whether you agree that defendants made the above representations for these three products, please identify any human clinical testing possessed by defendants that satisfies the requirements of section II of the Order or confirm that defendants do not possess any such testing.[1]

(2) Similarly, we did not identify in defendants' submission any human clinical testing of

[1] Our December 19, 2018 asked that "[i]f defendants do not possess clinical testing of the product, or of an Essentially Equivalent Product, as that term is defined in the Order (as opposed to testing of individual ingredients), please so state." Defendants failed to provide any such statement.

Neupathic, or any essentially equivalent product as defined in the Order, showing that it cures, mitigates or treats diabetes or diabetic neuropathy. Regardless of whether you agree that defendants made the above representations for Neupathic, please identify any human clinical testing possessed by defendants that satisfies the requirements of section II of the Order or confirm that defendants do not possess any such testing.

(3) Provide the total revenue received by defendants since entry of the Order in January 2018 from all goods and services sold, as well as the revenue for each of the following products sold by Health Research Laboratories or Whole Body Supplements since the entry of the Order: Black Garlic Botanicals, BG-18, Ultimate Heart Formula, and Neupathic.[2]

(4) Verify whether the defendants disseminated the attached brochure to consumers after the entry of the Order in January 2018.

As a reminder, defendants must provide true, accurate, and complete responses under penalty of perjury in compliance with 28 U.S.C. § 1746. If you have additional questions, please contact me at (202) 326-2098 or rfrisby@ftc.gov, or Elizabeth Averill at 202-326-2993 or eaverill@ftc.gov.

Sincerely,

Robert M. Frisby

Robert M. Frisby

CC: DEbrief@ftc.gov

[2] Defendants previously refused to provide revenue figures in response to my December 2018 letter on the ground that it was "irrelevant" to defendants' compliance with the Order provisions cited in my letter. However, section XVIII.A of the Order requires defendants to create and retain accounting records showing the revenues of all goods or services sold, all costs incurred in generating those revenues, and the resulting net profit or loss. Thus, the defendants' revenue information is probative regarding their compliance with section XVIII.A of the Order.

Averill Affidavit – Attachment I

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Robert M. Frisby
Attorney

Division of Enforcement
600 Pennsylvania Ave., N.W.
Mailstop CC-9528
Washington, DC 20580

(202) 326-2098
rfrisby@ftc.gov

September 4, 2019

Via Email to ALustigman@olshanlaw.com

Andrew Lustigman
Olshan Frome Wolosky, LLP
1325 Avenue of the Americas
New York, NY 10019

Re: ***Recommendation of Contempt Action***

Dear Mr. Lustigman:

Based on our investigation related to the Neupathic, Ultimate Heart Formula, Black Garlic Botanicals, and BG-18 products marketed by Health Research Laboratories, LLC ("HRL"), we plan to recommend that the Commission file an order to show cause for contempt in U.S. District Court against your clients HRL and Kramer Duhon alleging violations of Section II.H of the January 16, 2018 Order in *FTC and State of Maine v. Health Research Laboratories, LLC and Kramer Duhon*, 2:17-cv-00467-JDL.

Prior to forwarding that recommendation to the Commission, we have received authority to engage in discussions with your clients regarding a potential settlement of this proposed contempt action. To that end, we have enclosed a proposed Stipulated Judgment and Modified Order for your clients' review. Please bear in mind that the views expressed herein, including those contained in the Stipulated Judgment and Modified Order, are those of the undersigned Staff and do not necessarily represent the views of the Commission or any Commissioner. The Commission would need to review and vote to accept any proposed settlement of this matter prior to filing. We plan to propose a judgment amount in section XIII of the Modified Order once the defendants provide updated revenue figures pursuant to our email of September 3, 2019.

We have a limited amount of time in which to discuss a possible settlement of this action. At the conclusion of that period, we will need to forward a recommendation to the Commission. As a result, please let us know within one week of receiving this letter whether your clients wish

to engage in settlement discussions. We would be happy to arrange a conference call later this week or next week to discuss the compliance investigation and Modified Order.

