PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **HEALTH RESEARCH LABORATORIES, LLC,** **a limited liability company,** **WHOLE BODY SUPPLEMENTS, LLC,** **a limited liability company, and** **KRAMER DUHON,** **individually and as an officer of** **HEALTH RESEARCH LABORATORIES, LLC** **and WHOLE BODY SUPPLEMENTS, LLC.**	**DOCKET NO. 9397**

COMPLAINT COUNSEL'S MOTION TO CERTIFY RULINGS FOR INTERLOCUTORY APPEAL

The recent rulings granting Respondents' amended answer and denying the proposed amended complaint present novel issues substantially affecting the case and about which there is no FTC precedent. Interlocutory review is required because the rulings at issue involve: (1) a "controlling question of law or policy"; (2) "as to which there is a substantial ground for difference of opinion"; and (3) "subsequent review will be an inadequate remedy." Rule 3.23(b) (emphasis added).

First, both rulings present "controlling questions" because they are material to the outcome of the case. The Rule 3.12(b) ruling resolved all material allegations in a particular manner that leads to an outcome that Respondents prefer. As the decision denying Complaint Counsel's parallel motion to amend the Complaint correctly noted, allowing Complaint Counsel's proposed amendment would make that outcome much less likely. Order (Mar. 12, 2021) at 5.

Second, there are "substantial grounds" for interlocutory review because the Commission might reasonably disagree with the conclusion that Rule 3.12(b) permits affirmative defenses. Regarding the amended complaint, the Commission could reasonably conclude that, although it

would make Respondents unlikely to employ Rule 3.12(b), the likelihood that Respondents obtain their preferred litigation outcome is irrelevant to whether to permit an amendment. Furthermore, the Commission could reasonably conclude that whether new allegations (theoretically) could complicate proceedings concerning liability is irrelevant to the question under Rule 3.15(a)—namely, whether those allegations facilitate proceedings regarding the scope of relief.

Third, subsequent review is inadequate because it is likely unavailable. Specifically, as the ruling explained, the Rule 3.12(b) decision "remov[ed] proceedings to the Commission for determination of an appropriate final order." Order (Mar. 12, 2021) at 5. Thus, this tribunal apparently will not issue an initial decision. The lack of an initial decision removes the predicate for appeal. *See* Rule 3.52. Even if a non-interlocutory appeal were possible, a potential remand will delay the matter's resolution by months or more. Because the relief at stake includes notice to customers with diabetes or cardiovascular issues informing them that Respondents' supplements do not work, subsequent review is inadequate because the associated delay risks physical harm. Ultimately, no one can predict how the Commission might resolve the questions at hand; however, everyone benefits from resolving that uncertainty promptly rather than after additional expense and delay.

Background

A. The Complaint

The Complaint alleges Respondents marketed supplements as, among other things, "cures" for cardiovascular disease and diabetic neuropathy (nerve pain). Cmpl. at 10-12. For example, Respondents falsely claimed certain supplements "reduc[e] arterial plaque, blood pressure, and cholesterol," *id.* at 3, and help consumers "say goodbye to [their] heart surgeon and avoid an angioplasty," *id.* at 7. Respondents also sell another purportedly "100% effective" supplement that purportedly "[r]elieve[s] nerve pain" and "increase[s] mobility." *Id.* at 9.

B. The Amended Answer

This matter's unique posture results from Respondents' attempt to amend their answer pursuant to Rule 3.12(b). Respondents initially denied various allegations and asserted certain affirmative defenses. Answer (Dec. 4, 2020). Subsequently, they moved to amend their answer to admit "all material allegations." No. 600668. However, Respondents' amendment still asserted affirmative defenses attacking these proceedings (and factual findings therein) as both unconstitutional and unlawful under the Administrative Procedure Act. *See id.*

Complaint Counsel opposed the motion on multiple grounds including that Rule 3.12(b) does not allow affirmative defenses. In particular, Rule 3.12(a) expressly permits such defenses, whereas Rule 3.12(b) does not. *See id.*; *see also* No. 600866 at 3-4. Construing Rule 3.12(b) as impliedly permitting such defenses renders the two provisions substantively identical. *See id.*; *see also* No. 600866 at 3-4. Therefore, the rule against surplusage precludes interpreting Rule 3.12(b) to mean what it does not say. *Cf. Freeman v. Quicken Loans*, 566 U.S. 624, 635 (2012) (noting that the law "favors that interpretation which avoids surplusage"). Additionally, Rule 3.12(b) requires unequivocal "judicial admissions." *See Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941) (characterizing admissions under 3.12(b)'s predecessor as "judicial admissions"); *In re Teleglobe Commc'ns*, 493 F.3d 345, 377 (3d Cir. 1977) ("[A]dmissions must be unequivocal."). Because Respondents sought to preserve their right to challenge their admissions on constitutional and statutory grounds—which would render them potentially non-binding even in this proceeding—they, by definition, are not unequivocal. No. 600771 at 5-6; No. 600866 at 4-5.

