UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Rebecca Kelly Slaughter, Acting Chairwoman**
Noah Joshua Phillips
Rohit Chopra
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,** **Respondents**	**DOCKET NO. 9397**

ORDER FOR FURTHER PROCEEDINGS BEFORE THE COMMISSION

On April 20, 2021, the Administrative Law Judge (ALJ) granted Respondents' motion to transfer this matter to the Commission for further proceedings pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2). Order Granting In Part and Denying In Part Respondents' Motion to Enter New Scheduling Order or, in the Alternative, to Transfer Case to the Commission (Apr. 20, 2021) ("April 20 Order").[1]

Rule 3.12(b)(2) provides that a respondent who elects not to contest the allegations of fact in the complaint can, as Respondents did here, file an answer admitting all of the material allegations to be true. Such an answer constitutes a waiver of hearings as to the facts alleged in

[1] Transfer to the Commission moots a motion filed by Complaint Counsel to reschedule the evidentiary hearing. Expedited Motion to Reschedule Evidentiary Hearing Date (Mar. 30, 2021) ("Motion to Reschedule"). Complaint Counsel have subsequently filed a Motion to Withdraw Complaint Counsel's Expedited Motion to Reschedule Evidentiary Hearing Date and Request for Schedule (Apr. 26, 2021). Withdrawal of the Motion to Reconsider is granted; this Order sets out our determinations regarding scheduling. Respondents have moved for an extension of time to respond to the Motion to Reschedule. Respondents' Motion to Extend Time to Respond to Complaint Counsel's Motion to Reschedule the Evidentiary Hearing Date (Apr. 16, 2021). Respondents' motion for an extension is denied as moot.

the complaint and, together with the complaint, provides a record basis for the Commission to issue a final decision. Rule 3.12(b)(2). A Rule 3.12(b)(2) answer does not, however, necessarily terminate all proceedings in the case. For example, the respondent can – and in this case, did – reserve its rights to submit proposed findings of fact and conclusions of law. *Id.* Respondents' Answer also asserts a legal defense that challenges the constitutionality of the FTC's administrative process and of some elements of the FTC's structure.

Respondents argued to the ALJ that the case is now "ripe for a decision" without further discovery on the basis of a "record" consisting of the Complaint and Respondents' Answer. Respondents' Expedited Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission at 1-2 (Mar. 31, 2021). Similarly, Respondents have now argued that "the Commission is required to issue its final decision based solely on the facts alleged in the complaint." Response to Motion to Withdraw Expedited Motion to Reschedule Hearing Date and Request for Schedule at 2 (Apr. 26, 2021). Respondents have also filed Respondents' Stipulation as to "Fencing-In" Relief (Apr. 13, 2021) ("Respondents' Stipulation"), in which Respondents "stipulate and agree that the Initial Decision of the ALJ can include whatever 'fencing-in' relief is permitted by statute and requested in the Complaint."[2] Respondents do not make clear what implications they attach to the stated limitation to fencing-in relief "permitted by statute"[3] and do not specify whether they will accept and agree to the specific items of relief identified in the Notice of Contemplated Relief that was attached to the Complaint.

Complaint Counsel, for their part, asserted before the ALJ that discovery was required on the issue of remedy notwithstanding the Rule 3.12(b)(2) Answer. *See, e.g.,* Complaint Counsel's Second Motion to Compel Respondents to Supplement Interrogatory Responses at 1-2 (Mar. 24, 2021[]). As the ALJ recognized, there is nothing in Rule 3.12(b)(2) that prevents Complaint Counsel from pursuing discovery on issues that remain in dispute after a Rule 3.12(b)(2) answer. Order Granting Respondents' Motion for Leave to Amend Answer at 5 (Mar. 10, 2021). The issues in dispute and corresponding discovery needs, however, appear to remain in flux, with the recent filing of Respondents' Stipulation and, perhaps, with Respondents' recent provision of supplemental interrogatory responses. *See* Respondents' Expedited Motion to Partially Reconsider May [sic] 6, 2021 Order Granting Complaint Counsel's Motion to Compel and Statement of Impasse at 3 (Apr. 13, 2021). Consequently, as we structure the next steps in this proceeding, it is important that we understand what, if any factual issues remain to be resolved.

Under these circumstances, we have determined to ask the parties to identify any additional material facts that they intend to assert and to state whether those facts are in dispute.

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[2] As the ALJ has noted, Rule 3.12(b)(2) contemplates a final decision by the Commission and does not provide for an Initial Decision by the ALJ. April 20 Order at 3 n.4, 4. Clarification regarding the application of Respondents' Stipulation to the Commission's final opinion and order would be desirable.

[3] Elsewhere, Respondents state both that they "have no objection to a *blanket* prohibition on disseminating or causing to be disseminated *any* advertising or promotional materials for *any* supplements that makes *any* representations regarding health or disease," Respondents' Expedited Motion to Partially Reconsider May [sic] 6, 2021 Order Granting Complaint Counsel's Motion to Compel and Statement of Impasse at 7 (Apr. 13, 2021), (emphasis original), and that "[t]he *only* relief permitted by Section 5 of the FTC Act is an order requiring Respondents to cease and desist from the allegedly deceptive act or practice —which is the dissemination of advertising and promotional materials regarding the four supplements." *Id.* at 5 (emphasis original).

Based on the filings we are requesting, the Commission will determine the scope and manner of further proceedings. Future proceedings will include, but not necessarily be limited to, an opportunity for the parties to submit proposed findings of fact and conclusions of law and a proposed order, together with reasons therefor and briefs in support thereof, addressing the elements of liability, the appropriate remedy, and legal defenses. If substantial factual issues remain in dispute, we will consider remanding this proceeding to the ALJ for further fact-finding procedures. Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel shall, within seven (7) days of the date of this Order, file with the Commission and serve upon Respondents a statement of the material facts that Complaint Counsel intend to assert, other than facts expressly alleged in the Complaint, and shall identify the decisional issue(s) to which each asserted fact relates.

IT IS FURTHER ORDERED that Respondents shall within seven (7) days of the date of service of Complaint Counsel's statement, file with the Commission and serve upon Complaint Counsel a Response to Complaint Counsel's statement. For each fact that Complaint Counsel have identified, Respondents shall state whether they dispute the asserted fact and shall explain the basis for any disputes identified. Such Response shall clarify whether Respondents' Stipulation applies to the Commission's final opinion and order and shall specify whether Respondents will accept and agree to the specific items of relief identified in the Notice of Contemplated Relief that was attached to the Complaint. Such Response shall also identify any additional material facts, other than those alleged in the Complaint or asserted by Complaint Counsel, that Respondents intend to assert and shall identify the decisional issue(s) to which each additional fact relates.

IT IS FURTHER ORDERED that within five (5) days of the date of service of Respondents' Response, Complaint Counsel may file with the Commission and serve upon Respondents a brief reply to any new matters raised in the Response. If Respondents have identified any additional facts that they intend to assert, Complaint Counsel, within five (5) days of the date of service of Respondents' Response, shall file with the Commission and serve upon Respondents a reply in which, for each fact that Respondents have identified, Complaint Counsel shall state whether they dispute the asserted fact and shall explain the basis for any disputes identified. And

IT IS FURTHER ORDERED that Complaint Counsel's Expedited Motion to Reschedule Evidentiary Hearing Date is **DEEMED WITHDRAWN**. Respondents' Motion to Extend Time to Respond to Complaint Counsel's Motion to Reschedule the Evidentiary Hearing Date is **DENIED**.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: May 14, 2021