You can contact me at (202) 326-2098, rfrisby@ftc.gov or Elizabeth Averill at (202) 326-2993, eaverill@ftc.gov.

Sincerely,

Robert M. Frisby

Averill Affidavit – Attachment J

From: Averill, Elizabeth
To: "Lustigman, Andrew B."; Shaffer, Scott A.
Cc: Frisby, Robert M.; Brendan O"Neil
Subject: RE: Health Research Laboratories, LLC (FTC No. X180007)
Date: Thursday, September 19, 2019 10:03:00 AM

Andy and Scott,

In order to make sure we all have the same expectations, I am sending along a quick summary of our conversation yesterday.

First, it is our understanding that you will submit additional revenue information for Neupathic, Ultimate Heart Formula, BG-18, and Black Garlic Botanicals for June-September 2019 as well as some additional studies next week.

During the call yesterday, you advised us that your clients are no longer "affirmatively marketing" Neupathic, Ultimate Heart Formula, BG-18, or Black Garlic Botanicals. Please clarify in your submission next week what that means (mailed brochures, telemarketing, other type of advertising or marketing) and the specific timing of any changes in the advertising or marketing of the four products. You previously advised us that marketing of Ultimate Heart Formula was discontinued last year. You also indicated yesterday that BG-18, Black Garlic Botanicals, and Neupathic are only being sold to consumers who previously enrolled in continuity programs. However, we checked the websites yesterday and found that your clients are still advertising and selling Ultimate Heart Formula, Neupathic, BG-18, and Black Garlic Botanicals to consumers.

Second, you also requested the opportunity to submit a white paper discussing HRL's compliance efforts and plan to submit that no later than October 11. Please be specific in your submission about identifying the timing of when various compliance efforts were initiated or performed.

Finally, we explained during the call that we are authorized to discuss the possibility of settlement with your clients for a limited period of time ending on November 4.

Best regards,

Elizabeth J. Averill
Federal Trade Commission
Bureau of Consumer Protection, Enforcement Division
202-326-2993

From: Lustigman, Andrew B. <ALustigman@olshanlaw.com>
Sent: Tuesday, September 17, 2019 10:42 AM
To: Averill, Elizabeth <eaverill@ftc.gov>; Frisby, Robert M. <RFRISBY@ftc.gov>; Brendan O'Neil <brendan.oneil@maine.gov>
Cc: Shaffer, Scott A. <SShaffer@olshanlaw.com>
Subject: RE: Health Research Laboratories, LLC (FTC No. X180007): Settlement Communication

How about 11 am tomorrow?

Andrew B. Lustigman
OLSHAN
OLSHAN FROME WOLOSKY LLP
1325 Avenue of the Americas
(Entrance is on 53rd Street between Sixth and Seventh Avenues)
New York, NY 10019
Direct: 212.451.2258
Facsimile: 212.451.2222
Email: ALustigman@olshanlaw.com
Web: www.olshanlaw.com

From: Averill, Elizabeth [mailto:eaverill@ftc.gov]
Sent: Tuesday, September 17, 2019 10:41 AM
To: Lustigman, Andrew B. <ALustigman@olshanlaw.com>; Frisby, Robert M. <RFRISBY@ftc.gov>; Brendan O'Neil <brendan.oneil@maine.gov>
Cc: Shaffer, Scott A. <SShaffer@olshanlaw.com>
Subject: RE: Health Research Laboratories, LLC (FTC No. X180007): Settlement Communication

Andy,

Could we plan to talk sometime between 10 and 2:30 tomorrow or Thursday?

Best,
Liz

From: Lustigman, Andrew B. <ALustigman@olshanlaw.com>
Sent: Tuesday, September 17, 2019 10:19 AM
To: Frisby, Robert M. <RFRISBY@ftc.gov>; Averill, Elizabeth <eaverill@ftc.gov>; Brendan O'Neil <brendan.oneil@maine.gov>
Cc: Shaffer, Scott A. <SShaffer@olshanlaw.com>
Subject: RE: Health Research Laboratories, LLC (FTC No. X180007): Settlement Communication

Robert –

Can we set up a call to discuss the matter. Thanks.