C. The Ruling Regarding the Amended Answer

After Complaint Counsel opposed Respondents' motion to amend, Respondents waived certain affirmative defenses[1] and their motion was granted. This tribunal found that Rule

[1] Because the waiver "functionally serve[d] as a new motion to file a second amended answer," Complaint Counsel "request[ed] permission to file a response . . . addressing remaining issues following the waiver and Respondents' original motion for leave to file an amended answer." No. 600785. This request was granted, No. 600816, and Complaint Counsel submitted a response arguing that the original motion should still be denied notwithstanding the waiver, No. 600886 at 1 (discussing the original motion's "continuing flaws"). However, the tribunal

3.12(a)(1)(i) permits affirmative defenses expressly, and Rule 3.12(b) permits them impliedly because it does not prohibit them. *See* No. 600937 at 4. The decision also addressed whether the defenses rendered the admissions equivocal because they permit Respondents to contend that their admissions do not bind them (due to the allegedly unconstitutional or otherwise unlawful nature of these proceedings). The ruling concluded that Respondents may assert defenses that "may bar liability or the requested relief," *see id.* at 4, even if barring relief because these proceedings are allegedly unconstitutional or unlawful means that admissions therein necessarily will not bind Respondents. Accordingly, this tribunal permitted the amendment, which it subsequently explained "has the effect of dispensing with a hearing and removing proceedings to the Commission for determination of an appropriate final order." Order (Mar. 12, 2021) at 5.

D. The Proposed Amended Complaint

Complaint Counsel moved to add allegations to its Complaint related to the scope of relief, including allegations related to a Maine consent order prohibiting the conduct alleged here. No. 600771. Respondents opposed the motion on various grounds including that the amendment was outside the scope of the original complaint. No. 600805 at 9-10. Respondents further argued that permitting the amendment would "mak[e] it impossible for Respondents to 'elect' not to contest the material facts" pursuant to 3.12(b). *Id.* at 9 (characterizing new allegations as "inflammatory").

The decision concluded the proposed amendments were within "the reasonable scope of the complaint." Order at 4. Nevertheless, the ruling denied the proposed amendment for two reasons. First, it noted that Complaint Counsel may argue "that Respondents knowingly violated a court order . . . so as to justify broad fencing in relief." *Id.* at 5. This "would complicate resolution of the case on the merits." *Id.* Second, because the amendment contained allegations

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declined to consider this response because "Complaint Counsel did not seek leave to file the purported supplement" to its original opposition, and because it did "not present arguments in opposition to Respondents' waiver filing." Order at 2.

that Respondents view as "inflammatory," it "could make it less likely that . . . Respondents will elect not to contest the material allegations under Rule 3.12(b)(2)." *Id.*

E. Public Interest and Scope of Relief

The scope of relief remains outstanding. Most urgently, Complaint Counsel seeks to require Respondents to notify their customers—including customers with diabetes and cardiovascular problems—that Respondents' products do not work and that consumers should seek medical advice from qualified professionals. *See* Complaint at 14 § (e). Delaying notice puts consumers' health, and potentially their lives, at risk. Accordingly, the public interest counsels strongly against proceeding without an interlocutory appeal because a later appeal followed by a potential remand could add months to these proceedings.

Notably, although Respondents dispute the scope of relief, they have nevertheless often urged this tribunal to expedite these proceedings. It is inefficient and damaging to the public interest to continue without an interlocutory appeal when there is at least a reasonable chance that the Commission will ultimately remand the matter and much of what transpires beforehand will need to be redone.

Legal Standard

Rule 3.23(b) requires this tribunal to certify questions to the Commission when: (1) "a ruling involves a controlling question of law or policy"; (2) "as to which there is substantial ground for difference of opinion"; and (3) an immediate appeal "may materially advance the ultimate termination of the litigation **or** subsequent review will be an inadequate remedy." (Emphasis added). Importantly, although Rule 3.23(b) is similar to 28 U.S.C. § 1292(b), which governs interlocutory appeals from District Court, the Commission rule is broader. Specifically, although 1292(b) does not authorize interlocutory appeals where "subsequent review will be an inadequate remedy," the Commission's rules do—a unique feature that makes sense because administrative litigation is an intentionally expedited process with an ultimate factfinder (the Commission) that reviews the record *de novo*.

Argument

I. The 3.12(b) Ruling Should Be Certified.

A. The 3.12(b) Ruling Materially Altered the Case.

A "controlling question of law" is one that "could materially affect the outcome of the case." *In re Trump*, 874 F.3d 948, 951-52 (6th Cir. 2017) (quotation omitted); *see also Cement Antitrust Litig.,* 673 F.2d 1020, 1026 (9th Cir. 1982) (same). Because the decision resolved liability, and could affect relief, it materially affects the case's outcome.

