

**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  
COMPEL RESPONDENTS TO SUPPLEMENT INTERROGATORY RESPONSES**

Pursuant to Rule 3.38(a), Complaint Counsel respectfully requests the Court order Respondents to promptly supplement their answers to the First Set of Interrogatories served on December 22, 2020. *See* Averill Decl., CCX-B1 & B2. Respondents produced their Objections and Answers on January 21, 2020 (“Answers”) and subsequently refused to supplement on the ground they preferred to discontinue the administrative case without participating in any additional fact discovery.<sup>1</sup> Specifically, on February 1, Respondents’ counsel advanced the position for the first time that further discovery was irrelevant because they preferred to terminate the administrative case by settlement, withdrawing their answer, amending their answer to admit allegations in the Complaint, or declining to participate in discovery and

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<sup>1</sup> Respondents’ efforts to avoid participating in discovery have evolved over the last month starting with deficient responses to Complaint Counsel’s First Set of Interrogatories and First Requests for Production, followed by their Motion for Acceptance of Contested Stipulated Cease-and-Desist Order. When that Motion was unsuccessful, the parties engaged in an unsuccessful settlement discussion and then Respondents decided to file their Motion for Leave to Amend their Answer on February 12. Complaint Counsel intends to oppose that motion as facially inadequate.

incurring sanctions from the Court that would terminate the proceeding. Averill Decl., ¶¶ 8-9.<sup>2</sup> It is, of course, completely inappropriate for Respondents to attempt to grant themselves a *de facto* stay of discovery based on assumptions about how this Court will resolve their pending Motion to Amend.<sup>3</sup>

## **I. LEGAL STANDARD**

Rule 3.31(c)(1) provides that “[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” When a party fails to comply with its discovery obligations, a motion to compel under Rule 3.38(a) is appropriate. The Court will limit discovery only “if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive or if the burden and expense of the proposed discovery outweigh its likely benefit.” *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at \*2 (Jan. 9, 2009). Importantly, “[p]arties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.”<sup>4</sup> For the reasons explained below, Respondents cannot satisfy that burden here.

## **II. ARGUMENT**

### **A. Respondents’ Interrogatory Responses are Grossly Inadequate.**

Respondents largely refuse to provide any of the relevant information Complaint Counsel requested in the Interrogatories. Interrogatory 1 asks Respondents to identify all documents they

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<sup>2</sup> Respondents’ new objection was not included in their Answers and therefore was arguably waived. *See, e.g., In re Daniel Chapter One*, No. 9329, 2009 WL 569717, at \*2 (Feb. 11, 2009); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (“It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection.”).

<sup>3</sup> Respondents could certainly have made a decision before filing their Answer to admit all allegations in the Complaint. They also could have filed their Motion to Amend earlier or applied to this Court for a stay of their discovery obligations. They did none of these things, but instead dragged their feet in providing documents and information to Complaint Counsel. In addition to their professed cost concerns, Respondents also appear motivated to do everything possible to avoid producing documents or testimony that will provide a full picture of their decision-making related to the challenged ads.

<sup>4</sup> *See In re Matter of LabMD, Inc.*, No. 9357, 2014 WL33621, at \*1 (quoting *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at \*2 (Jan. 9, 2009)).

rely on to substantiate advertising claims challenged in the Complaint. *See* Averill Decl., CCX-B1. Respondents objected on the grounds this interrogatory improperly requires them “to marshal all of their evidence” and is overly burdensome. Averill Decl., CCX-B2. However, these objections plainly fail because Respondents were required to have substantiation for their advertising claims at the time they disseminated the ads.

In their objections to Interrogatory 1, Respondents also erroneously contend “Complaint Counsel can answer this interrogatory by reviewing and compiling the information from the documents produced.” *Id.*<sup>5</sup> In fact, Complaint Counsel cannot independently identify the documents Respondents rely on to substantiate their claims. Given the questionable quality of the evidence presented in many of the produced documents, it is not apparent which documents Respondents will rely on to substantiate the challenged ad claims. Moreover, Respondents’ document production strategy when combined with their refusal to answer Interrogatory 1 greatly hampers Complaint Counsel’s ability to identify relevant substantiation materials. In their first production, Respondents generally produced three or more copies of an assortment of different scientific articles, random website content, and excerpts from publications mentioning ingredients found in the four products at issue in this case. *See* Averill Decl., ¶ 6. It is unduly burdensome and costly to require Complaint Counsel’s experts to review multiple copies of the same purported substantiation evidence rather than a clearly defined list of substantiation materials. Respondents’ refusal to answer this interrogatory greatly prejudices Complaint Counsel’s ability to have their experts efficiently prepare reports due on May 6, 2021 and impedes preparation for the hearing. At a minimum, Respondents should be required to provide an answer that clearly identifies the documents they will rely on to support the challenged

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<sup>5</sup> When “the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served,” Rule 3.35(b) provides that a party may answer an interrogatory by specifying “records from which the answer is may be derived or ascertained.” Any such “specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.” 16 C.F.R. § 3.35(b). With respect to this interrogatory, the burden is clearly not the same between the parties, as Complaint Counsel cannot predict which documents Respondents rely on as substantiation for the challenged claims by simply reviewing Respondents’ document production. Moreover, Respondents did not specifically identify any documents in their answer to Interrogatory 1.

advertising claims for specific products by Bates number and without any duplicative references to the same substantiation evidence Respondents have produced multiple times under different Bates numbers.

Interrogatory 2 requests information about the exact type and dosages of ingredients Respondents expected each product to contain, and what the products actually contained. Averill Decl., CCX-B1. Respondents did not object to this interrogatory, but only provided a partial answer stating they “expected the type and dosages of the ingredients ... would be the same as the exact types and dosages referenced in the Complaint.” Averill Decl., CCX-B2. Their answer is insufficient and should, at a minimum, contain more detailed information about the exact type of garlic ingredients contained in the challenged products. This interrogatory was posed in part because previous conversations with Respondents’ counsel suggest that Respondents may be uncertain about the exact type of garlic included in The Ultimate Heart Formula (*i.e.*, garlic powder, aged garlic extract, black garlic, or something else), and also because Respondents’ Answer contains a partial denial of paragraph 6 of the Complaint related to ingredients in Black Garlic Botanicals. This interrogatory is not burdensome and seeks information that is important in the assessment of Respondents’ proffered substantiation. If Respondents do not know precisely what type of garlic (or any other ingredient) was included in any of the relevant products, then they should say so in their Answer to Interrogatory 2.

