

Interlocutory Orders, Etc.

IN THE MATTER OF

**HEALTH RESEARCH LABORATORIES, LLC.,
WHOLE BODY SUPPLEMENTS, LLC.,
AND
KRAMER DUHON***Docket No. 9397. Order, July 30, 2021*

Order directing parties to submit all material pertinent to the motion.

**ORDER DIRECTING PARTIES TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND PROVIDING FOR SUMMARY DECISION PROCEEDING**

On April 20, 2021, the Chief Administrative Law Judge (“ALJ”) transferred this matter to the Commission for further proceedings pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2). 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 (Apr. 20, 2021). To determine the appropriate next step, the Commission sought clarification concerning whether any factual issues remained and whether additional discovery and fact-finding was needed. On May 14, 2021, the Commission issued an order directing the parties to submit filings identifying any additional material facts that they intend to assert, listing the decisional issues to which each asserted additional fact relates, stating whether they dispute the facts identified by the other party, and explaining the basis for any such dispute. Order for Further Proceedings Before the Commission (May 14, 2021) (“Order for Further Proceedings”). The Commission also asked Respondents to clarify their position on the items in the Notice of Contemplated Relief attached to the Complaint that initiated this proceeding.

On May 25, 2021, Complaint Counsel submitted their Statement of Additional Material Facts. All of the additional facts citing documents other than the Complaint and its exhibits were identified as relating to the scope of relief. *See* Complaint Counsel’s Statement of Additional Material Facts, Att. A (May 25, 2021). On June 1, 2021, Respondents submitted their response. Respondents’ Response to Complaint Counsel’s Statement of Additional Material Facts (June 1, 2021) (“Respondents’ Response”). In that submission, Respondents advanced a number of objections and arguments in opposition to allowing Complaint Counsel to introduce their additional material facts. Respondents, however, did not specifically dispute any of the individual asserted facts, nor did they identify additional material facts of their own. On June 21, 2021, Complaint Counsel submitted a reply responding to Respondents’ various arguments. Reply to Respondents’ Response to Complaint Counsel’s Statement of Additional Material Facts (June 21, 2021).

Although Respondents have not disputed the veracity of any of Complaint Counsel’s additional material facts, they object to including those facts in the record for a variety of reasons. We address these in turn.

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First, Respondents argue that Complaint Counsel have not provided enough information regarding the decisional issues to which their additional facts relate. Respondents' Response at 10-12. Complaint Counsel, however, indicated that these additional facts are relevant to the scope of relief.¹ In most cases, Complaint Counsel went further by identifying the particular factor used in remedy selection to which the asserted fact relates. *See* Complaint Counsel's Statement of Additional Material Facts, Att. A; *see also Telebrands Corp. v. F.T.C.*, 457 F.3d 354, 358 (4th Cir. 2006) ("The FTC considers three factors in determining whether order coverage bears a reasonable relationship to the violation it is intended to remedy: '(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.'") (quoting *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994)). This is sufficient to comply with the requirements in our Order for Further Proceedings.

Respondents' second argument is that Complaint Counsel's factual assertions are irrelevant and must be excluded because only legal issues remain in the case. Respondents' Response at 12-13. Respondents have admitted all of the Complaint's factual allegations and have "agree[d] and accept[ed]" the remedies in the Notice of Contemplated Relief, subject only to two purely legal objections regarding constitutionality and the FTC's remedial authority under Section 5(b) of the Federal Trade Commission Act. *Id.* at 7-10, 12. Complaint Counsel, however, indicated in briefing before the ALJ that, although it was not expressly requested in the Notice of Contemplated Relief, they also intend to seek to ban Respondents from the supplements industry. *See* Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint at 8 n.3 (Feb. 24, 2021). Respondents have not conceded the appropriateness of an industry ban, so the question of the proper remedy remains a potentially contested issue. Complaint Counsel's additional facts are therefore not irrelevant.

