PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina 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

REPLY TO RESPONDENTS' RESPONSE TO COMPLAINT
COUNSEL'S STATEMENT OF ADDITIONAL MATERIAL FACTS

Because Respondents cannot dispute the facts alleged in the Complaint and proffered in Complaint Counsel's Statement of Additional Material Facts, Respondents avoid facts entirely—contrary to the Commission's order that they address factual issues—resorting instead to meritless legal arguments that the Commission did not invite. *See* Order for Further Proceedings Before the Commission (May 14, 2021) ("Order") at 3. Regardless, none of Respondents' legal contentions warrants serious consideration.

First, Respondents claim that these proceedings are unconstitutional either because the President cannot fire Commissioners except for cause, or because administrative adjudications purportedly violate due process. However, *Humphrey's Executor v. United States*, 295 U.S. 602,

629-32 (1935), forecloses Respondents' Article II/separation of powers argument, and *Withrow v. Larkin*, 421 U.S. 35, 58 (1975), forecloses their due process argument.

Second, Respondents claim the FTC Act does not permit the Commission to include affirmative provisions (for instance, scofflaw or notice requirements) in cease-and-desist orders. Preliminary, Respondents waived this affirmative defense when they withdrew it from their Answer before the ALJ. Regardless, Section 5 of the FTC Act expressly describes Commission orders as potentially containing "affirmative relief provision[s]." 15 U.S.C. § 45(b). This language and associated legislative history clearly establish the Commission's authority to issue affirmative commands.

Third, although the Commission has already determined a Rule 3.12(b)(2) answer does not "necessarily terminate all proceedings in the case," and "issues [may] remain in dispute after a Rule 3.12(b)(2) answer," Respondents contend that considering facts beyond the Complaint is purportedly inconsistent with the Rule. Importantly, Respondents ignore the Rule's plain language, which states only that the Complaint and Answer will provide "a" record basis for the Commission's decision—not the exclusive record basis. In response, Respondents point to comments published when the Commission revised the Rule in 2009. However, as discussed below, these comments are not binding, they are not inconsistent with considering facts beyond the Complaint, and they are not intended to apply regardless of the procedural context.

Importantly, Respondents' baseless legal arguments should not obscure their failure to heed the Commission's Order to respond to Complaint Counsel's additional facts and propose their own. Given Respondents' choice not to participate in the Commission-ordered process, the Commission should decide this case based on the Complaint and Complaint Counsel's

uncontested additional facts. Accordingly, Complaint Counsel requests that the Commission propose a schedule for appropriate briefing and submissions.

I. Respondents' Constitutional Arguments Contravene Supreme Court Precedent.

A. Under Clear Supreme Court Precedent, the Commission's Independent Structure Is Consistent With Article II and the Separation of Powers.

Respondents contend this proceeding is unlawful because the FTC's adjudicative process violates the Constitution's Article II/separation of powers requirement because the President cannot remove Commissioners and ALJs except for "inefficiency, neglect of duty, or malfeasance in office." *See* 15 U.S.C. § 41; Response at 8-9, 12. More specifically, Respondents assert that the "Constitution did not authorize Congress to create the FTC as a 'quasi-legislative' or 'quasi-judicial' body whose leadership is not subject to at-will removal by any branch of government." *Id.* at 9. The Supreme Court squarely rejected this argument in *Humphrey's Executor*, 295 U.S. 602 (1935), holding the for-cause removal provisions applicable to FTC Commissioners did not violate the Constitution's vesting of executive authority in the President or the separation of powers. *Id.* at 629-32. In that case, the Court reasoned the FTC's duties as an administrative agency were "quasi-legislative and quasi-judicial" rather than purely "executive," *id.* at 624, and, therefore, Congressional authority to prohibit the removal of FTC Commissioners except for cause "cannot well be doubted," *id.* at 629.

Respondents nevertheless contend the Supreme Court "wrongly decided" *Humphrey's Executor*. Response at 8-9. Notwithstanding Respondents' opinion about what the Supreme Court should or will do, even recent decisions invalidating removal-protection provisions for single executives (not members of commissions) have reinforced the fact that *Humphrey's Executor* remains good law, at least with respect to independent commissions. *See Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (explaining that *Humphrey's Executor* establishes

an "exception[] to the President's unrestricted removal power" that allows Congress to "create expert agencies led by a *group* of principal officers removable by the President only for good cause") (Supreme Court's emphasis); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (discussing, but not altering, the principle from *Humphrey's Executor* that Congress can, "under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause"). Consequently, *Humphrey's Executor* sinks Respondents' Article II/separation of powers argument.