Andy

Andrew B. Lustigman
OLSHAN
OLSHAN FROME WOLOSKY LLP
1325 Avenue of the Americas
(Entrance is on 53rd Street between Sixth and Seventh Avenues)
New York, NY 10019
Direct: 212.451.2258
Facsimile: 212.451.2222
Email: ALustigman@olshanlaw.com
Web: www.olshanlaw.com

From: Frisby, Robert M. [mailto:RFRISBY@ftc.gov]
Sent: Thursday, September 12, 2019 10:19 AM
To: Lustigman, Andrew B. <ALustigman@olshanlaw.com>; Averill, Elizabeth <eaverill@ftc.gov>; Brendan O'Neil <brendan.oneil@maine.gov>
Cc: Shaffer, Scott A. <SShaffer@olshanlaw.com>
Subject: RE: Health Research Laboratories, LLC (FTC No. X180007): Settlement Communication

Thank you for your response. We look forward to hearing from you after you confer with your clients next week.

From: Lustigman, Andrew B. <ALustigman@olshanlaw.com>
Sent: Wednesday, September 11, 2019 5:18 PM
To: Frisby, Robert M. <RFRISBY@ftc.gov>; Averill, Elizabeth <eaverill@ftc.gov>; Brendan O'Neil <brendan.oneil@maine.gov>
Cc: Shaffer, Scott A. <SShaffer@olshanlaw.com>
Subject: Health Research Laboratories, LLC (FTC No. X180007): Settlement Communication

Robert –

I have reviewed your letter and proposed modified order. While we do not believe that contempt is an appropriate remedy here, my clients remain interested in resolving the FTC's and the State of Maine's concerns and would like to engage in settlement discussion. To that end, I am scheduled to meet with my clients early next week to fully discuss the matter. I would like the opportunity to do so first, and then schedule a call shortly thereafter. I will follow up promptly.

Best,
Andy

Andrew B. Lustigman
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From: "Frisby, Robert M." <RFRISBY@ftc.gov>
Date: September 4, 2019 at 4:57:03 PM EDT
To: "Lustigman, Andrew B." <ALustigman@olshanlaw.com>
Cc: "Averill, Elizabeth" <eaverill@ftc.gov>, Brendan O'Neil <brendan.oneil@maine.gov>, DEbrief <DEbrief@ftc.gov>
Subject: Health Research Laboratories, LLC (FTC No. X180007)

Please find the attached letter and proposed modified order.

Robert M. Frisby
Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580
Tel: 202-326-2098
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PUBLIC

Averill Affidavit – Attachment K

OLSHAN

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September 27, 2019

VIA E-MAIL

Elizabeth Averill, Esq.
Federal Trade Commission
Bureau of Consumer Protection
Division of Enforcement
Washington, D.C. 20580
E-mail: eaverill@ftc.gov

Re: *Health Research Laboratories, LLC* (FTC No. X180007)

Dear Elizabeth:

This letter and the accompanying materials is sent as a settlement communication and follows up on our most recent conference call.

The first enclosure accompanying this letter is an Excel file containing current revenue figures for BG-18, Black Garlic Botanicals, Ultimate Heart Formula and Neupathic from June 1, 2019 through September 24, 2019, which, as per your request, update the figures previously provided to your office.

We are also enclosing a claims substantiation overview containing basic product information and a table of studies that addresses the Black Garlic Botanicals and BG-18 products. This overview refers to certain studies, also produced herewith. Please note that the column on the table that is entitled "Claim" does NOT constitute any admission that a particular claim was actually or even impliedly contained in any of our client's marketing materials. Rather, the table is an attempt to organize, for the FTC's convenience, the various studies supporting the efficacy of the black garlic products in relation to the FTC's latest allegations.

The third group of materials are the studies themselves. Eleven studies are included, most-- but not all-- of which were contained in prior submissions to your office. In particular, we draw your attention to the following three:

Ried K., Travica N., Sali A. 2016 (PMID 26869811)
Title: The effect of aged garlic extract on blood pressure and other cardiovascular risk factors in uncontrolled hypertensives: the AGE at Heart trial.