Interrogatory 3 requests dissemination information related to the challenged ads. In their response, Respondents refer to a “Basic Dissemination Data spreadsheet” without clearly identifying it by Bates number and when they have not produced a spreadsheet with such a title. This is plainly insufficient. *See* Rule 3.35(c). Moreover, a spreadsheet included in their initial document production (HRLAC\_01261) does not clearly link the quantities and dates of dissemination to specific advertisements (*i.e.*, Complaint Exs. A-D). *See* Averill Decl., CCX-B3. This spreadsheet also fails to provide all information requested in the interrogatory such as how and where each ad was disseminated as well as the identity of individuals or entities

disseminating the ads. *Id.* The requested information is highly relevant to issues of liability and appropriate relief in this case.

Interrogatories 4, 5, 7, 8, 10, 11, 13, and 14 require Respondents to provide an answer with “sufficient detail” to explain the bases for denials in their Answer related to ad interpretation and dissemination as well as their denials of allegations that the challenged representations were not substantiated. *See* Averill Decl., CCX-B1 (Definition K). Interrogatories 6, 9, 12, and 15 require Respondents to explain the basis for any contentions that specific ad claims identified in the Complaint were substantiated. Respondents objected to providing complete responses on the grounds of burden and overbreadth and incorrectly claim answers to Interrogatories 5, 6, 8, 9, 11, 12, 14, and 15 can somehow be derived from unspecified materials provided to the FTC. Contention interrogatories are permitted by Rule 3.35(b)(2), and these are not overbroad because they do not require Respondents to specify *all* facts supporting their positions but instead request explanations “providing a sufficiently comprehensive response to avoid surprise[.]” Averill Decl., CCX-B1 (Definition K). Although Rule 3.35(b)(2) provides that contention interrogatories normally may be postponed until the end of discovery, it is appropriate to require earlier answers when Respondents do not need additional discovery to provide the requested answers. *See In re Matter of Impax Labs*, No. 9373, 2017 WL 2570856, at \*3 (June 12, 2017). Here, the Complaint clearly identifies the challenged representations (Complaint, ¶¶ 7, 9, 11, 13), and Respondents were required to have substantiation for those representations at the time they were made. No additional discovery is necessary, and Respondents should be required to provide responsive answers now.

Interrogatory 16 requests information about the bioavailability of the challenged products. Respondents failed to state any objection and answered with a single non-responsive sentence. Interrogatory 18 asks Respondents to state the basis of their contention that Kramer Duhon is not responsible for the conduct of other Respondents. Respondents objected on the ground that the interrogatory called for a legal conclusion and then opaquely state: “from a

factual perspective, Respondents contend that the alleged conduct of Kramer Duhon is not a legal basis for the FTC to seek the relief that it seeks against him.” Averill Decl., CCX-B2. Respondents are improperly refusing to provide either any facts or a cogent legal explanation for their contention that Kramer Duhon is not liable for the allegedly deceptive advertising. They should be required to provide responsive answers to both interrogatories.

**B. Complaint Counsel’s Efforts to Meet and Confer Have Been Unsuccessful.**

On February 1, Complaint Counsel insisted on proceeding with a conference postponed by Respondents to discuss deficiencies in Respondents’ Answers. Complaint Counsel spent approximately 75 minutes trying to meet and confer about specific issues related to the Answers and their Objections and Responses to Complaint Counsel’s First Requests for Production. *See* Averill Decl., ¶ 9. Unfortunately, Respondents’ counsel resisted substantively participating in that conversation and stated Respondents would not invest additional resources in completing or supplementing their discovery responses. *Id.*

**C. The Requested Discovery is Still Necessary Even if the Court Grants Respondents’ Motion to Amend Answer.**

On February 12, Respondents filed a Motion to Amend their Answer pursuant to Rule 3.12(b)(2) (“Motion”). Respondents’ proposed amended answer vaguely states they admit the truth of “all of the material allegations” in the complaint. However, it is completely unclear which paragraphs of the Complaint Respondents intend to admit. For example, Respondents have not clearly stated they admit Paragraphs 14-21 of the Complaint which allege Respondents made certain types of disease claims in connection with advertising and promoting the four products and that those representations were not substantiated. As a result, even if the Court granted Respondents’ Motion and approved the filing of the proposed amended answer, the parties will need to engage in discovery related to ad interpretation, substantiation, and materiality of the claims. Further, even if the Respondents are permitted to file an amended answer, the question of what provisions are appropriate in a cease and desist order must be

resolved by the Court and the Commission. Discovery related to substantiation for the challenged claims, dissemination, as well as Kramer Duhon's knowledge and intent would all be relevant to the proper scope of relief.

### **III. CONCLUSION**

Respondents' failure to answer the Interrogatories are highly prejudicial to Complaint Counsel. The deadline to issue document requests, interrogatories, and subpoenas *duces tecum* is rapidly approaching on March 25, 2021, and it is difficult to determine whether additional discovery is necessary when Respondents' Answers are so deficient. It is also difficult to efficiently prepare expert reports due May 6 and to prepare for the hearing without responsive Answers from Respondents identifying the materials they will rely on to substantiate the challenged advertising claims. For all of the above reasons, Complaint Counsel respectfully asks the Court order Respondents to promptly supplement their Answers to Interrogatories 1-16 and 18.

Respectfully submitted,

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

*Complaint Counsel*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Paragraph 4 of the Court’s December 14, 2020 Scheduling Order, the undersigned counsel represents that she and Jonathan Cohen attempted to confer with Respondents’ counsel, Joel Reese, in a good faith effort to resolve by agreement the issues raised in this motion to compel, but he generally refused to engage in a substantive conversation about specific issues and stated that Respondents would not supplement their discovery responses. We were therefore unable to resolve any of the issues raised in this motion by agreement. This conference took place by telephone starting at 4:30 PM (Eastern) on February 1, 2021 and lasted approximately 75 minutes.

s/ Elizabeth Averill  
Elizabeth Averill  
Federal Trade Commission  
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**CERTIFICATE OF SERVICE**

I certify that I served a copy of Complaint Counsel's Motion To Compel Respondents to Supplement Interrogatory Responses to counsel for the Respondents on February 19, 2021 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  
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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  
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

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**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  
COMPEL RESPONDENTS TO SUPPLEMENT INTERROGATORY RESPONSES**

This matter having come before the Chief Administrative Law Judge on February 19, 2021, upon Complaint Counsel's Motion to Compel Respondents to Supplement Interrogatory Responses, it is hereby **ORDERED** that:

1. The Motion is **GRANTED**; and
2. Within 10 business days of this Order, Respondents shall supplement their answers to Interrogatories 1-16 and 18 to provide full and complete answers to Complaint Counsel.

ORDERED:

Date:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

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**DECLARATION OF ELIZABETH J. AVERILL**

I, Elizabeth J. Averill, hereby state that I have personal knowledge of the facts set forth below. I submit this declaration in support of Complaint Counsel's Motion to Compel Respondents to Supplement Interrogatory Responses. 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 as an attorney representing the Federal Trade Commission in *FTC and State of Maine v. Health Research Laboratories, LLC, et al.*, Case No. 2:17-cv-00467-JDL (D. Me.).

