

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

**HEALTH RESEARCH LABORATORIES, LLC,
WHOLE BODY SUPPLEMENTS, LLC,
AND
KRAMER DUHON**

Docket No. 9397. Order, January 18, 2022

Order granting Complaint Counsel's requests to amend the Complaint and set a new hearing date and partially grant their other requests.

**ORDER GRANTING IN PART COMPLAINT COUNSEL'S SECOND MOTION TO AMEND COMPLAINT AND
NOTICE AND REQUEST FOR REMAND INSTRUCTIONS**

On December 1, 2021, consistent with our Order Denying Final Decision Under Rule 3.12(b)(2) and Denying Summary Decision at 6-7 (Nov. 19, 2021) ("Order Denying Final Decision"), Complaint Counsel moved to amend the Complaint. *See* Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions (Dec. 1, 2021) ("Motion"). Complaint Counsel also asked the Commission to set a new hearing date and provide instructions on remand concerning scheduling, discovery, and additional requirements for Respondents' answer. Respondents object to the proposed amendments and remand instructions. *See* Respondents' Response to Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions (Dec. 10, 2021) ("Response"). We grant Complaint Counsel's requests to amend the Complaint and set a new hearing date and partially grant their other requests.

I. MOTION TO AMEND THE COMPLAINT

Complaint Counsel state that their proposed amendments generally fall into two categories, with some overlap. First, the amendments add support for the requested fencing-in relief, including by adding allegations concerning a previous action brought by the FTC and the State of Maine against Respondents in the District of Maine and a related stipulated order.¹ Other allegations

¹ Per the proposed Amended Complaint, the complaint in the Maine action charged Health Research Laboratories and Kramer Duhon with violating the Federal Trade Commission Act ("FTC Act") by disseminating deceptive ads with false and unsubstantiated health and disease-related claims. *See* Motion Attachment 1 (Amended Complaint) ¶ 5 (citing Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Health Research Labs., LLC*, No. 2:17-CV-00467 (D. Me. Nov. 30, 2017)). The parties resolved that action with a Stipulated Final Judgment and Order ("Stipulated Order") that, among other things, prohibited Respondents from making representations about health benefits, safety, performance, or efficacy of a food, drug, or dietary supplement unless those representations were non-misleading and substantiated by competent and reliable scientific evidence. *See* Motion Attachment 1 (Amended

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falling into this category include those concerning the breadth and timing of ad dissemination as well as communications between Respondents and their consultants regarding the ad claims. Motion at 2-3. Second, the amendments clarify the factual and legal allegations in the Complaint and provide greater notice of the claims against Respondents, including by specifying the relevant time period of the challenged conduct, explicitly alleging wide dissemination and materiality, adding detail regarding how Respondents' substantiation was deficient, adjusting language to emphasize that Respondents' claims are challenged under both Sections 5(a) and 12 of the FTC Act, and replacing the Notice of Contemplated Relief with a proposed Order. Motion at 2-3. Respondents object to the amendments, particularly the inclusion of facts regarding the Maine action, and the requested relief. Response at 2.

"[T]he Commission may freely grant leave to amend complaints when the public interest so requires." *Champion Home Builders Co.*, 99 F.T.C. 397, 399 (1982) (citing *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 50 (1st Cir. 1964)). We find that this standard is met here, as the amendments buttress and provide greater notice of the allegations and the requested relief. Although Respondents now oppose the inclusion of facts regarding the Maine litigation, they previously objected to Complaint Counsel's reliance on these facts partly *because* they were not included in the original Complaint and Respondents "did not receive fair notice" of them. Respondents' Opposition to Summary Disposition and Reply Findings of Fact, Conclusions of Law, and Brief 14-15 (Sept. 10, 2021). Respondents also asserted that the original Complaint did not provide sufficient notice or clarity regarding the relief sought. *Id.* at 21, 23, 26-27. The amendments would address these purported deficiencies. Thus, the public interest would be served by amending the Complaint to ensure that additional notice is provided and to avoid future dispute about the sufficiency of the Complaint. See *Sunshine Biscuits, Inc.*, 52 F.T.C. 110, 116 (1955) (upholding amendment that clarified the complaint "to remove any possibility of doubt or misunderstanding on respondent's part as to the charge it must meet").