B. Under Clear Supreme Court Precedent, the Commission's Adjudicative Procedure Complies With Due Process.

Respondents also contend the "FTC's combined role of prosecutor, trial judge, jury, and appellate court in the administrative proceedings" violates their due process rights. Response at 15 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).[1] However, "[t]he combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies." *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982) (citations omitted). Specifically, in *Withrow v. Larkin*, 421 U.S. 35 (1975), the Supreme Court held that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation[.]" *Id.* at 58; *cf. FTC v. Cement Inst.*, 333 U.S. 683, 702-03 (1948) (declining to find Commission adjudicative proceeding violated due process despite the fact that the Commission had previously expressed the opinion that the

[1] *Hamdi* has nothing to do with administrative procedure. *See* 542 U.S. at 509 (holding that due process requires that a citizen detained in the United States "as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker").

conduct at issue was unlawful). Consequently, "[i]t is uniformly accepted that many agencies properly combine the functions of prosecutor, judge and jury," *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979), and Respondents' argument is frivolous as a matter of basic administrative law.

C. Respondents Had Notice of the Facts at Issue and an Opportunity to Respond.

Respondents also argue that considering facts outside the Complaint would violate their due process rights because Respondents purportedly did not have notice of the allegations against them and an opportunity to respond. Response at 16. However, there is no due process requirement that the Commission consider only allegations in the Complaint as long as the respondent has a fair opportunity to respond and develop the record. *See*, *e.g.*, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 353 (1938) (rejecting argument that the agency's "findings do not follow the pleadings" where the respondent "understood the issue and was afforded full opportunity" to litigate it); *see also Nat'l Realty & Const. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) ("So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue."). Respondents had an opportunity to contest the Complaint, but they chose not to.

Furthermore, the Commission afforded Respondents the opportunity to challenge Complaint Counsel's Statement of Additional Material Facts, but they elected to advance meritless legal arguments rather than confirm or deny the truth of any of these facts[2]—or propose

[2] Peripherally, Respondents contend that the decisional issues noted in the Statement of Additional Material Facts chart are insufficient or confusing. Response at 10-11. This is puzzling because the chart's notations clearly indicate most facts are relevant to either liability or the usual factors the Commission considers when determining whether proposed relief is

additional facts for the Commission to consider. Order (May 14, 2021) at 3 (ordering Respondents to state whether "they dispute [each] asserted fact" that Complaint Counsel asserts, and "identify any additional material facts, other than those alleged in the Complaint or asserted by Complaint Counsel, that Respondents intend to assert"); *see also ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 618 (6th Cir. 2017) (finding "elaboration over the course of 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 that Respondents (questionably) chose to admit everything, waive most defenses, and decline to develop the factual record does not mean they did not have notice of the matters at issue and an opportunity to respond—they did.

II. Respondents Waived Their Statutory Defense and, in Any Event, Respondents' Argument Is Baseless.

A. Respondents Waived Their Statutory Defense.

Respondents assert that the Commission lacks the power to impose scofflaw provisions and require notice to victimized consumers because the FTC Act does not authorize the Commission to impose affirmative relief. Response at 9-10. Importantly, the contention that the proposed relief exceeds the Commission's statutory authority is an affirmative defense that Respondents must prove. *See*, *e.g.*, *FDIC v. Main Hurdman*, 655 F. Supp. 259, 262-63 (E.D. Cal. 1987) (explaining that the contention that FDIC's actions were "in excess of [its] statutory

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reasonably related to a respondent's unlawful conduct including: the seriousness and deliberateness of the conduct, transferability, and any prior history of violations. *See, e.g., Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006) (quoting *Stouffer Foods Corp.,* 118 F.T.C. 746, 811 (1994)); Complaint Counsel's Statement of Additional Facts, Att. A, Nos. 1-3.

authority" is a "true affirmative defense" upon which the defendant "bears the burden of pleading and of persuasion"); *see also* 27 FED. PROC., L. ED. § 62:85 (2021) (explaining that affirmative defenses encompass "matters outside the scope of the plaintiff's prima facie case"). However, during the litigation before the ALJ regarding Respondents' answer, Respondents withdrew their affirmative defense asserting that the "FTC requests relief that exceeds the authority granted to the FTC under the FTC Act." *Compare* Respondents' Answer at ¶23 (Dec. 4, 2020) (raising this defense), *with* Amended Answer (Mar. 30, 2021) (omitting this defense).[3] Accordingly, Respondents waived any argument—however fallacious—that the proposed relief exceeds the Commission's statutory authority.