Third, Respondents argue that allowing Complaint Counsel to rely on facts outside the Complaint would be inconsistent with Rule 3.12(b)(2) and the Commission's explanatory statement in the Federal Register and contrary to Respondents' right to expedited proceedings under Rule 3.12(b)(2). Respondents' Response at 13-15. We disagree. Nothing in Rule 3.12(b)(2) prohibits the Commission from considering facts outside the pleadings but established in the record where appropriate, in rendering a final decision. The Rule states that the complaint and answer "provide a record basis on which the Commission shall issue a final decision," but it does not state that these pleadings provide *the sole* record basis for a final decision. Further, the Rule provides that an answer admitting the facts in the complaint waives hearings "as to the facts alleged in the complaint," not all hearings as to all pertinent facts. That the Rule allows the parties to file proposed findings of fact further suggests that the Commission may deal with matters that arise outside the pleadings; otherwise, such proposed findings would simply duplicate the complaint and answer.

¹ In one instance, Complaint Counsel indicated that facts drawn from Complaint Exhibits (referenced and quoted in the Complaint allegations) are related to the materiality of Respondents' claims. Complaint Counsel's Statement of Additional Material Facts, Att. A, Item 3.

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Nor does the Commission's statement in the Federal Register discussing a 2009 amendment to Rule 3.12(b) bar consideration of facts outside the Complaint. The 2009 amendment eliminated the intermediate step of requiring an administrative law judge to issue an initial decision when the answer admits all of the material allegations in the complaint. The Commission reasoned that, since the only issues remaining at that point are legal and policy ones, for expediency it makes sense to bypass the administrative law judge and have the Commission issue a final decision on the basis of the facts alleged in the complaint. *See* Rules of Practice, 74 Fed. Reg. 1804, 1808-09 (Jan. 13, 2009) (interim final rules with request for comment). This explanation, however, was not meant to limit the Commission's authority or to address every circumstance that may arise. Where, as here, issues regarding the choice of remedy remain in the case despite the admissions in the answer, it is appropriate to look to established evidence outside the pleadings to resolve the dispute. As to Respondents' claim that considering outside evidence violates their "right" to expedited proceedings, Rule 3.12(b)(2) in fact expedites the process by avoiding litigation of issues that have been admitted, but gives Respondents no "right" to terminate the proceeding without consideration of evidence relevant to the choice of remedy or to other unresolved issues such as affirmative defenses.

Respondents' final argument is that the Commission's issuance of a decision and order based on facts not in the Complaint would violate Respondents' due process rights under the Fifth Amendment. Respondents' Response at 15-16. Respondents do not object to Commission action based on the Complaint alone, but take issue with the Commission or the ALJ "deciding any additional facts beyond those alleged in the Complaint" because "[t]he FTC's combined role of prosecutor, trial judge, jury, and appellate court in the administrative proceedings" allegedly deprives Respondents of a neutral decision maker. *Id.* at 15. But the Supreme Court rejected this same argument in *Withrow v. Larkin*, 421 U.S. 35 (1975), holding that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation[.]" *Id.* at 58; *see also Gibson v. F.T.C.*, 682 F.2d 554, 560 (5th Cir. 1982) ("The combination of investigative and judicial functions within an agency has been upheld against due 4 process challenges, both in the context of the FTC and other agencies."). Thus, the combined roles of the FTC do not render the Commission's decisions and orders due process violations.²

Consequently, Respondents' objections are not persuasive, and we will not bar Complaint Counsel from presenting facts beyond those alleged in the Complaint. As the Commission explained in *Zale Corp.*, 77 F.T.C. 1635 (1970), "The selection of an appropriate remedy, and the admissibility of evidence with regard thereto, are governed by the unlawful practices actually found to exist, and not by the allegations of the complaint." *Id.* at 1636. The additional material facts identified by Complaint Counsel are appropriate for Commission consideration.