B. The Commission Could Reasonably Disagree With the Ruling.

A "substantial ground for difference of opinion" exists "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions." 2 FED. PROC. § 3:218 (2021); *see also Trump*, 874 F.3d at 952. Importantly, "a substantial ground for difference of opinion exists where reasonable jurists *might* disagree on an issue's resolution, not merely where they have already disagreed." *Bentley v. United of Omaha Life Ins.*, No. 15-cv-787, 2016 WL 7443190, *2 (C.D. Cal. Sept. 14, 2016) (Court's emphasis) (quotation omitted). There is no precedent concerning whether a respondent can assert affirmative defenses under Rule 3.12(b). Furthermore, a reasonable jurist might conclude that 3.12(b) does not imply the right to assert defenses, or that defenses preserving the right to challenge Commission fact-finding are impermissible given the Rule's purpose. Accordingly, a "substantial ground for difference of opinion" exists.

C. Subsequent Review Is Inadequate.

1. Subsequent Review Is Likely Unavailable.

Complaint Counsel may only appeal "initial decisions." *See* Rule 3.52. However, the ruling explained that Respondents' amended answer "has the effect . . . of removing proceedings to the Commission" to determine the Final Order. Order (Mar. 12, 2021) at 5. Therefore, because there will apparently be no initial decision, Complaint Counsel likely cannot appeal the 3.12(b) decision unless an interlocutory appeal is certified.

2. Subsequent Review Is Inadequate Because It Will Require a Remand.

Assuming future review were possible, it would be inadequate because the Commission's only option would be to remand the case if it disagreed with the ruling. Put differently, if Respondents' amended answer is inconsistent with 3.12(b), the Commission will have no record before it from which it can determine liability, and thus must remand. As discussed above, this delay poses consumer health risks (and prolonging the case would burden the parties as well). Thus, assuming a subsequent appeal were possible, it could undo the additional damage done during the interim.

Notably, although Section 1292(b) does not permit appeals based on the inadequacy of appellate remedies, and no law speaks directly to this unique element of Rule 3.23(b), other agencies interpreting identical administrative provisions conclude that delay alone can render subsequent review inadequate. *See State of California*, 2009 WL 5247382, at *2 (D.O.E.) (Dec. 17, 2009) (subsequent review inadequate partly because it "would have delayed the efficient enforcement" of a program); *Certain Dynamic Random Access Memories*, 1986 WL 379497 (I.T.C.) (June 17, 1986) (finding subsequent review inadequate partly because interlocutory review "might be able to save time and additional expense").

II. The Ruling Concerning the Proposed Amended Complaint Should Be Certified.

A. Whether To Permit the Amendment Presents a Controlling Question.

The tribunal declined to permit Complaint counsel to amend its complaint partly because doing so made it unlikely that Respondents would admit allegations under Rule 3.12(b). Order at 5. In this respect, denying the amendment materially affected the case's outcome by ensuring that litigation concerning liability would conclude. Accordingly, the denial presents a "controlling" legal question. *See Trump*, 874 F.3d at 951-52; *Cement Antitrust*, 673 F.2d at 1026.

B. The Commission Could Reasonably Disagree With the Ruling.

Although this tribunal concluded that the proposed amendment was not "appropriate," the contrary view is reasonable. In particular, the decision found that the amendment makes it unlikely Respondents will achieve the 3.12(b) resolution they seek; however, the Commission could reasonably conclude the reduced probability Respondents will achieve their goals is irrelevant to the "appropriateness" inquiry. In fact, amendments often make the other party less likely to achieve its goals; if such an outcome rendered amendments improper, few if any amendments would be allowed.

Additionally, the tribunal ruled that allegations concerning the Maine action are not "appropriate" because they would "complicate resolution of the case on the merits." Order at 5. However, the Commission could reasonably conclude that Rule 3.15(a) requires only that "determination of *a controversy* on the merits will be facilitated [by the amendment]," meaning that the amendment need only help resolve a controversy (such as the scope of relief) according to the weight of the relevant evidence (*i.e.*, "on the merits" of the controversy). (Emphasis added.) Put differently, the Commission could reasonably read 3.15(a) as requiring only that an amendment help "determine a controversy on *its* merits"—where the "controversy" to be adjudicated on its merits is the scope of relief—rather than limiting 3.15(a) to amendments that help "determine a controversy regarding *liability*." Indeed, this latter construction would mean that no amendment concerning any issue besides liability would ever be allowed. Furthermore, assuming the amendment might "complicate" proceedings by including additional issues, the Commission may reasonably place greater weight on developing a record with all facts relevant to the scope of relief so that it can make the best decision for the public regarding the remedy.

