

ORIGINAL



**UNITED STATES OF AMERICA
BEFORE 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

COMPLAINT COUNSEL'S MOTION TO DISMISS COUNTERCLAIM

Complaint counsel move, pursuant to Rule of Practice 3.22, to dismiss the "counterclaim" contained in Respondents' Answer. Put simply, there is no such thing as a counterclaim in FTC administrative proceedings, and this Court is therefore without jurisdiction to consider it.

BACKGROUND

On September 16, 2008, the Commission issued a Complaint alleging that Respondents made false and unsubstantiated claims that several of their herbal products were effective in the prevention, treatment or cure of cancer, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52. Respondents filed their Answer in a timely manner on October 15, 2008. In their Answer, Respondents included a counterclaim in which they seek a declaratory judgment that "they have the right to post on their website truthful, complete and non-misleading information (or a hyperlink to such information) contained in the National Center for Complementary and Alternative Medicine or any other federal government website which contains information about herbs and herbal remedies" (Respondents' Answer, at 10).

DISCUSSION

1. Counterclaims are not Valid in FTC Adjudicative Proceedings

The concept of a counterclaim derives from Rule 13 of the Federal Rules of Civil Procedure, which distinguishes between “compulsory” counterclaims (those arising from the same transaction or occurrence that gave rise to plaintiff’s complaint) and “permissive” counterclaims (those that do not arise out of the same transaction or occurrence as the opposing party’s claims). In either event, in federal court a counterclaim may be pled in a defendant’s answer.

There is, however, no analogous rule in the FTC’s Rules of Practice. The Rules of Practice specifically reference the complaint (Rule 3.11), the answer (Rule 3.12), intervention (Rule 3.14), interlocutory appeals (Rule 3.23), discovery (Rules 3.31-3.39), and numerous other aspects of pre-hearing procedure. All of these provisions have analogous Federal Rules. Clearly, if the Commission had intended to allow counterclaims in its adjudicative proceedings, it would have included a Rule of Practice governing them. The absence of any mention of counterclaims can only mean that they can not be legitimately advanced in FTC administrative proceedings. Accordingly, it is no surprise that there is no reference in FTC administrative jurisprudence to a counterclaim against the Commission being asserted, much less adjudicated.

The lack of any reference to counterclaims in the Rules of Practice reflects one of the core differences between FTC adjudicative proceedings and those that occur in the federal courts. Unlike proceedings in federal court, proceedings under Part 3 of the Commission’s Rules of Practice are designed to adjudicate only those matters that are initiated by the Federal Trade Commission. *See* Rule 3.11(a): (“An adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint”). Therefore, these proceedings are not intended to adjudicate causes of action, such as counterclaims, that are not initiated by the Commission.

2. The Commission has Established Procedures for Entities to Seek Advice

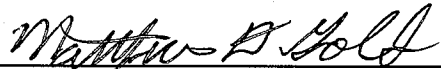
Although counterclaims are not valid in FTC adjudicative proceedings, the Commission’s Rules of Practice provide a mechanism for Respondents to seek the type of guidance that is referenced in their counterclaim. Rule 1.1(a) states: “Any person, partnership, or corporation

may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue.” The remainder of this Rule, as well as Rules 1.2-1.4, establish the procedures for making such requests, and set out the criteria the Commission will consider in determining whether and how to respond to such requests. These Rules, therefore, set out the appropriate method for Respondents to seek the advice that they assert in their counterclaim.

CONCLUSION

FTC adjudicative proceedings are designed to resolve disputes where the Commission, by majority vote, issues a complaint after determining that there is reason to believe that the law has been violated. Respondents have asserted a counterclaim in their Answer, a federal court device that is simply not applicable to Commission adjudicative proceedings and not provided for in the Rules of Practice. Because this Court is without jurisdiction to consider such a counterclaim, it should be dismissed.

Respectfully submitted,



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Complaint Counsel

Dated: October 29, 2008

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

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
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Essence Herb Company, and as an officer of the
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PROPOSED ORDER

Respondents, in their Answer, included a Counterclaim seeking a declaration from the Commission that they have the right to include certain statements on their Web site. There is, however, no provision for counterclaims in the Commission's Rules of Practice. As a result, I do not have jurisdiction to consider the counterclaim. Accordingly, Complaint Counsel's motion to dismiss the counterclaim is **GRANTED**.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2008, I caused Complaint Counsel's Motion to Dismiss Counterclaim to be served and filed as follows:

(1) the original, two (2) paper copies filed by overnight courier and one (1) electronic copy via email to:


Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by overnight courier and one (1) electronic copy via email to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

(3) one (1) electronic copy via email and one (1) paper copy by first class mail to:

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