B. The Commission Has Authority to Issue Orders Imposing Affirmative Obligations.

Nonetheless, even if Respondents had not waived the defense they now improperly assert, their argument is meritless. Respondents contend that 15 U.S.C. § 45(b) only authorizes the Commission to issue cease-and-desist orders containing prohibitions, not affirmative relief. However, the FTC Act expressly provides for affirmative relief. Specifically, 15 U.S.C. § 45(b) states the Commission may order respondents to "cease and desist from using such [unlawful] method of competition or such act or practice," and *in the same paragraph*, specifies that the Commission "shall reopen any such order" under certain circumstances "to consider whether such order (including *any affirmative relief provision* contained in such order) should be altered[.]" (Emphasis added).

The legislative history associated with the quoted provision containing the "affirmative relief" language makes clear that Congress meant what the statute says:

[3] In fact, the Commission's May 14, 2021 Order notes that Respondents' answer "asserts a legal defense" challenging the constitutionality of the FTC's administrative process and structure, *id.* at 2, but the Commission does not mention Respondents' withdrawn statutory defense.

> This section codifies existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made. The Commission will be obliged to consider whether changed conditions have caused a company under order to be unfairly disadvantaged vis-a-vis its competitors. *For example, if a company were required to make certain affirmative disclosures* of information when it sold a product, but then over the course of several years its major competitors were placed under orders requiring no comparable disclosure in the sale of the same type of product, the first company would be able to bring this changed condition of law to the Commission's attention with the assurance that the Commission will reexamine *the original affirmative relief provision*.

S. REP. NO. 500, 96TH CONG., 1ST SESS. 34 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1111 (emphasis added). Unsurprisingly given the statutory language and legislative history, courts find Commission orders requiring affirmative acts uncontroversial. *See, e.g.*, *AMREP Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985) (explaining that "affirmative disclosures designed to dissipate any misrepresentations that purchasers might have had" due to the respondent's unlawful conduct are permissible as long as they are "reasonably related" to the "past violations and practices"); *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 397 (9th Cir. 1982) (affirming cease-and-desist order with future record-keeping requirements).[4]

III. Rule 3.12(b) Does Not Preclude the Commission From Considering Facts Outside the Pleadings When Determining Scope of Relief.

[4] Respondents briefly claim that an order requiring affirmative conduct would "also violate the Constitution's separation of powers by usurping the judicial power provided to Article III courts." Response at 10. They fail to develop the argument, but cite *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) for the proposition that Article III judges "must hear and determine all matters concerning private rights." However, this case involves public rights; the Court explained that a matter involving public rights is one arising "between the Government and others," while a matter of private rights is one involving "liability of one individual to another." *Id.* at 69-70. *Northern Pipeline* explicitly recognized "the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving public rights." *Id.* at 67 (internal quotations omitted).

Respondents argue Rule 3.12(b)(2) prevents the Commission from considering any facts outside those they admitted through their Answer. Response at 1-2, 13-15. However, as the Commission already explained, "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 (May 14, 2021) at 2; *see also id.* ("A Rule 3.12(b)(2) answer does not, however, necessarily terminate all proceedings in the case."). Importantly, the Commission's interpretation is consistent with the Rule's language. It permits the Commission to consider facts outside of the Complaint because it states the pleadings "provide *a* record basis" for the Commission's decision rather than the exclusive basis for that decision. 16 C.F.R. § 3.12(b)(2). (emphasis added). Likewise, the Rule specifies the answer operates as "a waiver of hearings *as to the facts alleged in the complaint*" rather than all hearings. *Id.* (emphasis added). Thus, while Rule 3.12(b)(2) streamlines administrative proceedings to eliminate both further litigation about admitted facts and the ALJ's initial decision, it still permits the Commission to consider additional facts relevant to determining appropriate relief.