Budoff M. 2006 (PMID 16484554)
Title: Aged Garlic Extract Retards Progression of Coronary Artery Calcification

Budoff M. et al. 2004 (PMID 15475033)
Title: Inhibiting progression of coronary calcification using Aged Garlic Extract in patients receiving statin therapy: a preliminary study

These three studies, which administered 1200 mg of aged garlic powder and compared the results from aged garlic powder to a control group that received a placebo, establish the two garlic products at issue as Essentially Equivalent Products under the Stipulated Consent Order in this matter.

We also direct your attention to the following two studies:

Ried K., Frank O., Stocks N. 2013 (PMID 23169470)
Title: Aged garlic extract reduces blood pressure in hypertensives: a dose–response trial

Ried K., Frank O., Stocks N. 2010 (PMID: 20594781)
Title: Aged garlic extract lowers blood pressure in patients with treated but uncontrolled hypertension: A randomised controlled trial

Both of the above studies demonstrated positive results on human subjects who received lower amounts of aged garlic compared to the amount contained in our client's Black Garlic Botanicals and BG-18 products. In particular, the Ried 2013 study had a relatively large sample size (79 patients) and concluded that even the lower amount of aged garlic extract yielded a "reduction in SBP [systolic blood pressure that] is comparable to that achieved with commonly prescribed antihypertensive medicines, and is of clinical significance."

The remaining studies produced herewith are:

Phil, RA., Khan R.A., Ashraf I. 2011
Title: Effects of garlic on blood glucose levels and HbA1c patients with type 2 diabetes mellitus

Ashraf R. 2005 [Abstract] (PMID 16320801)
Title: Effects of garlic on dyslipidemia in patients with type 2 diabetes mellitus.

Ashraf R., Khan RA, Ashraf I 2011 [Abstract] (PMID 21959822)
Title: Garlic (Allium sativum) supplementation with standard antidiabetic agent provides better diabetic control in type 2 diabetes patients.

Ashraf R., Khan RA., Quereshi AA 2013 [Abstract] (PMID 24035939)
Title: Effects of Allium sativum (garlic) on systolic and diastolic blood pressure in patients with essential hypertension.

Atkin M., Laight D. Cummings MH 2016 [Abstract] (PMID 26954484)

Title: The effects of garlic extract upon endothelial function, vascular inflammation, oxidative stress and insulin resistance in adults with type 2 diabetes at high cardiovascular risk. A pilot double blind randomized placebo controlled trial.

Wang J. et al. 2017 (PMID 29056888)
Title: Effect of garlic supplement in the management of type 2 diabetes mellitus (T2DM): a meta-analysis of randomized controlled trials

We include these additional studies as further support that our two aged garlic products, which contain 1200 milligrams of aged black garlic bulb powder, are Essentially Equivalent Products as defined in the Consent Order that properly substantiate any claims made by our client through studies that meet the appropriate criteria.

With respect to any studies that may have been previously produced but are not included in this current submission, they are incorporated herein by reference, and we reserve all rights to rely on them in any future proceedings should such proceedings occur. We make this reservation of rights on the one hand, and provide certain substantiation for the first time on the other hand, because in our lengthy exchange of correspondence, up to and including the proposed Modified Order covering the alleged contempt (which is denied), different questions have continually been raised that were not addressed in previous Commission requests.

In response to your inquiry about our client's marketing efforts, your e-mail misstates things, so we appreciate your invitation to clarify the present situation. Our client has not been, and is not currently affirmatively marketing any of the four products identified in your September 4th letter, precisely because it desires to resolve the disputed contempt allegations expeditiously and in good faith. What this means is that our clients have paused sending out mail brochures for the two black garlic products for the time being, with the last BG-18 mailer having been sent on or about June 10, 2019 and the last Black Garlic Botanicals mailer having been sent on or about August 22, 2019. We are further advised that Ultimate Heart Formula mailings ceased in December 2018 and Neupathic mailings in April 2019.

