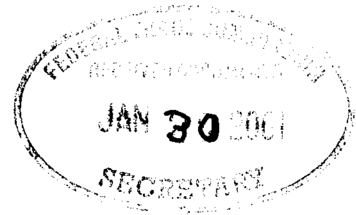
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of NATURAL ORGANICS, INC., a corporation, and GERALD A. KESSLER, individually and as an officer of the corporation.	)	DOCKET NO. 9294

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

I. HISTORY OF THE PROCEEDING

On August 9, 2000, the Commission issued a complaint charging the Respondents, one corporation and one individual, who have manufactured, advertised, labeled, offered for sale, sold and distributed products to the public, including Pedi-Active A.D.D., with violating the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. The Complaint alleges Respondents have disseminated advertisements containing representations, that Respondents lacked a reasonable basis substantiating such representations, and that the representations are false or misleading.

On October 18, 2000, Respondents were orally granted a stay in the proceeding in order to find new counsel and allow new counsel to become familiar with the matter. On December 1, 2000, Respondents' current counsel entered its appearance in this matter.

On January 3, 2001, Complaint Counsel filed its Motion for Partial Summary Decision ("Motion") pursuant to Commission Rule 3.24. Complaint Counsel seeks a summary decision on two issues: (1) whether the four documents attached to the Complaint make certain representations; and (2) whether Gerald A. Kessler, the Chief Executive Officer and owner of Natural Organics, Inc., is legally responsible for the acts of Natural Organics.

Respondents filed their Opposition on January 16, 2001. Respondents assert that summary decision is inappropriate before they have had the opportunity to take discovery. Respondents further assert that it is premature for the Administrative Law Judge to determine at this stage, without the benefit of extrinsic evidence, what representations are made by the advertisements. Respondents maintain that a determination that Kessler is individually liable before a determination of whether the company is liable is also premature.

II. SUMMARY DECISION STANDARD

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(2). These provisions are virtually identical to the provisions of Fed. R. Civ. P. 56 governing summary judgment in the federal courts. *Hearst Corp. et al.*, 80 F.T.C. 1011, 1014 (1972).

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). Summary decision under Rule 3.24 is improper "where the movant's affidavits are insufficient." *Hearst Corp.*, 80 F.T.C. at 1014. "The movant has the burden of establishing the nonexistence of any genuine issue of material fact, and all doubts are resolved against him." *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Further, summary decision is improper where "various inferences can be drawn." *Hearst Corp.*, 80 F.T.C. at 1014.

III. CLAIMS FOR WHICH SUMMARY JUDGMENT IS SOUGHT

A. Representations Made in Advertisements

Complaint Counsel asserts that the four advertisements, attached to the Complaint as Exhibits A, B, C, and D, represent that the Respondents' product will: treat or mitigate attention deficit/hyperactivity disorder ("ADHD") or its symptoms; will improve the attention span and the scholastic performance of children who suffer from ADHD; and will improve the attention span and the scholastic performance of children who have difficulty focusing on school work. Complaint Counsel asserts that "[t]hese advertisements contain language that is expressly made or clear enough on its face to demonstrate that respondents made the alleged claims." Complaint Counsel's Motion for Partial Summary Decision at 7.

Respondents argue that the advertisements do not expressly make the representations alleged by Complaint Counsel. Rather, Respondents assert that Complaint Counsel seeks a determination that the advertisements can be reasonably interpreted as making these representations. Declaration of John R. Fleder Opposing Complaint Counsel's Motion for Partial Summary Decision at 6-7.

Complaint Counsel presents no extrinsic evidence to support its assertion that Respondents made the alleged claims. Instead, Complaint Counsel asks the Administrative Law Judge to conclude, from reading the advertisements, that Respondents have made certain representations. "In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence." *Kraft, Inc. v. Federal Trade Commission*, 970 F.2d 311, 318 (7th Cir. 1992) (*citing Thompson Medical*, 104 F.T.C. 786, 788-89 (1984); *Cliffdale Assocs. Inc., et al.*, 103 F.T.C. 110, 165-66 (1984); FTC Policy Statement, 103 F.T.C. 174, 176 (1983).

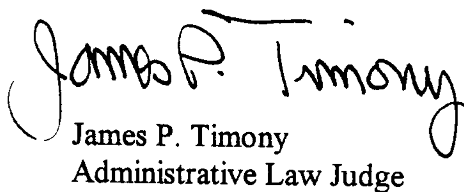
The advertisements do not expressly state that Pedi-Active A.D.D. will: treat or mitigate ADHD or its symptoms; will improve the attention span and the scholastic performance of children who suffer from ADHD; or will improve the attention span and the scholastic performance of children who have difficulty focusing on school work. Whether the ads may be reasonably interpreted as making such statements is a genuine dispute. "The general rule is that when the meaning or effect of words or acts is fairly disputed, the question is for the trier of the facts, to be decided after hearing all material evidence." *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414, 431 (2nd Cir. 1974) (citations omitted). In the absence of clear language in the exhibits expressly stating what Complaint Counsel asserts the exhibits state, a summary decision before Respondents have had adequate time for discovery is not warranted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment may be appropriate "after adequate time for discovery.") Accordingly, Complaint Counsel's motion for partial summary judgment is DENIED.

B. Individual Liability

Complaint Counsel also seeks a determination on summary decision that Respondent Gerald A. Kessler is individually liable because he participated directly in the acts or practices at issue, because he is the sole shareholder of Natural Organics, a closely held corporation, and because Kessler held active managerial and policy making responsibilities relating to the corporation's advertising during the period of time in question. Until a determination is made on whether Natural Organics violated the FTC Act, a determination that Kessler is individually liable is premature. Accordingly, Complaint Counsel's Motion for Partial Summary Decision is DENIED.

V. CONCLUSION

For the above stated reasons, Complaint Counsel's Motion for Partial Summary Decision is DENIED in full.



James P. Timony
Administrative Law Judge

Dated: January 30, 2001