Importantly, no FTC authority defines "appropriate" amendments that help determine "a controversy." Because the ruling raises novel issues about which the Commission could reasonably disagree, "substantial grounds" for an interlocutory appeal exist.

C. Subsequent Review Is Inadequate.

As discussed above, a subsequent appeal is likely impossible. *See* Rule 3.52. Furthermore, assuming an appeal were possible, subsequent review is inadequate because it will require a remand and therefore cause delay. That delay risks consumers' health and may unduly prolong this matter from Respondents' perspective as well.[2]

Conclusion

For all the foregoing reasons, an interlocutory appeal should be permitted.

Dated: March 29, 2021

Respectfully submitted,

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Complaint Counsel

[2] Notably, the Rule 3.15(a) decision rests substantially on the prior Rule 3.12(b) ruling. Thus, should the Commission resolve the novel Rule 3.12(b) question differently, it will become necessary to re-evaluate the Rule 3.15(a) decision as well. As such, it makes little sense not to permit interlocutory appeals of these interrelated issues simultaneously.

CERTIFICATE OF COMPLIANCE

Pursuant to Paragraph 4 of the December 14, 2020 Scheduling Order, the undersigned counsel represents that he and co-counsel Elizabeth Averill met and conferred on March 23, 2021 with Respondents' counsel, Joel Reese, in a good faith effort to seek Respondents' agreement to this motion. Respondents informed Complaint Counsel that they oppose this motion.

s/ Jonathan Cohen
Jonathan Cohen
Federal Trade Commission
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Washington, DC 20580

CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Motion To Certify Rulings for Interlocutory Appeal, and all attached documents, on counsel for the Respondents on March 29, 2021 via electronic mail.

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

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

The Honorable D. Michael Chappell
Administrative Law Judge
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PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **HEALTH RESEARCH LABORATORIES, LLC,** **a limited liability company,** **WHOLE BODY SUPPLEMENTS, LLC,** **a limited liability company, and** **KRAMER DUHON,** **individually and as an officer of** **HEALTH RESEARCH LABORATORIES, LLC** **and WHOLE BODY SUPPLEMENTS, LLC.**	**DOCKET NO. 9397**

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO CERTIFY RULINGS FOR INTERLOCUTORY APPEAL

This matter having come before the Chief Administrative Law Judge on March 29, 2021, upon Complaint Counsel's Motion To Certify Rulings for Interlocutory Appeal, it is hereby **DETERMINED** that, pursuant to Rule 3.23(b):

1. The March 10, 2021 Order Granting Respondents' Motion For Leave To Amend Answer involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and for which subsequent review will be an inadequate remedy.

2. The March 12, 2021 Order Denying Complaint Counsel's Motion To Amend the Complaint (Mar. 12, 2021) involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and for which subsequent review will be an inadequate remedy.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

Attachments

In re Health Research Laboratories, LLC, No. 9397

(1) Order Granting Respondents' Motion For Leave To Amend Answer (Mar. 10, 2021)

(2) Order Denying Complaint Counsel's Motion To Amend the Complaint (Mar. 12, 2021)

PUBLIC

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

In the Matter of	)	
Health Research Laboratories, LLC, a limited liability company,	)	Docket No. 9397
Whole Body Supplements, LLC, a limited liability company, and	)	
Kramer Duhon, individually and as an officer of Health Research Laboratories, LLC, and Whole Body Supplements, LLC,	)	
Respondents.	)	

ORDER GRANTING RESPONDENTS' MOTION FOR LEAVE TO AMEND ANSWER

I.

On February 12, 2021, Respondents Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC ("WBS"), and Kramer Duhon (collectively, "Respondents") filed a Motion for Leave to Amend the Answer in accordance with Rule 3.12(b)(2) ("Motion to Amend Answer"). On February 24, 2021, Federal Trade Commission ("FTC") Complaint Counsel filed an Opposition to the Motion to Amend Answer ("Opposition").[1]

On February 25, 2021, Respondents filed a Waiver of Affirmative Defenses of Mootness and Lack of Public Interest. Also on February 25, 2021, Complaint Counsel filed a motion for leave to respond to Respondents' waiver filing, which was granted on

[1] Complaint Counsel included within its Opposition to Respondent's Motion to Amend Answer a request for leave to amend the Complaint, pursuant to Rule 3.15(a), which Complaint Counsel referred to as a "Cross-Motion" ("Motion to Amend the Complaint"). An order on Complaint Counsel's Motion to Amend the Complaint will be issued on or before March 12, 2021.

March 1, 2021. As of this date, Complaint Counsel has not filed the allowed response.[2]

II.

The Complaint in this case was filed November 13, 2020 ("Complaint"). Respondents filed an answer to the Complaint on December 4, 2020 ("Answer"), denying a number of factual allegations and pleading nine legal defenses.