Mail brochures are the only way our clients actively market their products. They do not engage in any web marketing, *i.e.* efforts to drive internet traffic to its website. As you know, a stand-alone website has existed for satisfied customers to place repeat orders and for people who previously received mail brochures to obtain more information or to purchase products conveniently or safely.

In order to further demonstrate its good faith and sensitivity to the Commission's concerns, our client advises that it removed the four products at issue from company websites last week (September 19, 2019). This is being done without prejudice to resuming all appropriate marketing activities after this matter has been resolved.

Our clients intend to honor their obligations to fulfill continuity orders, other orders placed though incoming customer service lines, and reorders from consumers who enjoy the

products, have incorporated such products into their health regimens and wish to continue to do so.

We trust this explanation has answered your questions. We are preparing our next submission for October 11, 2019 and will continue to address the issues discussed above.

Sincerely,

/s/ Andrew B. Lustigman

Andrew B. Lustigman

cc: Robert M. Frisby, Esq; (rfrisby@ftc.gov);
Brendan O'Neill, Esq. (brendan.oneil@maine.gov)

Encls.

Averill Affidavit – Attachment L

HRL, LLC

These Revenue Numbers are from 1/1/18-5/31/19

Revenue in the US

Product Name	Gross Amt Billed to Customer	Refunds (Including Chargebacks)	Net Amount
Black Garlic Botanical (HRL)	$ 983,987.01	$ 27,682.18	$ 956,304.83
Ultimate Heart Formula (HRL)	$ 260,997.71	$ 9,775.18	$ 251,222.53
BG-18 (WBS)	$ 451,190.87	$ 10,674.95	$ 440,515.92
Neupathic (HRL)	$ 333,462.92	$ 19,730.00	$ 313,732.92

Revenue in Canada

Product Name	Gross Amt Billed to Customer	Refunds (Including Chargebacks)	Net Amount
Black Garlic Botanical (HRL)	$ 187,878.01	$ 14,316.72	$ 173,561.29
Ultimate Heart Formula (HRL)	$ 109,489.79	$ 11,125.75	$ 98,364.04
BG18 (WBS)	$ 107,885.96	$ 5,042.57	$ 102,843.39
Neupathic (HRL)	$ 144,270.53	$ 13,589.40	$ 130,681.13

HRL Total - Orders/Refunds/Chargebacks

Total orders from 1/1/18-5/31/19	37,252
Total Refunds from 1/1/18-5/31/18	2,756
Total Refund Rate from 1/1/18-5/31/19	7.40%
Total Chargebacks from 1/1/18-5/31/19	358
Total Chargeback Rate from 1/1/18-5/31/19	0.96%
Total Aggregate Refund + Chargeback rate from 1/1/18-5/31/19	8.36%

WBS - Total - Orders/Refunds/Chargebacks

Total orders from 1/1/18-5/31/19	7,732
Total Refunds from 1/1/18-5/31/18	485
Total Refund Rate from 1/1/18-5/31/19	6.27%
Total Chargebacks from 1/1/18-5/31/19	91
Total Chargeback Rate from 1/1/18-5/31/19	1.18%
Total Aggregate Refund + Chargeback rate from 1/1/18-5/31/19	7.45%

Averill Affidavit – Attachment M

Health Research Labs, LLC and Whole Body Supplements, LLC
FTC Revenue Ask Letter Dated 9/4/19
These Revenue Numbers are from 6/1/19-9/24/19

Revenue in the US

Product Name	Gross Amt Billed to Customer	Refunds (Including Chargebacks)	Net Amount
Black Garlic Botanical (HRL)	$ 129,325.57	$ 2,003.73	$ 127,321.84
Ultimate Heart Formula (HRL)	$ 29,727.54	$ 589.66	$ 29,137.88
BG-18 (WBS)	$ 54,581.50	$ 517.29	$ 54,064.21
Neupathic (HRL)	$ 33,139.55	$ 1,489.06	$ 31,650.49

