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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

RESPONDENTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Commission's July 30, 2021 Order, Respondents provide the following Findings of Fact and Conclusions of Law.

I. SUMMARY

In reliance on the federal regulations (16 C.F.R. 3.12), a federal statute (15 U.S.C. § 45(b)), the Administrative Procedures Act, and the FTC's explanation of its regulations in the Federal Register (74 Fed. Reg. 1804, 1808 (Jan. 13, 2009)), Respondents admitted the facts in the Complaint. Respondents understood that the "Commission would issue a final

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decision on the basis of the facts alleged in the complaint”¹ and that the relief granted would be limited to a “cease and desist order” that prohibits “disseminat[ing] or caus[ing] to be disseminated advertising and promotional materials” for four supplements. *See* 15 U.S.C. § 45(b). The FTC has now changed the rules again.

In its July 30, 2021 Order, the Commission stated that it would not issue a final decision based on the facts alleged in the Complaint, that it would consider “facts outside of the Complaint,” and that the relief that may be issued in this case would not be limited to the relief requested by the FTC in the Complaint. For the reasons stated in their Response to Complaint Counsel’s Statement of Additional Material Facts, Respondents respectfully disagree and believe that their constitutional and statutory rights are being violated and that the Commission is acting in manner that is inconsistent with the United States Constitution, FTC Act, Title 16 of the Code of Federal Regulations, and the FTC’s prior interpretation and explanation of its rules and regulations.

Because Respondents have no choice, Respondents submit the following findings of fact and conclusions of law without waiving their prior objections to these administrative proceedings, including the objection to the Commission’s refusal to issue a final decision based on the record created by the Complaint and the Answer.

II. PROPOSED FINDINGS OF FACT

Respondents requests the following Findings of Fact:

¹ 74 Fed. Reg. 1804, 1808 (Jan. 13, 2009).

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1. In the Complaint, Complaint Counsel alleges that Respondents have “disseminated or [have] caused to be disseminated advertising and promotional materials”² for four supplements.

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.”³

3. Pursuant to 16 C.F.R. § 3.12(b), Respondents elected to admit the material facts in the Complaint.

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.

III. PROPOSED CONCLUSIONS OF LAW

Respondents request the following conclusions of law:

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).

² See Complaint, ¶¶ 7, 9, 11 and 13.

³ See Complaint, ¶¶ 15, 17, 19, and 21.

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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).

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).

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).

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).

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

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of an ALJ's initial decision; the only issues in such cases are legal or policy ones” 74 Fed. Reg. at 1808-09.

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).”).

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).

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Dated: August 20, 2021

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification to:

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