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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina Khan, Chair
Noah Joshua Phillips
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

RESPONDENTS' RESPONSE TO COMPLAINT COUNSEL'S SECOND MOTION TO
AMEND COMPLAINT AND NOTICE AND REQUEST FOR REMAND
INSTRUCTIONS

Respondents oppose Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions.

I. The requested "Amendment" is a wholesale revision of the case.

As evidenced by the redline version of the Complaint filed by Complaint Counsel, Complaint Counsel is proposing a wholesale revision of the Complaint and a re-start of this case with new pleadings, theories, motions, discovery, and depositions. Most of the factual

PUBLIC

allegations have been significantly revised. Almost all of the requests for relief have been completely revised.

All of the new facts that Respondents seek to include, particularly the facts regarding the Maine Action, could have been asserted in the prior Complaint. Complaint Counsel elected not to include those facts. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 599 (5th Cir. 1981) (stating that absent special circumstances, a party's awareness of facts and failure to include them in pleading might give rise to the inference that the party was engaging in tactical maneuvers). Respondents specifically object to the inclusion of new allegations in paragraphs 5 through 18 regarding the Maine Action. If the alleged conduct is covered by the Consent Judgment in the Maine Action, then the FTC settled those claims and the United States District Court for the District of Maine has the sole jurisdiction to interpret and enforce its Judgment. If the alleged conduct is not covered by the Consent Judgment, then inclusion of facts related to the Consent Judgment is irrelevant. In summary, the Article III Court that signed the Consent Judgment has decided that Respondents were not in contempt. The FTC, who is simply one of the parties to that Consent Judgment, should not be permitted to re-litigate that action through an administrative action where the FTC is the prosecutor, judge, and jury.

Finally, all the requested relief, with the exception of Provisions I and II, are not authorized by Section 5 or 12 of the FTC Act.¹

¹ As Respondents have repeatedly argued, Respondents contend that the only permissible relief under Section 5 of the FTC Act is a cease-and-desist order that prohibits specific acts or practices. *See* 15 U.S.C. §45(a). Considering the limited relief provided by the statute and Respondents' permanent discontinuation of all sales

PUBLIC

II. Remand instructions are improper.

Respondents strongly disagree with any suggestion that Respondents or their counsel has acted improperly in proceedings before the ALJ and believe it is improper for the Commission to influence and nudge the ALJ to make adverse findings against Respondents or their counsel. *See Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013); 5 C.F.R. § 930.201(3) (“An agency employing [ALJs] ... has ... [t]he responsibility to ensure the independence of the [ALJ].”). Further, any argument that Respondents’ counsel should be suspended or barred due to Respondents’ interpretation of its Answer under Rule 3.12(b) is without merit.

Rule 3.12(b) provides “[i]f 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.” 16 C.F.R. § 3.12(b) (emphasis added). On March 30, 2021, Respondents filed an answer that tracked the exact language of Section 3.12(b) and included the required “statement”:

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.

Pursuant to 16 C.F.R. § 3.12(b) as previously interpreted by the FTC (74 Fed. Reg. 1804, 1808 (Jan. 13, 2009), the Complaint and the Answer should have provided a record on

of supplements, Respondents believe that this administrative proceeding is an unnecessary waste of time and resources.

PUBLIC

which the Commissions “shall issue” a decision.² However, on July 30, 2021, the Commission ruled that the Complaint and Answer do not provide the record for an initial decision and that Complaint Counsel may present facts “beyond the Complaint” and authorized Complaint Counsel to file a motion for summary disposition under 16 C.F.R. § 3.24. In other words, *after Respondents had admitted the facts under a Rule that expressly provided that the Complaint and Answer would provide a record under which the Commission “shall issue” a decision, the Commission changed the Rules to expand the case beyond the Answer and the Complaint.*³ In response to the Commission’s July 30, 2021 Order, Complaint Counsel filed numerous affidavits and 27-page brief to expand the case beyond the Complaint and the Answer. Respondents filed a 32-page opposition pursuant to 16 C.F.R. § 3.24(a)(2).

In its opposition to summary disposition, Respondents expressly stated that “[b]ecause Complaint Counsel seeks findings of fact beyond the facts alleged in the Complaint,” Respondents assert several objections. Included among those objections was the objection that, the statement submitted by the Respondents under Rule 3.12(b) in their Amended Answer admitted only the “facts” included in the Complaint’s allegations of fact, not the statements/arguments included in “legal counts” in the Complaint. This objection

² There is only one “record” in any appellate review. *See generally* Fed. R. App. Proc. 10 and 11. The Commission’s opinion that there could be multiple “records” on a review from the ALJ is not consistent with the Federal Rules of Appellate Procedure.

³ The Commission may disagree with this interpretation of the Rule, but Respondents’ interpretation is not without strong legal support. In fact, ALJ Chappell ruled that “the intent of the Rule indicates an intent to limit the record to the pleadings.” *See* Order Granting In Part and Denying in Part Respondents’ Motion to Enter New Scheduling Order or, in the alternative, to Transfer Case to the Commission, dated April 20, 2021.

PUBLIC

was three sentences in a 32-page opposition – an opposition that the Commission expressly authorized Respondents to file.⁴

The Commission obviously disagrees with Respondents' interpretation Rule 3.12(b) and believes that a statement under Rule 3.12(b) admits any and all statements that can be considered “material facts” regardless of where those “facts” are set forth in the FTC's Complaint.⁵ Considering this interpretation, the Commission could have overruled Respondents' objections and interpreted Respondents' Amended Answer under Rule 3.12(b) operated to admit statements/arguments in the “Legal Counts” section of the Complaint. Instead, the Commission found that the objection and Respondents' argument in the opposition operated to withdraw or nullify the Rule 3.12(b) statement in the Amended Answer.

The Commission now accuses Respondents of misrepresenting their positions and intentions and of intentionally delaying the case. Nothing could be further from the truth. In every example cited by the Commission where Respondents argued that there were no material factual issues in dispute, Respondents clearly argued that that the case should be decided based on the record in the Answer and Complaint. Respondents steadfastly attempted to have the ALJ and the Commission decide the case based on the facts in the live Complaint and Answer, but the Commission refused and decided to entertain a

⁴ See Opposition, p. 13-14. To be clear, Respondents never requested the summary disposition procedure. On the contrary, Respondents requested that the Commission decide the case on the Complaint and the Answer.

⁵ Obviously, this issue could have been avoided if the Complaint had been drafted with a clear section of material facts that included facts regarding substantiation and a separate section of legal counts.

PUBLIC

summary disposition motion to allow Complaint Counsel to inject additional facts, relief, and arguments into this case. Respondents never filed an Amended Answer under Rule 3.12(b) or attempted to withdraw their statement under Rule 3.12(b). Instead, in opposing Complaint Counsel's motion for summary disposition, which would have injected additional facts, issues, and requested relief into this case, Respondents exercised their right under Rule 3.24 to assert an objection and argument based on their interpretation of Rule 3.12(b) and the live Complaint.

CONCLUSION

Respondents oppose the requested Amended Complaint. However, if the Commission intends to allow the amendment, the Commission should not include the requested allegations regarding the Maine Action. For the previously stated reasons, Respondents also oppose the requested remand instructions.

PUBLIC

Dated: December 10, 2021

Respectfully submitted,

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PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification to:

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