Respondents take issue with the breadth of the amendments, describing them as a "wholesale revision of the case." See Response at 1-2. The amendments, however, do not change the theory of the case but only clarify and buttress existing charges and add specificity to and support for Complaint Counsel's requested relief.²

Complaint) ¶¶ 8-9. The court subsequently denied a contempt motion alleging that Respondents had disseminated mailers that violated one section of the Stipulated Order. *Id.* ¶¶ 15-16.

2 Among the proposed amendments, Complaint Counsel seek to modify the allegations that Respondents' representations "were not substantiated" at the time they were made to say that these representations "are false or misleading, or were not substantiated" when made. Motion Attachment 1 (proposed Amended Complaint) ¶¶ 46, 48, 50, 52). These amendments clarify the linkage between the Complaint's individual counts and its concluding paragraph, which alleges violation of both Section 5(a) of the FTC Act (prohibiting unfair or deceptive acts or practices) and Section 12 of the FTC Act (prohibiting false advertisements). They are not substantive changes to the causes of action or the theory of the case. As we have explained, claims that are not substantiated at the time they are disseminated are by their nature misleading. See Order Denying Final Decision at 6-7 (citing *ECM BioFilms, Inc.*, 160 F.T.C. 652, 709 (2015), *aff'd sub nom.*, *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599 (6th Cir. 2017); *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984)).

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In any case, Respondents have not made any argument that the breadth of the amendments will deprive them of a fair hearing, undermine their ability to present a defense, or otherwise cause undue prejudice. Indeed, the case is in the pre-trial stage and discovery is ongoing, so Respondents will have ample time to respond to the new allegations. *See Champion Home Builders*, 99 F.T.C. at 399 (“[I]t is clear that amending the complaint at this relatively early stage of the proceeding, where discovery is still ongoing and trial some months distant, would not prejudice respondent. Respondent would have adequate time to respond fully to the charges in the amended complaint.”) (citing *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961)). These circumstances afford no basis for rejecting the proposed amendments. *See Exquisite Form Brassiere*, 301 F.2d at 501 (upholding amendment after complaint counsel had completed their case-in-chief but ample time remained for answer and preparation of a defense); *James Carpets, Inc.*, 81 F.T.C. 1043, 1046 (1972) (“It does not appear to us that the amending of the complaint at [the pre-trial] stage of the proceeding will deprive respondents of the opportunity to answer the charges therein or to present a defense thereto.”).

Respondents also argue that allegations regarding the Maine action and the Stipulated Order should be excluded because (1) if the present allegations involve conduct covered by the Stipulated Order, the claims have been decided and rejected by the District Court and cannot be relitigated here and (2) if the present allegations involve conduct not covered by the Stipulated Order, the Maine litigation is irrelevant to this proceeding. Response at 2. Complaint Counsel, however, explain that allegations regarding the Maine litigation are relevant to “the deliberateness” of Respondents’ alleged conduct and therefore have been included to support the fencing-in relief requested. Motion at 2-3. *See, e.g., Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994) (explaining that the seriousness and deliberateness of the violation are among the factors to be considered in determining appropriate relief); *see also In re Traffic Jam Events*, 2021 WL 5124183, at *22 (FTC Oct. 25, 2021) (the “failure of prior enforcement efforts in stopping unlawful activity” is a relevant consideration in determining how broad a remedy to impose) (quoting *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000)) (ellipsis omitted), *petition for review filed*, No. 21-60947 (5th Cir. Dec. 21, 2021). For example, facts regarding the Maine litigation could have relevance to Respondents’ knowledge of substantiation requirements. Thus, the allegations regarding the Maine litigation may prove relevant to this proceeding without requiring relitigation of issues already decided.

