PUBLIC

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

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 SUPPLEMENTAL OPPOSITION TO
RESPONDENTS' MOTION TO AMEND

Effectively conceding their original motion's near-certain failure, Respondents now waive certain affirmative defenses to address one of three insurmountable obstacles to the relief they seek. Previously, through a proposed amended answer citing Rule 3.12(b)(2), Respondents claimed they no longer contest certain unspecified Complaint allegations while asserting affirmative defenses and without unequivocally admitting particular facts. *See* No. 600668 (Feb. 12, 2021). However, as Complaint Counsel's opposition explained, Respondents' approach failed for several reasons: (1) Respondents may not assert affirmative defenses at all; (2) Respondents must admit allegations unequivocally; and (3) Respondents may not dispute particular allegations by arguing that this action is moot and contrary to the public interest. *See* No. 600771 (Feb. 24, 2021). Respondents subsequently withdrew only some of their affirmative defenses—those concerning mootness and the public interest, *see* No. 600784 (Feb. 25, 2021). This maneuver, addressing only one of their motion's three fatal defects, must fail.

Importantly, Complaint Counsel's opposition to Respondents' original motion identified the two continuing flaws—the presence of affirmative defenses and the failure to unequivocally admit facts. Respondents' silence on these problems speaks volumes. With a few additional

sentences, Respondents could have easily withdrawn **all** of their affirmative defenses and stated unequivocally that the Complaint's allegations are true. Respondents' refusal to do so demonstrates that they do not unequivocally accept that all of the Complaint's material allegations are true.[1] Because Respondents' disingenuous *nolo contendre* approach violates both the spirit and the letter of Rule 3.12(b)(2), their motion must be denied.

Background

Shortly before the current dispute concerning Rule 3.12(b)(2), Respondents moved to force Complaint Counsel to accept a "contested stipulated cease-and-desist order." *See* No. 600441 (Jan. 13, 2021). The ALJ rejected Respondents' "novel" request made without "any case or other precedent." No. 600607 (Feb. 1, 2021) at 3. When that failed, Respondents moved to amend their answer through a proposed amendment that asserted five affirmative defenses (some of which themselves make multiple arguments). Importantly, many of these defenses preserve Respondents' right to challenge facts found through these proceedings as not binding on the basis that the administrative process that produces the factfinding is allegedly unconstitutional or otherwise unlawful. For instance, Respondents asserted that these proceedings violate the Fifth Amendment because they "seek[] to deny Respondents of property and rights without due process of law." No. 600668, Ex. 1 at 2. Respondents further contend that these proceedings violate the separation of powers because "the Commissioners and the ALJs are not subject to the supervision and authority of the President." *Id.* Respondents also assert, among other things, that "*de novo* review of the ALJ's factual findings" violates the Constitution and the Administrative Procedure Act ("APA"), and that they object to "any findings" that allegedly exceed the Commission's statutory authority. *See id.* Respondents also claimed that this matter is moot, and contrary to the public interest. *See id.* Finally, Respondents accompanied their

[1] Perhaps recognizing that their unwillingness to withdraw **all** of their affirmative defenses and otherwise admit facts unequivocally means their motion still must fail, Respondents also leave unaddressed Complaint Counsel's alternative argument that, should Respondents' motion be granted, it should be granted only upon conditions. Potential conditions are only germane if Respondents have satisfied Rule 3.12(b)(2), which they have not.

proposed answer with a motion explaining their choice "not to contest" unspecified allegations (rather than outright admitting their truth), *see* No. 600668 at 3, and suggesting that, if Respondents had greater resources, or a "fair, impartial [and] constitutional" process, they would demonstrate that the Complaint's allegations are actually false, *see id.* at 3.

As noted above, Complaint Counsel identified multiple fatal problems with Respondents' proposed answer, including that Rule 3.12(b)(2) does not permit affirmative defenses or an equivocal *nolo contendre* position. With their new gambit destined to fail, Respondents waived their mootness and public interest defenses and "agree[d] not to assert these particular affirmative defenses in any future answer[.]" No. 600784 at 1. However, Respondents' waiver does not specify whether it applies only to "future answers" *in this proceeding*, and regardless, Respondents still assert their myriad due process, separation of powers, and APA defenses. Accordingly, Respondents still reserve the right to assert constitutional and statutory challenges to any fact the ALJ and Commission ultimately find.

