

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 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.

DOCKET NO. 9397

**COMPLAINT COUNSEL'S REPLIES TO
RESPONDENTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW**

PUBLIC**I. Introduction**

Once again, Respondents have chosen not to contest the facts proffered by Complaint Counsel or otherwise develop the factual record. The Commission ordered both parties to submit proposed findings of fact, conclusions of law, a brief addressing liability, defenses, and relief, as well as a proposed order. *Order Directing Parties to Submit Proposed Findings of Fact and Conclusions of Law and Providing for Summary Decision Proceeding*, at 4 (July 30, 2021) (“July 30 Order”). However, Respondents largely disregarded the Order and instead submitted proposed findings of fact and conclusions of law which merely reiterate their legal defenses and narrow interpretation of Commission Rule 3.12(b)(2).

Specifically, Respondents contend: (1) the Commission’s authority to enter a cease and desist order is limited to prohibiting alleged unlawful conduct; (2) the Commission’s structure violates Article II and Constitutional separation of powers; (3) the Commission’s multi-faceted roles violate Respondents’ right to due process under the Fifth Amendment of the U.S. Constitution; and (4) Rule 3.12(b)(2) forecloses the Commission from considering facts outside of the pleadings. The Commission considered and rejected the last two arguments. *July 30 Order*, at 3-4. For the reasons set forth in Complaint Counsel’s previous submissions¹ and briefly below, each of Respondents’ arguments is meritless.

II. Replies to Respondents’ Proposed Findings of Facts

Complaint Counsel’s replies to Respondents’ Findings of Fact and Conclusions of Law are set forth below and organized to follow the proposed findings and conclusions.

¹ See *Complaint Counsel’s Brief in Advance of Final Decision*, at 20-21 (Aug. 20, 2021); *Reply to Respondents’ Response to Complaint Counsel’s Statement of Additional Material Facts* (June 21, 2021).

PUBLIC

Proposed Finding No. 1. In the Complaint, Complaint Counsel alleges that Respondents have “disseminated or [have] caused to be disseminated advertising and promotional materials” for four supplements.

Reply: Respondents’ proposed finding is incomplete and imprecise. The Complaint alleges Health Research Laboratories, LLC (“HRL”) disseminated or caused to be disseminated advertising and promotional materials for Black Garlic Botanicals, The Ultimate Heart Formula, and Neupathic in the form of multi-page mailers sent to consumer residences and on company websites. *Complaint* ¶¶ 7, 11, 13. Whole Body Supplements, LLC (“WBS”) disseminated or caused to be disseminated advertising and promotional materials for BG18 in the form of multi-page mailers sent to consumer residences and on company websites. *Id.* ¶9. The Complaint also alleges Respondents “advertised, labeled, offered for sale, sold, and distributed, or caused to be distributed a number of dietary supplement products to consumers” including Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic. *Id.* ¶4. Respondents have admitted all of these material facts. *Amended Answer* (Mar. 30, 2021).

Proposed Finding No. 2. In the Complaint, the Commission contends the statements in the advertisements and promotional materials for four supplements were “not substantiated at the time the representations were made.”

Reply: Respondents’ proposed finding is inaccurate and imprecise. The Complaint alleges Respondents’ mailers for Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic contained a number of representations about the products’ efficacy in preventing, reducing the risk of, curing, treating, or mitigating cardiovascular disease, atherosclerosis, hypertension, or diabetic neuropathy that “were not substantiated at the time the representations

PUBLIC

were made.” *Complaint* ¶¶14-21. Respondents have admitted these material facts. *Amended Answer* (Mar. 30, 2021).

Proposed Finding No. 3. Pursuant to 16 C.F.R. § 3.12(b), Respondents elected to admit the material facts in the Complaint.

Reply: Complaint Counsel agrees Respondents elected to admit all material facts in the Complaint pursuant to 16 C.F.R. § 3.12(b)(2).

Proposed Finding No. 4. In a written stipulation filed with the Commission, Respondents further agreed to a prohibition on disseminating or causing to be disseminated any advertising or promotional materials for any supplements that makes any representations regarding health or disease.

Reply: Respondents do not clearly identify the stipulation referred to in this proposed finding.² However, Complaint Counsel agrees that in Respondents’ June 1, 2021 submission to the Commission, they stated they “do not oppose 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’ Response to Complaint Counsel’s Statement of Additional Material Facts*, at 7 (June 1, 2021) (original emphasis).

