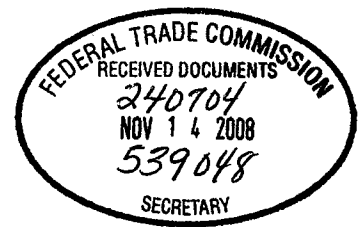


ORIGINAL



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of

**NATIVE ESSENCE HERB COMPANY,
a corporation,**

**MARK J. HERSHISER, individually, d/b/a Native
Essence Herb Company, and as an officer of the
corporation, and**

**MARIANNE HERSHISER, individually, d/b/a Native
Essence Herb Company, and as an officer of the
corporation.**

DOCKET NO. 9328

Public Document

**RESPONDENTS' RESPONSE TO COMPLAINT COUNSEL'S
MOTION TO DISMISS THE COUNTERCLAIM**

Respondents, by their undersigned counsel, hereby submit this response to Complaint Counsel's motion to dismiss the counterclaim.

Background

In June 2008, Respondents filed an action against the FTC, *inter alia*, seeking a declaration that they had a First Amendment right to provide accurate and complete information about herbs which appeared on the website of the National Center for Complementary and Alternative Medicine ("NCCAM") which is a division of the federal Government's National Institute of Health. The FTC moved to dismiss the action on jurisdictional ripeness grounds, basically arguing that since the FTC had not yet taken any

formal action against them, Respondents' claims (including the above mentioned declaratory judgment claim) was not ripe for adjudication. The New Mexico district judge agreed with the FTC and dismissed Respondents' lawsuit.

A few days after the dismissal, the FTC initiated the instant action against the Respondents. In their answer, Respondents have asked for the same relief that they asked for in the civil court action, namely, a declaration that they are entitled to post truthful and accurate information from NCCAM's website. Now Complaint Counsel moves to dismiss the request for relief in this forum.

Argument

Respondents concede that the Part 3 rules do not appear to specifically allow for a counterclaim. However, it might be arguable that an FTC administrative judge has the inherent authority to hear a counterclaim which is closely related to the claims in the case. However, Counsel has not found any authority for this proposition. Respondents believe that some judicial officer must have the authority to make a judicial finding as to whether or not the First Amendment allows them to engage in certain activities. There are only two possible courts which might have such authority: a federal court and an FTC administrative judge. Complaint Counsel has already successfully argued that the federal courts cannot hear this claim. That leaves this Court.

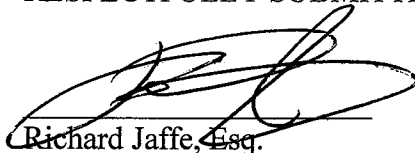
Complaint Counsel cites the Part 1 Rules and in particular, Rule 1.1 (a) as the procedure by which Respondents can seek guidance from the FTC about the subject of the counterclaim. However, we believe that this procedure is unavailable to Respondents or any other respondent/subject of an FTC enforcement action just because there is a pending action. We believe that Complaint Counsel shares this view. If so, then there appears to be no court in the

entire country which before or during an FTC enforcement action has jurisdiction to determine the legality of actions which Respondents wish to undertake, because of the pendency of this administrative action.

If this Court agrees with Complaint Counsel, Respondents seek an order from this Court that it is without jurisdiction to (1) adjudicate a counterclaim asserted by any respondent, and (2) make a determination as to whether Respondents have a First Amendment right to post truthful and accurate information taken from the NCCAM federal government website. It is possible that the federal court which dismissed Respondents case might take a different view based on Complaint Counsel's position in this case and an order from this Court.

Houston Texas,
November 7, 2008

RESPECTFULLY SUBMITTED



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CERTIFICATE OF SERVICE

Richard Jaffe, Esq. affirms as follows:

On November 7, 2008, I served and filed the within Response to Motion to Dismiss via USPS first class mail on and email on:

Donald S. Clark, Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Avenue, NW
Washington, D.C. 20580.

Erika Wodinsky, Esq.
Federal Trade Commission
901 Market St, Suite 570
San Francisco, CA 94103

Hon. D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580



Richard Jaffe, Esq.

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Essence Herb Company, and as an officer of the
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**MARIANNE HERSHISER, individually, d/b/a Native
Essence Herb Company, and as an officer of the
corporation.**

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PROPOSED ORDER

Respondents in their Answer include a counterclaim seeking a declaration from this Court that they have a First Amendment right to include certain statements on their website.

The Court finds that it has the inherent power hear and resolve any matter which fairly relates to the allegations in the complaint or the answer. The Court determines that the allegations in the counterclaim are in fact closely related to the allegations and legal issues involved in this case and, as a result, Complaint Counsel's motion to dismiss is hereby DENIED. (or)

The Court finds that there is no provision in the Commission's rules allowing a Respondent to interpose a counterclaim, and further finds that this Court does not have the jurisdiction or statutory authority to rule on whether the information which Respondent seeks to post on its website is protected by the First Amendment.

ORDERED:

Date:

D. Michael Chappell
Administrative Law Judge