Argument

I. Respondents Improperly Assert Affirmative Defenses.

Respondents seek to amend their answer pursuant to Rule 3.12(b)(2), a section that makes no provision for defenses. Rather, Rule 3.12(b)(1)(i)—which applies to "answer[s] in which the allegations of a complaint are contested"—provides that the answer must contain "[a] concise statement of the facts constituting each ground of defense[.]"

Notably, if Respondents could assert defenses under Rule 3.12(b)(2), there would be little difference between subsections (b)(1) and (b)(2), making subsection (b)(2) largely surplusage. *Cf. Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (noting that the law "favors that interpretation which avoids surplusage"). Nothing prevents Respondents seeking leave to amend under Rule 3.12(b)(1) with an answer that includes "[s]pecific admissions . . . of each fact alleged in the complaint," *id.* at 3.12(b)(1)(ii), along with whatever "defenses" Respondents identify, *id.* at 3.12(b)(1)(i). If this tribunal granted leave under those circumstances, then the

litigation would simply proceed to trial. In short, Respondents should not be permitted to meld two distinct subsections. Because subsection (b)(2) does not allow defenses, Respondents' attempt to proceed under that subsection must be denied.

II. Respondents Have Not Unequivocally Admitted That the Complaint's Allegations Are True.

Rule 3.12(b)(2) requires "formal concessions in the pleadings," also known as "judicial admissions. *See*, *e.g.*, *Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995) (defining judicial admissions). Notably, judicial admissions are a unique class of admission distinct from "the discovery device known as 'requests for admissions.'" 22A FED. PRAC. & PROC. EVID. § 5194 (2d ed. 2020). In fact, the Rules recognize that Rule 3.12(b)(2) admissions have unique attributes, including forming the basis for Commission factfinding that binds a respondent in subsequent proceedings. Specifically, Rule 3.32(c) permits discovery admissions to be withdrawn or modified under certain circumstances, and specifies that discovery admissions may not be used against a party "in any other proceeding." In contrast, Rule 3.12(b)(2) contains no comparable features and allows the admissions to "provide a record basis on which the Commission shall issue a final decision containing appropriate findings," which "shall be conclusive" upon the respondent. *See* 15 U.S.C. § 45(c). The binding nature of the facts this tribunal and the Commission will find based on 3.12(b)(2) judicial admissions is critical: they are not genuinely binding if Respondents can challenge them on constitutional or statutory grounds. Consequently, because Rule 3.12(b)(2) serves to create a record to support conclusive factfinding that binds a respondent in future proceedings, permitting affirmative defenses that seek to render that factfinding subject to future constitutional and statutory challenge is incompatible with the Rule.

The requirement that judicial admissions be "unequivocal" underscores the point. *See*, *e.g.*, *Teleglobe Commc'ns Corp*., 493 F.3d 345, 377 (3d Cir. 1977) ("[A]dmissions must be unequivocal."). The purpose of Rule 3.12(b)(2) is to permit respondents to admit allegations because they accept them as "true," thereby making them an appropriate basis for "conclusive"

findings of fact pursuant to 15 U.S.C. § 45(c). Admissions that Respondents reserve the right to dispute are not admissions at all, let alone the unequivocal judicial admissions that Rule 3.12(b)(2) requires. Furthermore, as discussed above, Respondents continue to suggest that they decline to contest the facts at issue solely for financial or strategic reasons. This exacerbates Respondents' equivocation and the Commission's corresponding inability to use Respondents' *nolo contendre* plea as a basis for conclusive, binding factfinding. In short, because Respondents have not unequivocally admitted facts, their proposed answer fails to satisfy Rule 3.12(b)(2).

Conclusion

For all the foregoing reasons, Respondents' motion should be denied.

Respectfully submitted,

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Complaint Counsel

CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Supplemental Opposition to Respondents' Motion to Amend on counsel for the Respondents on March 4, 2021 via electronic mail.

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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**:

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