² Respondents filed a Stipulation with the Office of the Administrative Law Judges stipulating “the Initial Decision of the ALJ can include whatever ‘fencing in’ relief is permitted by statute and requested in the Complaint.” *Respondents’ Stipulation as to “Fencing-In” Relief*, at 1-2 (Apr. 13, 2021). In a later submission to the Commission, Respondents stated they did not oppose a cease and desist order prohibiting them from disseminating advertising for the four supplements at issue or containing “fencing in relief directly related to the alleged deceptive acts or practices.” *Respondents’ Response to Complaint Counsel’s Statement of Additional Material Facts*, at 7 (June 1, 2021).

PUBLIC**III. Replies to Respondents' Proposed Conclusions of Law**

Proposed Conclusion No. 1. In an administrative proceeding under Section 5(b) of the FTC Act, the Commission is authorized to enter an order against Respondents “to cease and desist from using such method of competition or such act or practice” referenced in the Complaint. 15 U.S.C. § 45(b).

Reply: Complaint Counsel agrees Respondents’ selective quotation from 15 U.S.C. § 45(b) is accurate. However, Respondents’ contention that the Commission’s statutory authority is limited to ordering them to cease and desist from unlawful conduct specifically alleged in the Complaint is inconsistent with the text of 15 U.S.C. § 45(b), relevant legislative history, and well-established case law recognizing the Commission’s authority to include affirmative relief and fencing-in relief in administrative orders. *See Complaint Counsel’s Brief in Advance of Final Decision*, at 7-9; 13-18 (Aug. 20, 2021); *Reply to Respondents’ Response to Complaint Counsel’s Statement of Additional Facts*, at 6-8 (June 21, 2021).

Proposed Conclusions Nos. 2-6

Proposed Conclusion No. 2. Under 16 C.F.R. § 3.12(b)(2), the Complaint and the Amended Answer in this case provide “a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.” 16 C.F.R. § 3.12(b)(2).

Proposed Conclusion No. 3. Respondents’ Amended Answer had the effect of dispensing with a hearing in this case and removing the proceedings to the Commission for determination of a final order. 16 C.F.R. § 3.12(b)(2).

PUBLIC

Proposed Conclusion No. 4. In 2009, the Commission changed its Rules of Practice to “eliminate the ALJ’s authority to render an initial decision when the allegations of the complaint are admitted or there is a default. In those cases, the Commission would issue a final decision on the basis of the facts alleged in the complaint.” 74 Fed. Reg. 1804, 1808 (Jan. 13, 2009) (Interim final rules with request for comment).

Proposed Conclusion No. 5. In explaining the 2009 amendments to Rule 3.12(b)(2), the Commission stated that “the Commission would issue a final decision on the basis of the facts alleged in the complaint.” 74 Fed. Reg. at 1808. The Commission further noted that where the allegations are admitted pursuant to Rule 3.12(b), there would be no evidence to hear or “voluminous record” to review, and therefore, it would be more “efficient for the Commission to issue a final opinion and order without the intermediate step of an ALJ’s initial decision.” 73 Fed. Reg. 58832, 58836 (Oct. 7, 2008) (Proposed Rules).

Proposed Conclusion No. 6. In explaining the 2009 amendments to Rule 3.12(b)(2), the Commission also stated that these “cases can be resolved more expeditiously without the intermediate step of an ALJ’s initial decision; the only issues in such cases are legal or policy ones....” 74 Fed. Reg. at 1808-09.

Reply to Nos. 2-6: The Commission has already determined it can consider evidence outside of the pleadings relevant to disputed issues following Respondents’ Rule 3.12(b)(2) admissions. *July 30 Order*, at 3 (“Where, as here, issues regarding the choice of remedy remain in the case despite the admissions in the answer, it is appropriate to look to established evidence outside the pleadings to resolve the dispute.”). The Commission’s conclusion is consistent with the Rule’s text, which states the pleadings “provide a record basis” for the Commission’s decision rather

PUBLIC

than the exclusive basis for that decision. 16 C.F.R. § 3.12(b)(2) (emphasis added). In addition, the Rule specifies the answer operates as “a waiver of hearings as to the facts alleged in the complaint” rather than *all* hearings and allows parties to submit proposed findings of fact which would be unnecessary if fact-finding was strictly limited to pleading content. *Id.*³

Respondents cite previous Federal Register statements related to the amendment of Rule 3.12(b)(2), but those also do not preclude the Commission from considering facts outside the Complaint. *July 30 Order*, at 3. The commentary statements were “not meant to limit the Commission’s authority or to address every circumstance that may arise.” *Id.*

Proposed Conclusion No. 7. The structure of the Commission, under which the Commissioners can be removed by the President only for inefficiency, neglect, or malfeasance, violates Article II of the Constitution and the Constitution’s separation of powers. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2193 (2020) (“The President’s power to remove – and thus supervise – those who wield power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52 (1926).”).