2. On December 22, 2020, I served Complaint Counsel's First Set of Interrogatories by email to Respondents' counsel, Joel Reese and Joshua Russ. A true and correct copy of the Interrogatories is attached as CCX-B1.

3. On January 21, 2021, I received Respondents' Objections and Answers to Complaint Counsel's First Set of Interrogatories ("Answers"). A true and correct copy of the Answers is attached as CCX-B2.

4. A vendor working with Respondents' counsel produced documents on January 25, 2021 ("January 25 Production"). This is the only document production Complaint Counsel has received in response to Complaint Counsel's First Requests for Production ("RFPs"). The production included 492 documents.

5. I personally reviewed all of the documents in the January 25 Production. During my review, I noticed that the majority of the documents had previously been produced to the FTC as part of the contempt investigation related to *FTC and State of Maine v. Health Research Laboratories, LLC, et al.*, Case No. 2:17-cv-00467-JDL (D. Me.).

6. Furthermore, the January 25 Production includes multiple copies of the same articles, random website content, and excerpted sections of alternative health books related to individual ingredients in the four challenged products. For example, six copies of an article entitled "Aged Garlic Extract Reduces Low Attenuation Plaque in Coronary Arteries of Patients with Metabolic Syndrome in a Prospective Randomized Double-Blind Study" authored by Matsumoto et al. were produced with Bates numbers of HRLAC\_00186 to 00191; HRLAC\_00720 to 00725; HRLAC\_01444 to 01449; HRLAC\_01991 to 01996; HRLAC\_02566 to 02571; and HRLAC\_03113 to 03118. Six copies of an article entitled "Garlic Shows Promise for Improving Some Cardiovascular Risk Factors" authored by Ackermann et al. were produced

with Bates numbers of HRLAC\_00672 to 00683; HRLAC\_00684 to 00695; HRLAC\_01943 to 001954; HRLAC\_01955 to 01966; HRLAC\_03065 to 03076; and HRLAC\_03077 to 03088.

Three copies of an abstract related to an article entitled “Inhibiting progression of coronary calcification using Aged Garlic Extract in patients receiving statin therapy: a preliminary study”

authored by Budoff et al. were produced with Bates numbers of HRLAC\_00016 to 00017;

HRLAC\_01262 to 01263; and HRLAC\_02384 to 02385. There are three copies of a website

article entitled “14 Biggest Myths About Type 2 Diabetes” apparently downloaded from

<http://community.ihealthlabs.com> produced with Bates numbers HRLAC\_01426 to 01431;

HRLAC\_00168 to 00173; and HRLAC\_02548 to 02553. Respondents produced three copies of

an article entitled “Applicable People fermented black garlic; green natural org” apparently

downloaded from <http://www.iblackgarlic.com> and produced with Bates numbers

HRLAC\_01305 to 01306; HRLAC\_00059 to 00060; and HRLAC\_02427 to 02428.

Respondents produced three copies of an excerpt entitled “Chelation Therapy” from a book

entitled “Alternative Medicine: the definitive guide” with Bates numbers HRLAC\_01832 to

01842; HRLAC\_00561 to 00571; and HRLAC\_02954 to 02964. This is just a very small sample

of the extensive amount of duplicative materials in the January 25 Production.

7. On January 27, 2021, I sent an email to Respondents’ counsel asking to schedule a time to meet and confer about issues related to Respondents’ Initial Disclosures, their Objections and Responses to the RFPs (“Responses”), as well as Respondents’ Answers.

Respondents’ counsel advised that the earliest date he was available for such a conference was February 1, 2021. A true and correct copy of an email string between counsel related to scheduling a time to meet and confer is attached as CCX-A7.

8. On February 1, shortly before the scheduled time for counsel to meet and confer about discovery issues, Respondents' counsel, Joel Reese, sent an email indicating Respondents would agree to all relief requested in the Notice of Contemplated Relief without any conditions. Mr. Reese further indicated he believed, as a result, the scheduled meet and confer was not necessary. I responded by advising him it was important for us to meet and confer as scheduled to try to resolve issues related to Respondents' Initial Disclosures, their Objections and Responses to the RFPs ("Responses"), and the Answers. A true and correct copy of an email string reflecting this exchange between counsel is attached as CCX-A8.

9. On February 1, 2021 starting at 4:30 PM (Eastern), Jonathan Cohen and I spoke by telephone with Respondents' counsel, Joel Reese, in an effort to discuss and resolve the issues that are raised in the Motion to Compel Respondents to Produce Documents and Motion to Compel Respondents to Supplement Interrogatory Responses. A FTC paralegal, Celia Garrett, also listened to the call. I repeatedly tried to focus the conversation on specific questions and issues related to document production, the Responses, and the Answers in an effort to determine if issues could be narrowed by agreement. However, Mr. Reese was generally unwilling to engage in a detailed discussion about specific discovery issues and instead insisted that all of those issues were irrelevant because Respondents would not participate further in discovery in the administrative action because of cost. During the conference, Mr. Reese stated Respondents were willing to admit to all allegations in the Complaint. He stated that Respondents intended to terminate the administrative proceeding either by settlement, withdrawing their answer, filing a motion to amend their answer to admit allegations in the Complaint, or by declining to participate further in discovery and eventually incurring what he referred to as "death penalty" sanctions from the Court that would terminate the administrative proceeding. During the

conference, Mr. Reese also stated Respondents would not review or produce additional documents, produce a privilege log, or otherwise supplement their discovery responses. I did not note the exact time when the conference concluded, but estimate that we spoke for a total of approximately 75 minutes.

10. Following the conference on February 1, counsel had a discussion related to settlement that was ultimately not successful.

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

Executed on: February 19, 2021

/s/ Elizabeth J. Averill

Alexandria, VA

**CCX-B1**



**UNITED STATES OF AMERICA  
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**DOCKET NO. 9397**

**FIRST SET OF INTERROGATORIES TO RESPONDENTS**

Pursuant to the Rules of Practice, 16 C.F.R. § 3.35, Complaint Counsel asks Respondents to answer these Interrogatories.

**INTERROGATORIES**

1. Specify every Document that constitutes Substantiation Material including its Bates number and the date You first possessed the Document.
2. State the exact type and dosages of the ingredients that You expected each Identified Product would contain when consumed and, if different, the exact type and dosages of the ingredients each Identified Product actually contained when shipped to consumers.
3. Provide Basic Dissemination Data for each unique Advertisement for each Identified Product disseminated on or after January 17, 2018.
4. If You deny paragraph 14 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

5. If You deny paragraph 15 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

6. If You contend that some or all of the claims in paragraph 7 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

7. If You deny paragraph 16 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

8. If You deny paragraph 17 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

9. If You contend that some or all of the claims in paragraph 9 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

10. If You deny paragraph 18 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

11. If You deny paragraph 19 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

12. If You contend that some or all of the claims in paragraph 11 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

13. If You deny paragraph 20 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

14. If You deny paragraph 21 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

15. If You contend that some or all of the claims in paragraph 13 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

16. If You currently contend that the Identified Products (including any of their active ingredients) are Bioavailable after ingestion by consumers, State The Basis for Your contention.

