PUBLIC

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

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

OPPOSITION TO RESPONDENTS' EXPEDITED MOTION TO ENTER NEW SCHEDULING ORDER OR, IN THE ALTERNATIVE, TRANSFER CASE TO THE COMMISSION

Respondents' requests to overhaul the Scheduling Order or, alternatively, to transfer this case to the Commission for final decision must be denied because they are plainly inconsistent with the Commission's Rules of Practice. *See* No. 601099. Essentially, Respondents contend the filing of their Amended Answer means they are entitled to the elimination of any discovery and immediate termination of all proceedings before the Chief Administrative Law Judge. This is simply incorrect. Although Respondents' Amended Answer narrows disputed factual and legal issues in this case, an initial decision needs to be prepared and the issue of appropriate relief remains outstanding. [1] Further, Complaint Counsel is permitted to seek discovery relevant

[1] Rule 3.12(b)(2) states that the answer and complaint "will provide a record basis on which the Commission shall issue a final decision," but does not state the pleadings provide the *only* basis for the final decision. This reading of the Rule is consistent with earlier interpretations of other parts of Rule 3.12(b)(2). *See* No. 600937, at 4 (concluding affirmative defenses permissible because Rule does not state the answer "shall consist *only* of the required statement of admission, and this limitation will not be implied") (internal quotes omitted). *See also In re Zale Corp.*, 77 F.T.C. 1635, 1970 WL117293, *1 (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.")

to scope of relief, and the ALJ recently ordered the Respondents to produce responsive documents, a privilege log, and supplemental interrogatory answers. *See* Order Granting Complaint Counsel's Motions to Compel (Apr. 6, 2021).[2] Complaint Counsel also recently filed a motion with the Commission seeking a postponement of the evidentiary hearing date to provide sufficient time to conduct limited discovery. No. 601091. Under these circumstances, it is entirely inappropriate to eliminate all discovery and prehearing deadlines or set new deadlines for proposed findings of fact and conclusions of law in April and May as Respondents suggest. Respondents' alternative request to immediately transfer the case to the Commission for final decision also must be denied because it is contrary to the Rules of Practice as well as relevant precedent.

I. RELEVANT LAW

Rule 3.12(b)(2) does not provide a basis for granting either of Respondents' requests. A respondent's general admission of all material allegations does not resolve the issue of appropriate relief. *See* 16 C.F.R. § 3.12(b)(2) (answer and complaint "will provide a record basis on which the Commission shall issue … appropriate findings and conclusions and a final order[.]"). Further, the Rule permits limited discovery and an evidentiary hearing concerning facts relevant to the scope of relief because it states the pleadings "provide *a* record basis" rather than the only basis for decision and specifies the answer operates as "a waiver of hearings *as to the facts alleged in the complaint*" rather than all hearings. 16 C.F.R. § 3.12(b)(2) (emphasis added).

Modification of scheduling order deadlines is permitted in limited circumstances in Part 3 proceedings. Rule 3.21(c)(2) provides the ALJ with discretion to grant a motion to "*extend* any deadline or time specified in the scheduling order other than the date of the evidentiary hearing" if the movant makes a "showing of good cause." 16 C.F.R. § 3.21(c)(2) (emphasis added).

[2] *See also* No. 600937, at 5 ("[T]here is nothing in Rule 3.12(b)(2) … that prohibits Complaint Counsel from pursuing discovery regarding issues that remain relevant[.]")

Importantly, however, there is no provision in the Rules permitting the ALJ to grant a motion to eliminate or expedite existing deadlines in a scheduling order.

The Rules of Practice also establish that the ALJ must issue an initial decision prior to the Commission's issuance of a final decision and order in litigated cases. *See especially* 16 C.F.R. §§ 3.51(a) (ALJ "shall file an initial decision" within 70 days after post-hearing briefing is complete); 3.52 (providing for appeal of initial decisions to Commission); 3.53 (providing for Commission's *sua sponte* review of initial decisions). Moreover, in previous cases in which respondents have elected to file answers containing general admissions under Rule 3.12(b)(2), each has included an initial decision by an ALJ or hearing examiner followed by the Commission's final decision and order. *See In re Sir Carpet, Inc.*, 85 F.T.C. 190, 1975 WL 172194 (Feb. 6, 1975); *In re Auslander Decorator Furniture, Inc.*, 83 F.T.C. 1542, 1974 WL 175916 (Apr. 23, 1974); *In re New Home Sewing Center*, 76 F.T.C. 191, 1969 WL 101146 (Aug. 5, 1969); *In re Market Fur Dressing Corp.*, 76 F.T.C. 101, 1969 WL 101378 (July 24, 1969).

II. ARGUMENT

A. Respondents' requested changes to the Scheduling Order must be denied.

Respondents' proposed changes to the Scheduling Order must be denied because they are not permitted under Rule 3.21(c)(2) and are inappropriate in this case. As discussed above, Rule 3.21(c)(2) permits extensions of deadlines set forth in scheduling orders in appropriate circumstances rather than elimination or advancement of existing deadlines as Respondents propose. Moreover, Respondents' contention that all fact and expert discovery should be terminated in this matter is plainly inconsistent with the recent Order compelling them to provide requested discovery. *See* Order Granting Complaint Counsel's Motions to Compel (Apr. 6, 2021).

Respondents' request to set deadlines for proposed findings of fact and conclusions of law in April and May is similarly inconsistent with the Rules of Practice, which provide that such

submissions should be filed after the closing of the evidentiary hearing record. *See* 16 C.F.R § 3.46; *see also* § 3.12(b)(2) (providing respondents may "reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.") Proposed findings of fact and conclusions of law should be submitted by the parties after appropriate discovery related to the appropriate scope of relief and evidentiary hearing in accordance with Rule 3.46.[3]

B. Respondents' request to transfer to the Commission is improper.

Alternatively, Respondents half-heartedly request terminating further proceedings before the ALJ and an immediate transfer of the case to the Commission for final decision. To support this request, Respondents appear to rely on the provision in Rule 3.12(b)(2) stating the pleadings "will provide a record basis on which the Commission shall issue a final decision[.]" However, this provision concerning the Commission's final decision-making authority does not mean that all proceedings before the ALJ are eliminated. Indeed, as discussed above, the limited number of administrative decisions involving Rule 3.12(b)(2) have all included an initial decision followed by the Commission's issuance of a final decision and order.[4]

III. CONCLUSION

For the reasons set forth above, Respondents' Motion should be denied.

Respectfully submitted,

s/ Elizabeth J. Averill
Elizabeth J. Averill
Jonathan Cohen
Federal Trade Commission

[3] The staggered schedule proposed by Respondents in their proposed Amended Scheduling Order should also be rejected because it does not give both parties an equal chance to reply and is inconsistent with the structure for filing proposed findings of fact and conclusions of law and replies to such filings set forth in 16 C.F.R. § 3.46(a).

[4] *See In re Sir Carpet, Inc.*, 85 F.T.C. 190, 1975 WL 172194 (Feb. 6, 1975); *In re Auslander Decorator Furniture, Inc.*, 83 F.T.C. 1542, 1974 WL 175916 (Apr. 23, 1974); *In re New Home Sewing Center*, 76 F.T.C. 191, 1969 WL 101146 (Aug. 5, 1969); *In re Market Fur Dressing Corp.*, 76 F.T.C. 101, 1969 WL 101378 (July 24, 1969).

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CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Opposition to Respondents' Expedited Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission on April 9, 2021 via electronic mail.

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

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

The Honorable D. Michael Chappell
Chief Administrative Law Judge
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