Pursuant to Rule 3.15(a)(1) the Administrative Law Judge "may allow appropriate amendments" to an answer "[i]f and whenever determination of a controversy on the merits will be facilitated thereby" and may impose "such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties." 16 C.F.R. § 3.15(a)(1).

Respondents seek to amend their Answer to elect not to contest the factual allegations of the Complaint, in accordance with Rule 3.12(b)(2), which states in pertinent part:

> If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

16 C.F.R. § 3.12(b)(2).

Respondents' proposed amended answer, under a section titled, "Answer Pursuant to [Rule] 3.12(b)(2)," states:

> Pursuant to 16 CFR § 3.12(b)(2), Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true. Pursuant to 16 CFR § 3.12(b)(2), Respondents reserve the right to submit proposed findings of fact and conclusions of law.

Motion to Amend Answer Ex. 1.

[2] On March 4, 2021, Complaint Counsel filed what it titled a "Supplemental Opposition" to its Opposition to the Motion to Amend Answer. The Commission's Rules do not provide for such a filing and Complaint Counsel did not seek leave to file the purported supplement. A cursory review of the filing shows that the supplement is little more than a regurgitation of the arguments made in Complaint Counsel's original Opposition. Moreover, Complaint Counsel's Supplemental Opposition does not present arguments in opposition to Respondents' Waiver filing, which response was permitted under the Order of March 1, 2021.

Respondents' proposed amended answer also includes a section titled "Legal Defenses," which asserted five of the nine legal defenses Respondents pled in their original Answer. Respondents subsequently filed a document titled, "Waiver of Affirmative Defenses of Mootness and Lack of Public Interest," pursuant to which Respondents waived those two defenses (the "Waived Defenses"), thereby leaving only three asserted "legal defenses": that the requested relief exceeds statutory authorization; that the FTC's administrative litigation process is unconstitutional; and that the Commission's *de novo* review of fact-findings by the Administrative Law Judge ("ALJ") on administrative appeals is unconstitutional and a violation of the Administrative Procedures Act. Respondents' original answer had asserted nine defenses.

Respondents argue that the amendments should be allowed because they do not add any allegations or defenses from their original answer. Rather, Respondents state, the proposed amended answer seeks to "admit the few material allegations that Respondents did not admit" in the original answer. Respondents further argue that Complaint Counsel is not prejudiced, and is in fact benefitted, by the proposed amended answer because Complaint Counsel will "not have to prove any disputed factual allegations." Motion to Amend Answer at 4.

Complaint Counsel contends that Respondents' proposed amended answer is improper under Rule 3.12(b)(2) because, according to Complaint Counsel, the amended answer does not unequivocally admit "all" material facts; and denies or challenges the facts through positing legal defenses. Complaint Counsel argues in the alternative that certain conditions should attach to allowing the amended answer, including requiring Respondents to provide a paragraph-by-paragraph statement admitting (or denying) each allegation of the Complaint and ordering discovery as to issues that remain in dispute.

III.

As further explained below, leave to file Respondents' proposed amended answer, without the now-waived defenses of mootness and lack of public interest, will be allowed. There can be little doubt that Respondents' admissions, made pursuant to Rule 3.12(b)(2), will significantly narrow the issues in the case and thereby facilitate a determination of the merits. 16 C.F.R. § 3.15(a)(1). Moreover, Respondents' proposed amended answer contains an appropriate election and statement of admission under Rule 3.12(b)(2). As noted above, Rule 3.12(b)(2) allows a respondent to elect "not to contest the allegations of fact" in a complaint by submitting an answer "consist[ing] of a statement that the respondent admits all of the material allegations to be true." Respondents' proposed amended answer includes the express and unequivocal statements: "Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true." Motion to Amend Answer Ex. 1. Complaint Counsel complains about Respondents' use of the phrase "material allegations" as inserting unknown limitations and equivocation into Respondents' admissions because Respondents do "not specify which allegations they consider material." However, the language used by Respondents is that which is provided in Rule 3.12(b)(2). Indeed, Respondents' language tracked the language of the Rule

precisely. Under these circumstances, which allegations Respondents "consider" material appears to be irrelevant.

Complaint Counsel also contends that Respondents' proposed amended answer is improper under Rule 3.12(b)(2) because it includes affirmative defenses. Complaint Counsel first argues that Rule 3.12(b)(2) bars the assertion of legal defenses by providing that an answer under the Rule "shall consist of" the statement admitting all material allegations to be true. However, the Rule does not state that such an answer "shall consist *only*" of the required statement of admission, and this limitation will not be implied. In addition, the Rule expressly allows the answering party to submit both proposed findings of fact and proposed conclusions of law, which is inconsistent with a conclusion that a Rule 3.12(b)(2) answer prohibits presentation of legal arguments that may bar liability or the requested relief, notwithstanding the admission of all material allegations.