17. Identify each person You intend to call at the hearing in this matter including contact information and the subjects his or her testimony will address.

18. If You contend that Kramer Duhon is not responsible for the conduct of other Respondents in this action, State the Basis for Your contention.

19. Identify all affirmative defenses You intend to raise in this matter.

### **DEFINITIONS**

A. **“Advertisement” or “Advertisements”** means any written or verbal statement, illustration, or depiction that promotes the sale of a good or service, or is designed to increase consumer interest in a brand, good, or service and was disseminated to consumers. The terms include, but are not limited to: labeling, packaging, package inserts, radio, television, promotional materials, print (including but not limited to brochures, newspapers, magazines, pamphlets, leaflets, circulars, mailers, book inserts, free standing inserts, letters, catalogues, posters, charts, billboards, public transit cards, point of purchase displays), audio programs transmitted over a telephone system, telemarketing scripts, on-hold scripts, upsell scripts, training materials provided to telemarketing firms, program-length commercials and other infomercials, website content, social media, and other digital content, including electronic newsletters.

B. **“And,”** as well as **“or,”** shall be construed both conjunctively and disjunctively, as necessary, to bring within the scope of any Interrogatory all information that otherwise might be construed as outside its scope.

C. **“Any”** includes **“all,”** and **“all”** includes the word **“any.”**

D. **“Basic Dissemination Data”** means all of the following information about each version of an Advertisement: (i) how it was disseminated; (ii) when it was disseminated; (iii) the total number disseminated; (iv) where it was disseminated; and (v) the identity and contact information of the individuals or entities that disseminated the Advertisements.

E. **“Bioavailable”** means the availability of a substance to be absorbed and used by the human body.

F. **“Respondents”** mean Health Research Laboratories, LLC; Whole Body Supplements, LLC; and Kramer Duhon, either individually or collectively.

G. **“Document”** or **“Documents”** mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. **“Document”** shall also include all Electronically Stored Information.

H. **“Each”** includes **“every,”** and **“every”** includes **“each.”**

I. **“Electronically Stored Information”** or **“ESI”** mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after You translate it into a reasonably usable form. This includes, but is not limited to, email, text, instant messaging, videoconferencing, social media, and other electronic correspondence (whether active, archived, or in a deleted items folder), metadata, word processing files, spreadsheets, databases, and recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media.

J. **“Identified Product”** and **“Identified Products”** means Black Garlic Botanicals, BG18 (also known as BG-18), The Ultimate Heart Formula, and Neupathic, either individually or collectively.

K. **“State the Basis”** means explain with sufficient detail that Complaint Counsel can rely on Your answer, before and during the hearing in this matter, as providing a sufficiently comprehensive response to avoid surprise with respect to the subject the Interrogatory addresses.

L. **“Substantiation”** means any evidence establishing that a claim is true or evidence providing a reasonable basis for a claim.

M. **“Substantiation Materials”** means any information that You rely on to substantiate any of the Subject Claims, including but not limited to tests, reports, studies, clinical trials, experiments, demonstrations, scientific literature, written opinions, anecdotal evidence, and any other information You contend an expert in the scientific community would rely upon.

N. **“Subject Claims”** means the claims identified in paragraphs 7, 9, 11, 13, 14, 16, 18 and 20 of the Complaint issued in this matter.

O. **“You”** or **“Your”** means Health Research Laboratories, LLC; Whole Body Supplements, LLC; Kramer Duhon, either individually or collectively.

### INSTRUCTIONS

A. **Duty to Supplement.** These Interrogatories require supplemental responses. 16 C.F.R. § 3.31(e).

B. **Return Date.** Your response is due thirty days after service.

C. **Answer Form.** You must answer each Interrogatory separately, in writing, and under oath. Your response should set forth the Interrogatory fully preceding each answer.

D. **Period Covered.** Unless otherwise specified, no Interrogatory is limited in time.

E. **Scope.** The Interrogatories cover information in the possession, custody, or control of Respondents, Your attorneys, accountants, agents, affiliates, directors, officers, consultants, employees, contractors, bailees, other representatives, or any other person or entity from whom You can obtain such Documents by demand, request, or otherwise.

F. **Reference to Documents.** If You answer an Interrogatory with reference to Documents, Your answer must attach the Document (or identify it by Bates number if already produced), and refer to specific responsive section and page. 16 C.F.R. § 3.35(c).

G. **Waiver.** Any objection You fail to raise through Your initial response is waived.

H. **Objections.** If You object to any Interrogatory or a part thereof, Your response must provide Your exact objection and the facts upon which You base the objection. If you object to part of an Interrogatory, You must answer the remainder fully. If You object to an Interrogatory or part thereof as allegedly irrelevant, You must provide all responsive information

that You concede is relevant. If You object to an Interrogatory or part thereof as unduly burdensome, You must describe any alleged burden a response would entail.

I. **Privilege Claims.** If You object to any Interrogatory based on privilege or any similar claim, You must assert the claim no later than the return date for these Interrogatories. Your response must include the basis for the privilege or similar claim, and any responsive information that Your objection does not cover.

J. **Notice.** If any party files any dispositive motion, or at the commencement of the hearing, Complaint Counsel may move to preclude You from offering evidence regarding responsive matters Your answers to these Interrogatories fail to include.

Dated: Dec. 22, 2020

/s/ Elizabeth J. Averill  
ELIZABETH J. AVERILL  
JONATHAN COHEN  
Federal Trade Commission  
Division of Enforcement  
600 Pennsylvania Ave., NW, Mailstop CC-9528  
Washington, DC 20580  
(202) 326-2993, [eaverill@ftc.gov](mailto:eaverill@ftc.gov)  
(202) 326-2551, [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)  
(202) 326-3197 (Fax)

Complaint Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, the foregoing was served via email on Respondents' counsel.

Joel W. Reese  
Joshua M. Russ  
Reese Marketos LLP  
750 N. Saint Paul Street, Suite 600  
Dallas, TX 75201-3201  
joel.reese@rm-firm.com  
josh.russ@rm-firm.com

Dated: December 22, 2020

/s/ Elizabeth J. Averill  
ELIZABETH J. AVERILL  
Federal Trade Commission  
Division of Enforcement  
600 Pennsylvania Ave., NW, Suite CC-9528  
Washington, DC 20580  
(202) 326-2993, *eaverill@ftc.gov*  
(202) 326-3197 (Fax)

Complaint Counsel



**CCX-B2**

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

COMMISSIONERS: Joseph J. Simons, Chairman  
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

RESPONDENTS’ OBJECTIONS AND ANSWERS TO COMPLAINT  
COUNSEL’S FIRST SET OF INTERROGATORIES

Respondents Health Research Laboratories, LLC (“HRL”), Whole Body Supplements, LLC (“WBS”) and Kramer Duhon (collectively, “Respondents”) provide the following Objections and Answers to Complaint Counsel’s First Set of Interrogatories as required by Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.31.