² Respondents also argue that provisions within the FTC Act that make the Commission's findings of fact, if supported by evidence, "conclusive" for purposes of subsequent review by a court of appeals under 15 U.S.C. § 45(c) or that make the Commission's findings of fact "conclusive" in later enforcement actions under 15 U.S.C. § 57b are unconstitutional because the Commissioners and ALJs who decide the facts are not neutral decision makers. Respondents' Response at 15-16. We need not address the constitutionality of provisions about possible future review or enforcement actions because it is not raised by the issues presently before us.

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Indeed, in a similar setting, the Federal Rules of Civil Procedure contemplate and provide for consideration of such facts beyond those in the complaint.³ Specifically, Rule 12(d) states, “If, on a motion under Rule 12(b)(6) or 12(c) [providing for judgment on the pleadings], matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). Thus, where, as here, judgment is sought based on the facts of the complaint and the answer, courts have discretion to consider additional facts by treating the matter as one for summary judgment. We exercise analogous discretion here. Respondents’ Response does not identify a factual dispute with any of the additional facts that Complaint Counsel have identified as material, *see* Respondents’ Response at 10-16, so summary decision procedures are appropriate. The Federal Rules, however, caution that when a motion for judgment on the pleadings is converted to one for summary decision, “[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d). By drawing upon the summary decision procedures of Commission Rule 3.24, 16 C.F.R. § 3.24, we afford the parties that opportunity.

Accordingly,

IT IS HEREBY ORDERED that on August 20, 2021, Complaint Counsel and Respondents shall file with the Commission proposed findings of fact and conclusions of law, along with a proposed order and briefs addressing liability, remedy, and defenses, in the form required by Commission Rule 3.46; if any party chooses to rely on facts outside the allegations of the Complaint, it shall state whether summary decision or partial summary decision is warranted and shall include, either within its proposed findings of fact or in a separate document, a concise statement of the material facts as to which it contends there is no genuine issue for trial, as specified in Commission Rule 3.24(a)(1);

IT IS FURTHER ORDERED that on September 10, 2021, Complaint Counsel and Respondents shall file with the Commission reply findings of fact, conclusions of law, and briefs; also on September 10, 2021 any party against whom summary decision or partial summary decision has been sought may file opposition papers as specified in Commission Rule 3.24(a)(2), either as part of or separate from its reply findings, conclusions, and briefs; and

IT IS FURTHER ORDERED that any party that requests summary decision or partial summary decision may file a reply in support of that request within five days after service of the filings specified in the second ordering paragraph.

By the Commission.

³ The Commission may look to the Federal Rules of Civil Procedure for guidance when its own rules do not mandate a result. *See, e.g., LabMd, Inc.*, 2014-1 Trade Cas. (CCH) ¶ 78784, 2014 WL 253518, at *2 n.3 (F.T.C. Jan. 16, 2014).

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IN THE MATTER OF

ILLUMINA, INC.

AND

GRAIL, INC.

Docket No. 9401. Order, August 12, 2021

Order moving evidentiary hearing to video conferencing and public live web streaming to mitigate COVID-19 spread.

ORDER REGARDING PUBLIC ACCESS TO AND MEANS OF CONDUCTING THE EVIDENTIARY HEARING
IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency¹ associated with the outbreak of the coronavirus disease 2019 (“COVID-19”), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing in this proceeding pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a) and providing that that hearing be conducted electronically. Accordingly,

IT IS HEREBY ORDERED THAT

- (1) the evidentiary hearing in this proceeding will take place virtually via video conferencing; and
- (2) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone or live web streaming, in either instance, only for monitoring purposes.

By the Commission.

¹ Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a public health emergency exists because of COVID-19; and on March 13, 2020, former President Trump issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* <https://www.whitehouse.gov/briefingsstatements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/> (Mar. 13, 2020). A continuation of this public health emergency was issued by President Joseph R. Biden on February 24, 2021. Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, *available at* <https://www.whitehouse.gov/briefing-room/presidentialactions/2021/02/24/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/> (Feb. 24, 2021).