Next, Complaint Counsel argues Respondents' legal defenses necessarily implicate a denial of alleged facts, which would be contrary to the purpose of an answer under Rule 3.12(b)(2). Complaint Counsel's examples include Respondents' defenses of mootness and lack of public interest, but Respondents have waived those defenses and Respondents will not be permitted to include them in the amended answer allowed under this Order. Complaint Counsel fails to demonstrate how Respondents' remaining legal defenses in the proposed amended answer challenge or deny the material allegations of the Complaint. Indeed, the nature of an affirmative defense is that it defeats the plaintiff's claim even assuming the allegations are true. Thus, Respondents can, for example, challenge the scope of remedy, while still admitting the underlying factual allegations supporting liability. *See, e.g.*, *In re Auslander Decorator Furniture Inc.*, 83 F.T.C. 1542, 1974 FTC LEXIS 213, *47-48 (Apr. 23, 1974) (accepting Rule 3.12(b)(2) answer that "admitted all the material allegations" of the complaint and resolving remaining issue of scope of remedy). Ultimately, the risk that Respondents' admissions of fact will undermine their legal defenses is Respondents' to bear, and is not a reason to disallow either the admissions or the legal defenses.

In addition, Complaint Counsel argues that even if the proposed amended answer is allowed, certain conditions are necessary to prevent prejudice to Complaint Counsel. The notion that Complaint Counsel is prejudiced by Respondents' admission of all material allegations of the Complaint and the reduction of Respondents' asserted legal defenses defies credulity. The effect of a Rule 3.12(b)(2) answer is to "waive [all] hearings" and, as Respondents state in their Motion, Complaint Counsel will "not have to prove any disputed factual allegations." Motion to Amend Answer at 4. That Respondents have reserved the right to file proposed findings and conclusions, as outlined in Rule 3.46 and expressly allowed by Rule 3.12(b)(2), also does not create a risk of prejudice as Respondents will be bound by the admissions of fact in their amended answer.

Moreover, Complaint Counsel's proposed condition that Respondents provide a paragraph-by-paragraph response to each allegation of the Complaint is not contemplated by Rule 3.12(b)(2) and could create ambiguity, when the proposed amended answer

already expressly admits "all material allegations" of the Complaint. Complaint Counsel's request that the ALJ order discovery to continue "concerning all remaining issues," as a condition of Respondents' amending their Answer, is unnecessary. Although Complaint Counsel's most recent motions to compel discovery from Respondents were denied without prejudice until the resolution of the motions to amend the Answer and the Complaint, there is nothing in Rule 3.12(b)(2) or the Scheduling Order issued in this case that prohibits Complaint Counsel from pursuing discovery regarding issues that remain relevant after these motions are resolved.

Complaint Counsel also requests it be permitted to amend the Complaint as a condition for permitting Respondents to amend their Answer. Complaint Counsel fails to explain how amending the Answer is prejudicial to Complaint Counsel's case or to persuade that such amendment operates to avoid such alleged prejudice. Accordingly, Complaint Counsel's request to amend the Complaint as a condition for allowing Respondents to amend the Answer is rejected.

IV.

For all the foregoing reasons, Respondents' Motion for Leave to Amend the Answer is GRANTED, and it is hereby ORDERED that Respondents may file an Amended Answer to the Complaint, in the form proposed by Respondents, except that Respondents may not include the Waived Defenses.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 10, 2021

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

In the Matter of Health Research Laboratories, LLC, a limited liability company, Whole Body Supplements, LLC, a limited liability company, and Kramer Duhon, individually and as an officer of Health Research Laboratories, LLC, and Whole Body Supplements, LLC, Respondents.	Docket No. 9397

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO AMEND THE COMPLAINT

I.

On February 24, 2021, Federal Trade Commission ("FTC") Complaint Counsel filed a Cross-Motion for Leave to Amend the Complaint ("Motion to Amend").[1] Respondents Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC ("WBS"), and Kramer Duhon (collectively, "Respondents") filed a Response to the Cross-Motion to Amend the Complaint on February 26, 2021.[2]

As set forth below, the Motion to Amend the Complaint is DENIED.

[1] The Motion to Amend the Complaint was filed as a "Cross-Motion" as part of Complaint Counsel's Opposition to Respondents' Motion for Leave to Amend the Answer, which Respondents had previously filed on February 12, 2021. By Order issued March 10, 2021, Respondents' Motion for Leave to Amend the Answer was granted ("March 10 Order").

[2] Also on February 26, 2021, Respondents filed a motion to exceed the word limits applicable to their response to the Motion to Amend, which Complaint Counsel opposed on March 2, 2021. Respondents' motion to exceed the word limits for their response is GRANTED.

II.