Reply: The Supreme Court specifically rejected this constitutional argument in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) and upheld the removal provisions applicable to Commissioners. Further, subsequent decisions have reinforced the fact that *Humphrey’s Executor* remains good law. *See Complaint Counsel’s Brief in Advance of Final Decision*, at 20-21.⁴

³ *See July 30 Order*, at 3.

⁴ The Supreme Court’s decision in *Myers v. United States*, 272 U.S. 52 (1926) established that Congress may not condition the removal of a federal officer on Senate “advice and consent,” but did not address the question of

PUBLIC

Proposed Conclusion No. 8. The FTC’s combined role of prosecutor, trial judge, jury, and appellate court in these administrative proceedings violates Respondents’ rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. Minimal due process requires “notice of the factual basis” of the Government’s assertions “and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). Any use of the findings of fact – which are decided without adequate due process before a neutral decisionmaker – to deprive Respondents of property in a later action under 15 U.S.C. § 57b violates the Due Process Clause of the Fifth Amendment. *See* 15 U.S.C. § 57b(c).

Reply: As the Commission has previously recognized, Respondents’ argument that the Commission’s combined investigative and adjudicative roles violate their due process rights is contrary to well-established Supreme Court precedent in *Withrow v. Larkin*, 421 U.S. 35 (1975). *July 30 Order*, at 3-4; *see also Complaint Counsel’s Brief in Advance of Final Decision*, at 20 (Aug. 20, 2021).

Moreover, Respondents have had ample notice of the factual allegations in this proceeding and decided not to dispute them when given multiple opportunities to do so. Respondents had an opportunity to contest the Complaint, but filed their Amended Answer instead. The Commission afforded Respondents the opportunity to challenge Complaint Counsel’s Statement of Additional Material Facts, but they elected not to confirm or deny the truth of any of these facts—or propose any additional facts for the Commission to consider. *Order For Further Proceedings Before the Commission*, at 3 (May 14, 2021); *see also ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 618 (6th Cir. 2017) (finding “elaboration over the course of

whether Congress can limit the President’s own removal power to some level of “good cause” which was later considered in *Humphrey’s Executor*.

PUBLIC

the proceedings sufficient to provide notice”); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 18-19 (7th Cir. 1971) (holding that respondent had adequate notice because, “[a]s the Commission case against petitioners unfolded, there was a reasonable opportunity to know the claims of the opposing party and to meet them”) (internal quotations omitted). The fact Respondents chose not to develop the factual record in this matter obviously does not mean they did not have notice of the factual allegations and an opportunity to respond. It means Respondents made a strategic decision not to fully participate in the process provided.

Finally, Respondents’ constitutional challenge to provisions in 15 U.S.C. § 57b(c) making the Commission’s findings of fact conclusive in a hypothetical future enforcement action brought under 15 U.S.C. § 57b is premature. *July 30 Order*, at 4 n.2 (“We need not address the constitutionality of provisions about possible future review or enforcement actions because it is not raised by the issues presently before us.”).

Dated: September 10, 2021

Respectfully submitted,

s/ Elizabeth J. Averill
Elizabeth J. Averill
Jonathan Cohen
Federal Trade Commission
600 Pennsylvania Ave, NW, CC-9528
Washington, DC 20580
(202) 326-2993 (Averill); -2551 (Cohen)
Eaverill@ftc.gov; Jcohen2@ftc.gov
(202) 326-3197 (facsimile)

Complaint Counsel

PUBLIC

CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Replies to Respondents' Findings of Fact and Conclusions of Law today via electronic mail.

Joel Reese
Joshua Russ
Reese Marketos LLP
750 N. Saint Paul St., Suite 600
Dallas, TX 75201
Joel.reese@rm-firm.com
Josh.russ@rm-firm.com

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 Judge**:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave, N.W., Room H-110
Washington, DC 20580

s/ Elizabeth J. Averill
Elizabeth J. Averill
Federal Trade Commission
600 Pennsylvania Ave, NW, CC-9528
Washington, DC 20580
(202) 326-2993; eaverill@ftc.gov