ANSWERS TO INTERROGATORIES

1. Specify every Document that constitutes Substantiation Material including its Bates number and the date You first possessed the Document.

**ANSWER:** Pursuant to 16 C.F.R. § 3.31(c) and (d), Defendants object to this Request because it seeks to require Respondents to marshal all of their evidence and because it is unnecessarily burdensome. Respondents are in the process of producing “every Document that constitutes Substantiation Material.” Complaint Counsel can answer this interrogatory by reviewing and compiling the information from the documents produced.

2. State the exact type and dosages of the ingredients that You expected each Identified Product would contain when consumed and, if different, the exact type and dosages of the ingredients each Identified Product actually contained when shipped to consumers.

**ANSWER:** Respondents expected the type and dosages of the ingredients that each Identified Product would contain when consumed would be the same as the exact types and dosages referenced in the Complaint. Per the FTC's request, samples of each Identified Product are being produced.

3. Provide Basic Dissemination Data for each unique Advertisement for each Identified Product disseminated on or after January 17, 2018.

**ANSWER:** Please see Basic Dissemination Data spreadsheet in the document production.

4. If You deny paragraph 14 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** Respondents object to this Interrogatory because it is overly broad, unduly burdensome, and improper. Kramer Duhon disagrees that he represented any of the items in paragraph 14. HRL and Kramer Duhon both disagree that the advertisements represented any of the items in paragraphs (a) through (e).

5. If You deny paragraph 15 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** First, as explained in the previous answer, Respondents disagree that they made the representations in the manner characterized by the FTC. Second, with regard to any statements or claims actually made by the advertisements, Respondents believe that the statements and claims are supported by the materials provided to the FTC.

6. If You contend that some or all of the claims in paragraph 7 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

**ANSWER:** Respondents object to this Request. The Request identifies an advertisement and then requests that Respondents "State the Basis" for the contention that "each claim" has "Substantiation." Defendants object to this Request because it seeks to require Respondents to marshal all of their evidence and because it is unnecessarily burdensome. Respondents are in the process of producing the Substantiation Material, which Respondents believe is already in the FTC's possession.

7. If You deny paragraph 16 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** Respondents object to this Interrogatory because it is overly broad, unduly burdensome, and improper. Kramer Duhon disagrees that he represented any of the items in paragraph 16. HRL and Kramer Duhon both disagree that the advertisements represented any of the items in paragraphs (a) through (e).

8. If You deny paragraph 17 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** First, as explained in the previous answer, Respondents disagree that they made the representations in the manner characterized by the FTC. Second, with regard to any statements or claims actually made by the advertisements, Respondents believe that the statements and claims are supported by the materials provided to the FTC.

9. If You contend that some or all of the claims in paragraph 9 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

**ANSWER:** Respondents object to this Request. The Request identifies an advertisement and then requests that Respondents “State the Basis” for the contention that “each claim” has “Substantiation.” Defendants object to this Request because it seeks to require Respondents to marshal all of their evidence and because it is unnecessarily burdensome. Respondents are in the process of producing the Substantiation Material, which Respondents believe is already in the FTC’s possession.

10. If You deny paragraph 18 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** Respondents object to this Interrogatory because it is overly broad, unduly burdensome, and improper. Kramer Duhon disagrees that he represented any of the items in paragraph 18. HRL and Kramer Duhon both disagree that the advertisements represented any of the items in paragraphs (a) through (e).

11. If You deny paragraph 19 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** First, as explained in the previous answer, Respondents disagree that they made the representations in the manner characterized by the FTC. Second, with regard to any statements or claims actually made by the advertisements, Respondents believe that the statements and claims are supported by the materials provided to the FTC.

12. If You contend that some or all of the claims in paragraph 11 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

**ANSWER:** Respondents object to this Request. The Request identifies an advertisement and then requests that Respondents “State the Basis” for the contention that “each claim” has “Substantiation.” Defendants object to this Request because it seeks to require Respondents to marshal all of their evidence and because it is unnecessarily burdensome. Respondents are in the process of producing the Substantiation Material, which Respondents believe is already in the FTC’s possession.

13. If You deny paragraph 20 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** Respondents object to this Interrogatory because it is overly broad, unduly burdensome, and improper. Kramer Duhon disagrees that he represented any of the items in paragraph 20. HRL and Kramer Duhon both disagree that the advertisements represented any of the items in paragraph (a).

14. If You deny paragraph 21 of the Complaint in this matter, in whole or in part, State the Basis for Your denial.

**ANSWER:** First, as explained in the previous answer, Respondents disagree that they made the representations in the manner characterized by the FTC. Second, with regard to any statements or claims actually made by the advertisements, Respondents believe that the statements and claims are supported by the materials provided to the FTC.

15. If You contend that some or all of the claims in paragraph 13 of the Complaint in this matter have Substantiation, State the Basis for that contention with respect to each claim You contend has Substantiation, including identifying all Substantiation Materials.

**ANSWER:** Respondents object to this Request. The Request identifies an advertisement and then requests that Respondents “State the Basis” for the contention that “each claim” has “Substantiation.” Defendants object to this Request because it seeks to require Respondents to marshal all of their evidence and because it is unnecessarily burdensome. Respondents are in the process of producing the Substantiation Material, which Respondents believe is already in the FTC’s possession.

16. If You currently contend that the Identified Products (including any of their active ingredients) are Bioavailable after ingestion by consumers, State The Basis for Your contention.

**ANSWER:** Products are essentially equivalent to the ingredients in the produced studies.

17. Identify each person You intend to call at the hearing in this matter including contact information and the subjects his or her testimony will address.

**ANSWER:**

Rick Cohen

Kramer Duhon

Kyle Duhon

Curtis Walker

Plus, Respondents intend to call any witnesses called by the FTC, including any witnesses deposed by the FTC or the Respondents.

18. If You contend that Kramer Duhon is not responsible for the conduct of other Respondents in this action, State the Basis for Your contention.

**ANSWER:** Respondents object to this interrogatory because it seeks a legal opinion or legal conclusion, which Respondents are not required to provide. From a factual perspective, Respondents contend that the alleged conduct of Kramer Duhon is not a legal basis for the FTC to seek the relief that it seeks against him.