The Complaint in this matter, issued November 13, 2020, alleges that Respondents "disseminated or caused to be disseminated advertising and promotional materials" for four supplements that the FTC contends were "not substantiated at the time the representations were made," and that such unsubstantiated representations constitute deceptive advertising in violation of sections 5 and 12 of the FTC Act. Complaint ¶¶ 7, 9, 11, 13, 15, 17, 19 and 21.

The notice of contemplated relief in the Complaint states that Complaint Counsel will seek an order that will, among other things: prohibit any representations that any of Respondents' products "cure, treat, mitigate, prevent, or reduce the risk of any disease"; prohibit any representations "about the health benefits, safety, efficacy, or the performance" of Respondents' products "unless those representations are supported by competent and reliable scientific evidence"; and, prohibit any "misrepresentations regarding tests, studies, or other research." Complaint at 14-15.

Respondents filed their Answer to the Complaint on December 4, 2020, which denied they made unsubstantiated representations or that their conduct violated the FTC Act. Answer ¶¶ 13, 15, 17, 19 and 21. Respondents also raised nine affirmative defenses, including, among others: that Complaint Counsel's requested relief exceeds the Commission's authority; that the case is moot; that the filing of the action is not in the public interest; that the FTC's administrative process is unconstitutional; and the Commission's *de novo* review on appeal of the fact findings of the Administrative Law Judge ("ALJ") violates the Administrative Procedures Act. Answer at 3-4.

On February 12, 2021, pursuant to Rule 3.15(a)(1), Respondents filed a Motion for Leave to Amend their Answer seeking to file an answer pursuant to Rule 3.12(b)(2), which provides:

> If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

16 C.F.R. § 3.12(b)(2). In accordance with the foregoing Rule, Respondents' proposed amended answer stated:

> Pursuant to 16 CFR § 3.12(b)(2), Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true. Pursuant to 16 CFR § 3.12(b)(2), Respondents reserve the right to submit proposed findings of fact and conclusions of law.

Respondents' proposed amended answer reduced their legal defenses from nine to the five defenses summarized above that had been included in the original Answer to the Complaint. Respondents subsequently waived two of the five defenses. *See* Waiver of Affirmative Defenses of Mootness and Lack of Public Interest, filed February 25, 2021. Over Complaint Counsel's opposition, Respondents' Motion for Leave to Amend their Answer was granted on March 10, 2021, allowing Respondents to file an Amended Answer to the pending Complaint, in the form proposed by Respondents, except that Respondents were not permitted to include the two waived defenses in the Amended Answer. The remaining three legal defenses in Respondents' proposed Amended Answer are: that the requested relief exceeds statutory authorization; that the FTC's administrative litigation process is unconstitutional; and that the Commission's *de novo* review of fact-findings by the ALJ on administrative appeals is unconstitutional and a violation of the Administrative Procedures Act.

In its Motion to Amend the Complaint, Complaint Counsel asserts that even under Respondents' proposed Amended Answer, the parties will litigate the scope of relief.[3] Complaint Counsel argues that the amendments seek to add new factual allegations to support the broad relief that Complaint Counsel seeks.

Complaint Counsel's proposed amendments highlight certain events that took place in other litigation between the FTC and Respondents, in the United States District Court for the District of Maine (the "Maine Litigation"), which culminated in a consent judgment and permanent injunction barring certain product claims by Respondents. *See* Proposed amended complaint ¶ 4 ("The FTC and Respondents HRL and Kramer Duhon signed a Stipulated Final Judgment and Order ('Order') entered by U.S. District Judge Jon D. Levy on January 16, 2018 in *FTC and State of Maine v. Health Research Laboratories, et al.*, 2:17-cv-00467 (Dkt. 15)"). The FTC filed a motion for contempt in that case, contending that Respondents had made unsubstantiated claims regarding certain supplements in violation of the consent judgment. The contempt motion was ultimately denied. The issuance of the Complaint in this case followed.

In summary, the proposed amendments to the Complaint primarily allege that Respondents made the unsubstantiated representations alleged in this case after the entry of the consent judgment and the filing of the FTC's contempt motion in the Maine Litigation. *See, e.g.*, ¶ 8 (amendments in italics) ("HRL began selling Black Garlic Botanicals in November 2016 *and continued to sell it following entry of the Order and after the filing of a contempt motion against Respondents in FTC and State of Maine v. Health Research Laboratories, LLC, et al., 2:17-cv-00467-JDL. HRL continued to sell the product to consumers through at least January 2021 . . .*"); ¶ 10 (amendments in italics) ("HRL has disseminated or has caused to be disseminated advertising and promotional materials for Black Garlic Botanicals in multi-page mailers sent to consumer residences and on company websites. *Following entry of the Order, HRL disseminated or has caused to be disseminated more than 800,000 mailers to consumer residences in the United States and Canada. HRL continued to disseminate these mailers as late*

[3] Complaint Counsel's argument that the parties will litigate the Respondents' defenses of mootness and lack of public interest is now moot, as Respondents have waived those defenses and agreed not to assert these particular affirmative defenses in any future answer.

as August 2019 despite Respondents' awareness that the FTC was investigating whether advertising for Black Garlic Botanicals violated the Order.").