In response, Respondents refer to the ALJ's opinion to argue that the Commission may consider *only* facts alleged in the Complaint given Federal Register commentary stating that the most recent revision to Rule 3.12(b)(2) "eliminate[s] 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." Order (Apr. 21, 2021) at 2 (citing 74 FED. REG. 1804, 1808 (Jan. 13, 2009)); Response at 14. Respondents' rejoinder fails for three reasons. First, the commentary is not binding. The Commission sought public comment about proposed amendments to various Part 3 rules as a matter of discretion; it made clear that it sought comment "even though the proposed rule

revisions relate solely to agency practice, and thus are not subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b)(A)." 74 FED. REG. at 1804.[5] Accordingly, the comments regarding Rule 3.12(b)(2) are, at most, a "procedural"[6] or "interpretive" rule, *see* 5 U.S.C. § 553(b)(A), and such rules "do not have the force and effect of law," *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995); *see also Hennepin County Medical Center v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996) ("An agency's interpretative rules, which are not subject to APA rulemaking procedures, are nonbinding and do not have the force of law.") (citation omitted).

Second, the Commission's procedure is consistent with the commentary, which provides the Commission will "issue a final decision on the basis of the facts alleged in the complaint." 74 FED. REG. at 1808. The Commission plainly intends to do that, even if the final decision is not based *exclusively* on those facts. Contrary to Respondents' suggestion, neither the Rule nor the commentary gives Respondents a "right" to foreclose all factual questions beyond the Complaint's specific allegations.

Third, nothing in the commentary suggests the Commission intended it to apply in every possible circumstance, no matter the procedural context. In this unusual case, Respondents have invoked Rule 3.12(b)(2) while refusing to squarely admit facts, choosing instead to evasively qualify or obscure their position. *See, e.g.*, Response at 5-9; Respondents' Expedited Motion to Partially Reconsider at 5, 7 (Apr. 13, 2021). Additionally, the Complaint does not contain all

[5] *See also* Notice of Proposed Rulemaking, 73 FED. REG. 58832, 58835 (Oct. 7, 2008) ("The proposed [Part 3] rule revisions relate solely to agency practice and, thus, are not subject to the notice and comment requirements of the APA[.]").

[6] A procedural rule is one that "does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Chamber of Commerce of U.S. v. DOL,* 174 F.3d 206, 211 (D.C. Cir. 1999) (quotations and citations omitted).

facts potentially relevant to the scope of relief, nor is it required to. *See In re Zale Corp.*, 77 F.T.C. 1635, 1970 WL 117293, *1 (June 17, 1970) ("It is clear, however, that evidence as to an appropriate remedy may always be received, regardless of the allegations in the complaint. The selection of an appropriate remedy . . . [is] governed by the unlawful practices actually found to exist, and not by the allegations of the complaint.") (citations omitted). It is unlikely the Commission intended the commentary to prevent itself from considering relevant facts that the Respondents have had the opportunity to address.[7] Put simply, the commentary does not apply to every possible procedural scenario. Because the commentary does not alter the Commission's original, sound interpretation of Rule 3.12(b)(2) in this context, *see* Order (May 14, 2021), Respondents' argument should be rejected.

IV. The Commission Should Rule on the Existing Record.

The Commission requested briefing to clarify "any factual issues [that] remain to be resolved," and to ascertain Respondents' position on proposed relief, to enable it to determine the scope and manner of further proceedings. Order (May 14, 2021) at 2. The Commission provided Respondents an opportunity to contest Complaint Counsel's additional facts and to introduce facts of their own, but Respondents did neither.[8] Therefore, Complaint Counsel asks the Commission to direct the parties to submit proposed findings of fact (limited to facts in the

[7] Respondents contend the additional facts are inadmissible under 16 C.F.R. § 3.43(b) because they are "irrelevant and immaterial to any of the facts alleged in the Complaint, to any of the current defenses, and to the items for relief in the Notice of Contemplated Relief." Response at 13. However, the additional facts are obviously material and relevant to issues of liability and relief, and the chart attached to Complaint Counsel's Statement of Additional Facts specifies the relevant decisional issues for each fact. *See* Complaint Counsel's Statement of Additional Material Facts, Att. A.

[8] Respondents' submission did clarify they will not be introducing any additional material facts in this case. Response at 10.

Complaint and Statement of Additional Material Facts), conclusions of law, and proposed orders, along with supporting briefs and oral argument (if desired). The Commission should then decide this case based on a record consisting of the Complaint and Complaint Counsel's uncontested additional facts.

Dated: June 21, 2021

Respectfully submitted,

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Complaint Counsel

CERTIFICATE OF SERVICE

I certify that I served a copy of Complaint Counsel's Reply to Respondents' Response to Complaint Counsel's Statement of Additional Material Facts on Respondents' counsel on June 21, 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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