19. Identify all affirmative defenses You intend to raise in this matter.

**ANSWER:**

**Requested Relief Exceeds Statutory Authorization:** Section 5 of the FTC Act only grants the Commission the legal authority to enter an “order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.” 15 U.S.C. § 45(b). The FTC’s Administrative Complaint does not make a proper request for relief consistent with the FTC Act. Instead, the FTC requests relief that exceeds the authority granted to the FTC under the FTC Act. Respondents object to any Order that includes any findings, statements, or relief that exceeds the statutory authority granted by the FTC Act.

**Mootness and Lack of Statutory Authority:** The causes of action alleged in the Complaint are barred by mootness because all alleged conduct (i.e., marketing and advertising) referenced in the Complaint ceased more than year prior to the filing of the Complaint and will not reoccur in the future. The FTC has alleged no facts regarding a likelihood of reoccurrence. Further, the FTC Act does not grant the FTC the authority to seek a cease

and desist order for conduct that ceased prior to the Administrative Complaint without evidence that the conduct will likely reoccur in the future.

**Not in the public interest:** Neither the filing of the administrative action nor the contemplated relief is in the public interest as required by 15 U.S.C. § 45.

**Violation of the United States Constitution:** The FTC’s administrative process violates the Fifth Amendment to the United States Constitution because it seeks to deny Respondents of property and rights without due process of law. Further, the FTC receives its authority through Article II of the United States Constitution. The FTC’s structure violates and is inconsistent with Article II of the United States Constitution because the Commissioners and the Administrative Law Judges (“ALJs”) can only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office,” which means that the Commissioners and the ALJs are not subject to the supervision and authority of the President.

**De Novo Review of Factual Findings Violates of the United States Constitution:** Even though the Commissioners do not hear live testimony from witnesses, the Commissioners conduct a *de novo* review of the ALJ’s factual findings. This *de novo* review of the ALJ’s factual findings violates the United States Constitution and the Administrative Procedure Act.

**Res Judicata and Collateral Estoppel:** The actions alleged in the Administrative Complaint are barred under the doctrines of res judicata and/or collateral estoppel due to the January 16, 2018 Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief (“Final Judgment”) and/or the August 12, 2020 Order in Case No. 2:17-cv-00467-JDL, styled *Federal Trade Commission, et al. v. Health Research Laboratories, LLC, et al.*, pending in the United States District Court for the District of Maine.

**Consent Judgment Settlement:** The actions alleged in the Administrative Complaint are barred due to the settlement as referenced in the Final Judgment.

**Fails as a matter of law:** The Complaint fails to state a claim upon which relief can be granted.

**No Vicarious Liability and No Direct Liability:** The Complaints’ claims against Kramer Duhon are barred because Duhon is not responsible for the conduct of the other Respondents.

Respondents reserve the right to supplement this response as additional discovery is conducted.

Dated: January 21, 2021

Respectfully submitted,

**REESE MARKETOS LLP**

By: /s/ Joel W. Reese

Joel W. Reese  
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Joshua M. Russ  
Texas Bar No. 24074990  
josh.russ@rm-firm.com

750 N. Saint Paul St., Suite 600  
Dallas, TX 75201-3201  
Telephone: (214) 382-9810  
Facsimile: (214) 501-0731

**ATTORNEYS FOR RESPONDENTS**

**CERTIFICATE OF SERVICE**

I certify that, pursuant to 16 C.F.R. § 3.31, a copy of this document was served on Complaint Counsel on January 21, 2021 via electronic mail:

Elizabeth J. Averill  
Jonathan Cohen  
Federal Trade Commission  
600 Pennsylvania Ave. NW, CC-9528  
Washington, DC 20580  
202.326.2993  
[eaverill@ftc.gov](mailto:eaverill@ftc.gov)  
[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

/s/ Joel W. Reese  
Joel W. Reese



**CCX-B3**

## Black Garlic- Canada

Mail Date	Quantity
1/11/2018	17391
3/15/2018	12519
4/30/2018	10049
6/7/2018	10708
7/17/2018	11010

## Black Garlic - US

Mail Date	Quantity
2/1/2018	76640
3/19/2018	75182
5/7/2018	90996
6/11/2018	80966
7/25/2018	80358
8/27/2018	89839
10/5/2018	62407
11/9/2018	60037
12/12/2018	45139
1/21/2019	31884
2/25/2019	26457
3/28/2019	26608
4/29/2019	20748
5/27/2019	20735
6/24/2019	19532
7/22/2019	14458
8/22/2019	21463

## Neupathic - Canada

Mail Date	Quantity
1/25/2018	18601
2/22/2018	20676
4/17/2018	22100
5/21/2018	13609
6/28/2018	9928

## Neupathic - US

Mail Date	Quantity
2/1/2018	46287
3/12/2018	39412
4/12/2018	19004
5/14/2018	35852
6/21/2018	33716
7/30/2018	35852
9/26/2018	34231
10/29/2018	29983
12/3/2018	31266

1/10/2019	10657
2/18/2019	22357
3/21/2019	7692
4/22/2019	9692
6/24/2019	22890

## The Ultimate Heart Formula - Canada

Mail Date	Quantity
3/5/2018	22577
4/11/2018	24256
5/17/2018	15344
6/22/2018	9252

## The Ultimate Heart Formula - US

Mail Date	Quantity
3/12/2018	44919
4/23/2018	32587
5/31/2018	26890
9/2/2018	33379
10/10/2018	33146
11/14/2018	21587
12/21/2018	19514

## BG-18 - Canada

Mail Date	Quantity
2/14/2018	16701
3/26/2018	14835
3/26/2018	11319
6/27/2018	7147

## BG-18 - US

Mail Date	Quantity
2/5/2018	61809
3/26/2018	43432
5/14/2018	60887
6/25/2018	51809
7/26/2018	14000
8/20/2018	38849
10/12/2018	33344
11/26/2018	22924
12/27/2018	18819
1/31/2019	9899
4/4/2019	14522
5/13/2019	18921
6/10/2019	12604

**CCX-A7**

**From:** [Averill, Elizabeth](#)  
**To:** [Joel Reese](#)  
**Cc:** [Cohen, Jonathan](#)  
**Subject:** RE: Dkt. 9397 - Request for Meet and Confer  
**Date:** Friday, January 29, 2021 6:58:00 PM

---

Joel,

The production format issues are not on my agenda for the meet and confer on Monday. However, I did think it was important to explain the differences between the production and the guidelines given your earlier response. I have asked to meet and confer about the Initial Disclosures as well as your responses to our Interrogatories and Requests for Production which indicate that you are not willing to provide information Respondents are required to produce.

That said, it might be helpful to set up a short, separate call involving attorneys and both of our litigation support folks to discuss production mechanics. Please let me know what times might work for that call next week on your end, and I'll check with my litigation support colleague to schedule it.

We will plan to talk with you 3:30 to 5:00 (Central) on Monday. I'll circulate a dial-in number on Monday morning.

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

---

**From:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Sent:** Friday, January 29, 2021 6:15 PM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>  
**Subject:** Re: Dkt. 9397 - Request for Meet and Confer

Liz:

Let's talk through these issues.