Complaint Counsel argues that: (1) the proposed amendments add only details, not new theories, counts or defendants, and therefore fall reasonably within the scope of the original complaint; (2) the proposed amendments will facilitate a determination on the merits because they provide greater notice; and (3) because Respondents have not served any discovery, the proposed amendments are not unduly prejudicial. Respondents argue that: (1) the proposed amendments impermissibly add a new theory; (2) Complaint Counsel does not explain how the proposed amendments will facilitate a determination on the merits; and (3) changing the material facts, theories, and allegations in a case that is set for trial on a tight schedule is prejudicial.

III.

The operative FTC Rule, 3.15(a)(1), sets forth:

> If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: Provided, however, That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

16 C.F.R. § 3.15(a)(1).

"[A] motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice." 16 C.F.R. § 3.15(a)(1). Thus, the ALJ has authority to order amendments which clarify the allegations of a complaint or which merely add examples of practices already challenged." *In re Champion Home Builders Co.*, 1982 FTC LEXIS 52, at *2-3 (Mar. 9, 1982). "Where a proposed amendment alters the 'underlying theory' of the original complaint, however, the Commission must make the determination whether to amend the complaint because only the Commission is authorized to determine whether there is reason to believe that the law has been violated and whether a proceeding on those amended charges would be in the public interest." *Id.*

Complaint Counsel asserts that the proposed amendments fall "'within the scope of the original complaint,' because [they add] details, not new theories or practices." Motion to Amend at 7-8. Having reviewed the redlined amended complaint attached to the Motion to Amend, the allegations comprising the proposed amendments do not appear to add any new legal theories or allege new or different violations of the FTC Act. Although Complaint Counsel states that it has informed Respondents that Complaint Counsel "will seek to ban Respondents from the supplement industry," Motion to Amend at 7-8 n.3, Complaint Counsel's proposed amendments do not include any proposed changes to the Notice of Contemplated Relief. Based on the foregoing, Complaint Counsel's proposed amendments are not outside the reasonable scope of the Complaint, and are therefore within the authority of the ALJ to allow. 16 C.F.R. § 3.15(a)(1).

To resolve the merits of the Motion to Amend, it must now be determined if the proposed amendments constitute "appropriate amendments" which will facilitate a "determination of a controversy on the merits." 16 C.F.R. § 3.15(a)(1).

Complaint Counsel has failed to show that the proposed amendments should be allowed. With respect to whether the proposed amendments will "facilitate a determination on the merits," Complaint Counsel's only argument is that the amendments will provide "greater notice regarding what Complaint Counsel will prove." Motion to Amend at 7-8. The proposed amendments appear designed to support an argument that Respondents knowingly violated a court order when making the alleged misrepresentations challenged in this case, so as to justify broad fencing in relief. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992) ("In determining whether a broad fencing-in order bears a 'reasonable relationship' to a violation of the [FTC] Act, the Commission considers (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations."). To the extent that Complaint Counsel's amendments are intended for that reason, allowing the proposed amendments risks interjecting into this case the merits of whether Respondents' conduct violated the Maine consent judgment, which would complicate resolution of the case on the merits.

In addition, Respondents have elected not to contest the allegations of fact set forth in the pending Complaint and to admit all of the material allegations of the Complaint to be true, pursuant to Rule 3.12(b)(2). *See* March 10 Order. Such an answer has the effect of dispensing with a hearing and removing proceedings to the Commission for determination of an appropriate final order. 16 C.F.R § 3.12(b)(2) ("Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding."). Complaint Counsel's seeking the proposed amendments, in reaction to Respondents' election under Rule 3.12(b)(2), appears to be more of a strategic effort to counter Respondents' efforts to bring this case to a resolution, than an effort to facilitate a determination of this case on the merits. Furthermore, by interjecting additional factual allegations, which Respondents state they view as "inflammatory," Complaint Counsel's proposed amendments could make it less likely that, in answering the amended Complaint, Respondents will elect not to contest the material allegations under Rule 3.12(b)(2). Under these circumstances, allowing the proposed amended complaint would not serve the purpose of Rule 3.15(a)(1) and would also unnecessarily frustrate the right to obtain expedited proceedings under Rule 3.12(b)(2).[4]

[4] Complaint Counsel contends that the proposed amendments derive from recent discovery; however, the substance of the Maine consent judgment and the FTC's motion for contempt have been known since 2019.

IV.

For all the foregoing reasons, the Motion to Amend the Complaint is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 12, 2021