Finally, Respondents argue that the relief requested in the proposed Order is not authorized by the FTC Act. Response at 2. Arguments to that effect can be addressed at a later point, if any violations are established and the Commission needs to consider the appropriate relief. Accordingly, we grant Complaint Counsel’s request to amend the Complaint.

II. REQUEST TO REQUIRE RESPONDENTS TO ANSWER EACH ALLEGATION

As discussed extensively in the Order Denying Final Decision, Respondents have sidetracked this proceeding by shifting their position regarding their Amended Answer, first admitting all material allegations pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2), but then asserting that certain critical allegations were not in fact admitted because they were part of the “counts.” In light of this, Complaint Counsel have asked us to require Respondents to

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provide in their Answer a specific response to each individual factual allegation in the Amended Complaint, even if they decide to again invoke Rule 3.12(b)(2). Motion at 6.

Complaint Counsel have also asked us to amend the third paragraph of the Notice to reflect this requirement. We agree that, given Respondents' history, greater clarity will be needed regarding which paragraphs or allegations are actually admitted and which are denied should Respondents attempt again to invoke Rule 3.12(b)(2). Accordingly, if Respondents elect not to contest the allegations of fact set forth in the Amended Complaint, the Answer should state that Respondents admit all of the material facts to be true, as per Rule 3.12(b)(2), and must also provide a specific response to any portion of the Complaint that is not admitted. The first sentence of the third paragraph of the Notice shall be amended accordingly.

III. REQUEST TO EXTEND THE HEARING DATE

Complaint Counsel also ask us to set an evidentiary hearing date six months from the date of remand and to amend the Notice to reflect that new date. The hearing was originally set for July 13, 2021, a date that has come and gone. *See* Complaint at 12. Commission Rule 3.41(b) requires hearings to proceed "with all reasonable expedition." 16 C.F.R. § 3.41(b). Six months strikes an appropriate balance between the competing needs of providing a prompt resolution and ensuring that the parties have sufficient time to conduct discovery and prepare their case. We therefore find good cause to set a new hearing date for July 19, 2022, which is approximately six months from the date of remand. *See id.*

IV. REQUESTS FOR INSTRUCTION ON REMAND REGARDING DISCOVERY AND SCHEDULING

In our Order Denying Final Decision, we stated that, in light of Respondents' litigation conduct, the Chief Administrative Law Judge ("ALJ") should consider on remand whether Respondents' counsel should be suspended or barred from participating in this proceeding under Commission Rule 3.42(d), 16 C.F.R. § 3.42(d), for dilatory and obstructionist conduct. Order Denying Final Decision at 8-9. Complaint Counsel have requested that we instruct the ALJ to do this "promptly," in order to avoid a later procedural delay. Motion at 6. We agree that the efficiency of this proceeding on remand would be enhanced by considering this issue promptly and leave it to the ALJ to set an appropriate briefing schedule.³

Complaint Counsel also ask us to require that a new scheduling order give the parties at least three months after remand to conduct additional fact discovery and an additional six weeks to produce expert reports and conduct expert depositions. Complaint Counsel also request that the parties be permitted to serve up to 50 additional document requests, 25 additional interrogatories, and 50 additional requests for admission (without any limitation on the number of requests for admission for authentication and admissibility of exhibits), to conduct fact witness and expert

³ Respondents object to the characterization of their conduct as improper and provide a lengthy defense of their shifting positions. Respondents are free to make these arguments to the ALJ when he considers whether suspension of counsel is appropriate under Rule 3.42(d).