1. As for the filings, I only finished in this case what had to get done (i.e., the response to the motion to strike and the witness list).
2. 2:30 PM to 4:00 doesn't work, but 3:30 PM to 5:00 PM does work. Tell me if that works for you. If not, we can try to move some things around.
3. I am going to suggest that the vendor participate in at least part of the call. We use the vendor on all of our cases, so I feel comfortable he will understand the issues.
4. I will print off copies of all of the discovery responses for the call.

**Reese Marketos LLP****Joel W. Reese**

750 N. Saint Paul St., Suite 600

Dallas, Texas 75201 | Direct: (214) 382-9801 | Main: (214) 382-9810

[www.rm-firm.com](http://www.rm-firm.com)

On Jan 29, 2021, at 2:23 PM, Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)> wrote:

Joel,

You seem to have invested time on motion practice yesterday and today, so we don't understand why you claim you are completely unavailable to meet and confer about discovery on either date.

Let's schedule the meet and confer for 2:30 (Central) on Monday. We need to discuss a number of issues related to Respondents' discovery responses so we are planning on reserving at least 90 minutes. If that time on Monday is impossible for you, propose alternative times on Monday that do work. The compressed timeline for fact discovery in the administrative case means that we need to resolve issues promptly.

Perhaps you should speak with your vendor again. A summary of some of the differences between your first production and the production guidelines is set forth below. As I said earlier during our telephone call on January 6, we are willing to discuss and can accommodate productions with different formats/characteristics but asked to discuss deviations from the guidelines prior to production.

The more important issues at the moment are related to Respondents' Initial Disclosures as well as your Responses to the First Set of Interrogatories and Requests for Production. That is what we plan to focus on during the meet and confer on Monday.

Liz

Differences between Respondents' First Production and Requested Guidelines  
(Attachment A)

1. Section 1.b and 2 clearly asks Respondents NOT to render native files into image (e.g. TIFF or JPEG) unless the FTC requests them. With respect to ESI, Section 2.a and 2.b requests parties to produce documents in Native format rather than as image renderings (TIFF or JPEG). Your first production converted almost all native files to image renderings. The only native files produced were some Excel spreadsheets.

2. Many things are not consistent with the Guidelines in the provided DAT file (HRLAC001.DAT):
  - a) Number of fields in FTC production guideline are 38 vs 29 number of fields in HRLAC001.DAT
  - b) Below fields are not found in HRLAC001.DAT
    - DOCID
    - ALLCustodians
    - SOURCE
    - FILESIZE
    - FileExtension
    - PRODUCTION\_Volume
    - HASRedactions
    - Exception Reason
    - Email Subject
  - c) Below fields are not required but were provided in HRLAC001.DAT
    - a) ATTACHMENT
    - b) FAMDATE
    - c) FAMTIME
    - d) PATH
  - d) Many fields are provided under different name

Field name in HRLAC001.DAT	Field name in FTC production guideline
BEGBATES	ProdBEG
ENDBATES	ProdEnd
BEGATTACH	ProdBeg_Attach
ENDATTACH	ProdEnd_Attach
PARENTBATES	ParentID
DEDUPHASH	MD5Hash
NATIVEPATH	FilePath
OCRPATH	TextPath

3. Your production included .lfp, .log files provided along with .OPT and .DAT file, which are unnecessary and not requested. If you want to provide them, that is of course fine.

---

**From:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Sent:** Friday, January 29, 2021 9:20 AM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>  
**Subject:** Re: Dkt. 9397 - Request for Meet and Confer

Again, I can talk on Monday.

On the production guidelines issue, I have spoken with my ediscovery vendor. He, of course, had the FTC's production guidelines that were attached as Exhibit A when we were processing the documents for production. We reviewed them again. We followed EXACTLY what was set forth in the guidelines.

## Reese Marketos LLP

### Joel W. Reese

750 N. Saint Paul St., Suite 600

Dallas, Texas 75201 | Direct: (214) 382-9801 | Main: (214) 382-9810

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On Jan 27, 2021, at 9:11 AM, Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)> wrote:

Joel,

We are certainly willing to discuss your request for a two-week extension for Respondents' production of documents. However, we need additional information about what categories of documents have not yet been reviewed and produced as well as a commitment that all non-privileged, responsive documents will be produced by the extended deadline.

We would like to schedule a meet and confer this week. Would 2:30 (Central) tomorrow or later in the day tomorrow work? If so, I'll circulate a dial-in number. We would like to meet and confer about: (1) Respondents' failure to supplement their initial disclosures as previously requested; (2) Respondents' objections and failures to respond to the First Set of Interrogatories; and (3) clarify whether Respondents are withholding any non-privileged documents based on objections set forth in their Responses to Complaint Counsel's First Requests for Production as well as the bases for specific objections.

In light of our previous conversation, I was surprised that Respondents' first document production on January 25 was not produced in a format consistent with the requested production guidelines. (Almost no native files were produced.) We should be able to load this first production into Relativity, but my litigation support team informs me that the path names provided are unusual because they include a file name at the end. Please ask your vendor why the file name is included in the path field. The solution proposed by my litigation support team is for you to provide an overlay file for the path name, where the first column is BEG BATES and the second column is the path without the file name. (This would be provided as a DAT file.) We would like to discuss whether future productions will be made in accordance with the guidelines in Attachment A to the First Requests for Production. My understanding is that it is actually more costly and time-intensive to convert all documents to image



files as you did in the first production.

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

---

**From:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Sent:** Monday, January 25, 2021 10:13 AM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Dee Dee Carr <[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>; Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>; Welby, Grant <[gwelby@ftc.gov](mailto:gwelby@ftc.gov)>  
**Subject:** Re: Dkt. 9397 - Document production?

Liz:

We will have additional productions. We haven't finished the review, but should have it done in the next two weeks.

Reese Marketos LLP

**Joel W. Reese**

750 N. Saint Paul St., Suite 600

Dallas, Texas 75201 | Direct: (214) 382-9801 | Main: (214) 382-9810

[www.rm-firm.com](http://www.rm-firm.com)

On Jan 25, 2021, at 9:09 AM, Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)> wrote:

Grant tells me we received notice of the production from Mr. Kinney within moments of when I sent the email to you, so I wanted to update that it looks like the documents have been uploaded.

---

**From:** Averill, Elizabeth  
**Sent:** Monday, January 25, 2021 10:03 AM  
**To:** Dee Dee Carr <[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>; Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Cc:** Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>; Welby, Grant <[gwelby@ftc.gov](mailto:gwelby@ftc.gov)>

**Subject:** Dkt. 9397 - Document production?

Joel,

We still have not received your first document production.

Please send the physical product samples via FedEx or UPS to the address below. Please do not send them to us via USPS.