Revenue in Canada

Product Name	Gross Amt Billed to Customer	Refunds (Including Chargebacks)	Net Amount
Black Garlic Botanical (HRL)	$ 9,924.89	$ -	$ 9,924.89
Ultimate Heart Formula (HRL)	$ 5,655.81	$ -	$ 5,655.81
BG18 (WBS)	$ 6,782.12	$ -	$ 6,782.12
Neupathic (HRL)	$ 5,826.14	$ 119.97	$ 5,706.17

Averill Affidavit – Attachment N

Product	Sales Type	Gross Sales	Continuity from List Code Pre 2018	Continuity from WEB/WM/RO Pre 2018	Estimated RO for 1/17/18-6/17/18 (based on 5.5 bottles per order)	Gross Revenue for Orders Steming from 18-19 Mailings	Marketing Spend 2018	Marketing Spend 2019	Order Cost	Total Order Cost
Black Garlic Botanicals	Initial	$ 790,435.81				$ 790,435.81	$ 380,119.67	$ 86,912.01	36%	$ 285,821.59
	Continuity	$ 494,085.05	$ 250,126.75	$ 10,385.55		$ 233,572.75			36%	$ 84,459.91
	Reorder	$ 164,623.84			$ 43,646.13	$ 120,977.71			36%	$ 43,745.54
BG-18	Initial	$ 381,154.30				$ 381,154.30	$ 265,317.95	$ 25,543.87	36%	$ 137,825.39
	Continuity	$ 229,220.75	$ 95,253.15	$ 5,007.65		$ 128,959.95			36%	$ 46,631.92
	Reorder	$ 82,017.98			$ 13,706.85	$ 68,311.13			36%	$ 24,701.30
Neupathic	Initial	$ 342,531.86				$ 342,531.86	$ 218,931.95	$ 34,778.88	36%	$ 123,859.52
	Continuity	$ 136,889.90	$ 21,911.45	$ 1,159.60		$ 113,818.85			36%	$ 41,156.90
	Reorder	$ 55,014.20			$ 7,749.85	$ 47,264.35			36%	$ 17,090.79
UHF	Initial	$ 227,838.68				$ 227,838.68	$ 147,234.90	$ -	36%	$ 82,386.47
	Continuity	$ 146,721.65	$ 29,055.61	$ 8,774.80		$ 108,891.24			36%	$ 39,375.07
	Reorder	$ 102,439.16			$ 22,081.48	$ 80,357.68			36%	$ 29,057.34
		$ 3,152,973.18	$ 396,346.96	$ 25,327.60	$ 87,184.31	$ 2,644,114.31	$ 1,011,604.47	$ 147,234.76		$ 956,111.73

Product	Sales Type	Gross Sales	Net Revenue	DSE	SK	Candee	Osterhouse	Cohen	Creative total	Net after All Fees
Black Garlic Botanicals	Initial	$ 790,435.81	$ 37,582.54	$ 1,500.00	$ 1,000.00	$ 1,237.50		$ 86,945.00		
	Continuity	$ 494,085.05	$ 149,112.84							
	Reorder	$ 164,623.84	$ 77,232.17							
BG-18	Initial	$ 381,154.30	$ (47,532.91)		$ 7,000.00	$ 2,696.25				
	Continuity	$ 229,220.75	$ 82,328.03							
	Reorder	$ 82,017.98	$ 43,609.83							
Neupathic	Initial	$ 342,531.86	$ (35,038.49)		$ 7,000.00		$ 5,638.00			
	Continuity	$ 136,889.90	$ 72,661.95							
	Reorder	$ 55,014.20	$ 30,173.56							
UHF	Initial	$ 227,838.68	$ (1,782.69)		$ 7,000.00		$ 5,637.00			
	Continuity	$ 146,721.65	$ 69,516.17							
	Reorder	$ 102,439.16	$ 51,300.34							
		$ 3,152,973.18	$ 529,163.34	$ 1,500.00	$ 22,000.00	$ 3,933.75	$ 11,275.00	$ 86,945.00	$ 125,653.75	$ 403,509.59