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depositions, and to complete expert reports. Motion at 6-7. We leave it to the ALJ to determine the timing and scope of additional discovery as appropriate and permitted by Commission regulations.⁴ We note, however, that one of the reasons cited by Complaint Counsel for their request for additional discovery is the need to change paragraph references and make other adjustments based on the revisions in the Amended Complaint. Motion at 5. To the extent a discovery request is substantively identical to one already served and is modified only to reflect the Amended Complaint's paragraph numbers or slight wording changes, this would not constitute a new request.

Accordingly,

IT IS HEREBY ORDERED THAT Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions is **GRANTED IN PART**.

IT IS FURTHER ORDERED THAT the evidentiary hearing in this proceeding shall commence at 10:00 am on July 19, 2022.

IT IS FURTHER ORDERED THAT within 5 days of this Order, Complaint Counsel shall file an Amended Complaint as submitted as Attachment 1 to the Motion, except the Notice shall be modified to include the new hearing date and instructions, as specified in this opinion, regarding the required contents of an answer should Respondents elect not to contest the allegations of fact set forth in the Amended Complaint.

IT IS FURTHER ORDERED THAT Respondents shall file their Answer to the Amended Complaint within 14 days of service, pursuant to Commission Rule 3.12(a), 16 C.F.R.

§ 3.12(a). If Respondents elect not to contest the allegations of fact set forth in the Amended Complaint, pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2), the Answer must state that Respondents admit all the material facts to be true and must also provide a specific response to any portion of the Complaint that is not admitted. And

IT IS FURTHER ORDERED THAT, this proceeding is hereby remanded to the ALJ for discovery, evidentiary hearing, and initial decision, and for consideration of whether Respondents' counsel should be suspended or barred from future participation in this proceeding under Commission Rule 3.42(d), 16 C.F.R. § 3.42(d), for dilatory or obstructionist conduct.

By the Commission.

⁴ Commission Rule 3.35, 16 C.F.R. § 3.35, limits the number of interrogatories that may be served to 25.

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IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, January 19, 2022

Order granting the ALJ's request to further extend the time period for filing the Initial Decision to February 17, 2022.

ORDER GRANTING EXTENSION OF TIME

This proceeding involves two theories of liability: (1) an allegedly anticompetitive agreement between Altria Group, Inc. ("Altria") and JUUL Labs, Inc. ("JLI") (collectively, "Respondents"), alleged by the Commission's Complaint to violate Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act; and (2) Altria's acquisition of an ownership stake in JLI, alleged by the Complaint to violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Respondents deny liability under either theory. Chief Administrative Law Judge D. Michael Chappell conducted the trial of this matter over several weeks in June 2021.

The FTC's Rule of Practice 3.51(a) provides that "[t]he Administrative Law Judge ['ALJ'] shall file an initial decision within 70 days after the filing of the last filed initial or replyproposed findings of fact, conclusions of law and order" and that the ALJ may extend this time period by up to 30 days for good cause. 16 C.F.R. § 3.51(a). Pursuant to FTC Rule 3.51(a), Judge Chappell issued an order on December 17, 2021, extending the time for filing the Initial Decision from the initial presumptive deadline, December 22, 2021, to January 21, 2022 ("Order"). Judge Chappell now requests that we further extend the time period to February 17, 2022.

FTC Rule 3.51(a) provides that the Commission may further extend the time period for good cause. We find that good cause exists in this case. The record of the multi-week trial is extensive, involving numerous witnesses and complex issues under two major theories of liability. Over 2,480 exhibits were admitted into evidence. Order at 1. Thirty-seven witnesses testified, either live or by deposition, resulting in over 3,400 pages of trial transcript from witnesses' live testimony. *Id.* The parties submitted 3,900 proposed findings of fact. *Id.* The parties' proposed findings of fact and conclusions of law, replies to findings of fact and conclusions of law, post-trial briefs, and reply briefs total over 4,000 pages. *Id.* at 1-2. As Judge Chappell indicates, these substantial materials must be thoroughly reviewed to give proper consideration to the issues raised in the proceeding. Under these circumstances the extension of time requested by Judge Chappell is appropriate.