Elizabeth Averill  
600 Pennsylvania Avenue, NW  
Mailstop CC-9528  
Washington, DC 20580

We expect to send copies of subpoena productions to Ms. Carr later this afternoon.

Liz

---

**From:** Dee Dee Carr <[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>  
**Sent:** Friday, January 22, 2021 12:53 PM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>; Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>; Welby, Grant <[gwelby@ftc.gov](mailto:gwelby@ftc.gov)>  
**Subject:** Re: FTC v. HRL; Discovery Responses

I'll talk to Jeff Kenney about handling this.

Dee Dee Carr  
(214) 382-9808

On Jan 22, 2021, at 11:51 AM, Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)> wrote:

Ms. Carr,

We have not received the document production yet. Grant Welby will send you another SFTP link directly. My understanding is that SFTP links won't work when the original recipient forwards the link to someone else.

Thank you.

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**From:** Dee Dee Carr <[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>  
**Sent:** Friday, January 22, 2021 11:52 AM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>; Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>; Welby, Grant <[gwelby@ftc.gov](mailto:gwelby@ftc.gov)>  
**Subject:** Re: FTC v. HRL; Discovery Responses

Good morning, I'm re-sending via your ftp site now. Please confirm once recieved.

Good Day

Dee Dee Carr  
(214) 382-9808

On Jan 22, 2021, at 8:00 AM,  
Jeff Kinney  
<[Jkinney@digitalverdict.com](mailto:Jkinney@digitalverdict.com)>  
wrote:

Please do.

---

**From:** Averill, Elizabeth  
<[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Sent:** Friday, January 22, 2021  
8:00 AM  
**To:** Jeff Kinney  
<[jkinney@digitalverdict.com](mailto:jkinney@digitalverdict.com)>;  
Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>; Cohen, Jonathan  
<[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>  
**Cc:** Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>; Dee Dee Carr  
<[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>;  
Welby, Grant <[gwelby@ftc.gov](mailto:gwelby@ftc.gov)>  
**Subject:** RE: FTC v. HRL; Discovery

Responses

Joel and Mr. Kinney,

We are unfortunately not permitted to download documents from any type of outside document sharing site or dropbox. However, we can easily send you a secure file transfer link to transfer the files. Mr. Kinney - Should we email that link to you?

Liz

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**From:** Jeff Kinney  
<[jkinney@digitalverdict.com](mailto:jkinney@digitalverdict.com)>  
**Sent:** Thursday, January 21, 2021  
8:25 PM  
**To:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>; Cohen, Jonathan  
<[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Averill,  
Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>; Dee Dee Carr  
<[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>  
**Subject:** RE: FTC v. HRL; Discovery  
Responses

Jonathan/Liz,

Below is a link to the production  
Joel referred to in the previous  
email.

[HRLAC\\_00001-HRLAC\\_03582](#)

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**From:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Sent:** Thursday, January 21, 2021  
5:21 PM  
**To:** Cohen, Jonathan  
<[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Averill,  
Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Hall Ann <[ann.hall@rm-firm.com](mailto:ann.hall@rm-firm.com)>

[firm.com](#)>; Jeff Kinney  
<[kinney@digitalverdict.com](mailto:kinney@digitalverdict.com)>;  
Dee Dee Carr <[deedee.carr@rm-firm.com](mailto:deedee.carr@rm-firm.com)>

**Subject:** FTC v. HRL; Discovery Responses

Jonathan and Liz:

Attached are our responses to the FTC's discovery requests. Jeff Kinney with Digital Verdict will be sending you a link for documents.

## Reese Marketos LLP

### **Joel W. Reese**

750 N. Saint Paul St., Suite 600  
Dallas, Texas 75201 | Direct: (214)  
382-9801 | Main: (214) 382-9810  
[www.rm-firm.com](http://www.rm-firm.com)

**CCX-A8**

**From:** [Averill, Elizabeth](#)  
**To:** [Joel Reese](#)  
**Cc:** [Cohen, Jonathan](#); [Garrett, Celia](#)  
**Subject:** RE: FTC v. HRL; Administrative Complaint.  
**Date:** Monday, February 1, 2021 3:20:00 PM

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We disagree with your contentions about the administrative action below. Yes, we want to meet and confer about the discovery issues today as planned.

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**From:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Sent:** Monday, February 1, 2021 3:18 PM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>  
**Cc:** Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>; Garrett, Celia <[cgarrett1@ftc.gov](mailto:cgarrett1@ftc.gov)>  
**Subject:** Re: FTC v. HRL; Administrative Complaint.

If you want to continue the case under these circumstances, I will participate in the call, but this is our position. Please advise if you want to continue with the call today.

## Reese Marketos LLP

### Joel W. Reese

750 N. Saint Paul St., Suite 600  
Dallas, Texas 75201 | Direct: (214) 382-9801 | Main: (214) 382-9810  
[www.rm-firm.com](http://www.rm-firm.com)

On Feb 1, 2021, at 2:05 PM, Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)> wrote:

Liz:

We are agreeing to all of the relief requested by the FTC in Administrative Complaint.

The only reason to continue the administrative action is that the administrative action is a stalking horse for some other type of action — which is improper under federal law and applicable rules.

## Reese Marketos LLP

### Joel W. Reese

750 N. Saint Paul St., Suite 600  
Dallas, Texas 75201 | Direct: (214) 382-9801 | Main: (214) 382-9810  
[www.rm-firm.com](http://www.rm-firm.com)

On Feb 1, 2021, at 1:58 PM, Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)> wrote:

Joel,

I don't understand your email. The next step is for us to meet and confer today about issues with Respondents' Initial Disclosures, Responses to the Requests for Production, and Objections and Answers to the Interrogatories at the time you suggested. (Today at 3:30 Central.) There is a limited time period for discovery in this case, and we need to resolve issues promptly.

We'll plan to speak with you then on the conference line below. Or let us know if you are now refusing to meet and confer.

888-675-2535  
Access code: 3263186

Liz

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**From:** Joel Reese <[joel.reese@rm-firm.com](mailto:joel.reese@rm-firm.com)>  
**Sent:** Monday, February 1, 2021 2:48 PM  
**To:** Averill, Elizabeth <[eaverill@ftc.gov](mailto:eaverill@ftc.gov)>; Cohen, Jonathan <[jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)>  
**Subject:** FTC v. HRL; Administrative Complaint.

Liz and Jonathan:

As I have stated previously, my clients do not have the funds to continue this fight. My clients will agree to all of the relief requested by the FTC in Administrative Complaint (a - 1) with no conditions. Please advise as to the next steps.

Considering this issue, it seems like the call today is unnecessary.

**Reese Marketos LLP**

**Joel W. Reese**

750 N. Saint Paul St., Suite 600

Dallas, Texas 75201 | Direct: (214) 382-9801 | Main: (214) 382-9810

[www.rm-firm.com](http://www.rm-firm.com)