PACIFIC LEGAL FOUNDATION

November 11, 2021

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D)
Washington, DC 20580

Re: Resident Home, LLC, Proposed Consent Order, File No. 202 3179

Dear Chair Khan:

Pacific Legal Foundation files this comment to object to the Commission's proposed consent order with Resident Home, LLC. As dissenting Commissioners Phillips and Wilson note, the proposed settlement agreement goes "beyond the bounds of what the law permits," because the "policy preferences of commissioners" seem to trump the limits of the Commission's authority. *See Resident Home, LLC; Analysis of Proposed Consent Order To Aid Public Comment*, 86 Fed. Reg, 58279, 58283 (Oct. 21, 2021). Indeed, the ink is hardly dry on the Supreme Court's unanimous rebuke of the Commission's decades-long practice of imposing massive fines from businesses without any legal authority. *See AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021). Yet the Commission has tried again, this time stretching a different source of authority far beyond the limits enacted by Congress. Commissioners Phillips and Wilson are also correct that by "flout[ing] the limits of [its] authority, the Commission should fully expect additional rebukes from the courts." *See* 86 Fed. Reg. at 58283. Rather than face future rebukes from the courts, the Commission should rescind or modify its proposed settlement order to comport with the limits of its authority.

STATEMENT OF INTEREST

Pacific Legal Foundation is the nation's leading public interest organization advocating, in courts throughout the country, for the defense of individual liberty and economic opportunity and against government overreach. PLF is deeply concerned about agency action that exceeds constitutional limits, particularly when it intrudes into areas of economic choice. PLF's attorneys have long been at the forefront of challenging administrative overreach and have regularly defeated unlawful agency action in the courts. Even though Commission Chair Khan does not seem troubled by the prospect of exceeding the agency's authority, worrying instead about the "existential stakes of underreaching," PLF believes that the stakes could hardly be higher. *See* Nancy Scola, *Lina Khan Isn't Worried About Going Too Far*, *Intelligencer*, Oct. 27, 2021, *available at* https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html. If the agency is not concerned with structural limits on its power, then PLF will not hesitate to have the courts enforce those limits. The undersigned PLF attorney is therefore an "interested person[]" under Commission Rule 2.34(c) (16 C.F.R. § 2.34(c)).

RELEVANT FACTS

The Commission believes that Respondent Resident Home, LLC, has engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act related to claims that its products were made in the U.S. 86 Fed. Reg. at 58280. As Commissioners Phillips and Wilson noted, Resident Home, LLC, is the new parent company of a group of companies that were previously under an FTC administrative order barring them from making "made in America" claims. *Id.* at 58283. The Commission therefore sought to enter a new, broader order, also encompassing the new parent company. *Id.* The Commission filed an administrative complaint, and now the respondent has proposed to settle the new allegations in a consent agreement. *Id.* at 58280.

Regardless of the merits of these allegations, the proposed consent agreement includes a series of "monetary provisions" that exceed the agency's authority. *Id.* "Part III imposes a judgment of $753,300. Part IV includes additional monetary provisions relating to collections. Part V requires Respondents to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate." *Id.* Although not apparent from the information provided by the Commission in its "Analysis of Proposed Consent Order to Aid Public Comment," according to Commissioners Philips and Wilson, "the Commission's proposed order includes monetary redress of $753,300, with any remainder not used for redress to be disgorged to the Treasury. The complaint does not include details that would help the public understand how the Commission arrived at this amount, and "we are not at liberty to reveal non-public information." *Id.* at 58283; *see also Proposed Decision and Order*, *In the Matter of Resident Home*, *LLC*, ¶ IV.D ("If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondents' practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondents have no right to challenge any activities pursuant to this Provision.") *available at* https://www.ftc.gov/system/files/documents/cases/2023179_-_resident_home_agreement_and_order_without_signatures.pdf.

On October 21, 2021, the Commission opened the proposed consent order to public comment. A majority, Chair Khan, (former) Commissioner Chopra, and Commissioner Slaughter defended the settlement in a joint statement. 86 Fed. Reg. at 58280. Former Commissioner Chopra included an additional statement of his own. *Id*. at 58281. Commissioners Phillips and Wilson, however, provided a dissenting statement urging that the penalty provision of the proposal exceeded the agency's authority. *Id*. at 58282.

DISCUSSION

I. The Commission Has No Authority to Demand Penalties Payable to the Treasury Under Section 19(b) of the FTC Act

At first glance, one wonders how the Commission's majority can plausibly justify its punitive fine in light of the Supreme Court's dressing down of the agency in *AMG Capital*. While that decision involved a different (purported) source of Commission authority to seek punitive fines, the Court also provided a "helpful" overview of "the Commission's authority" and how it "has evolved over time." *See* 141 S.Ct. at 1346. The Commission has two avenues for enforcement—in-house administrative proceedings and suits brought in federal court. *See id*. The availability of damages in the latter type of action was sharply curtailed by the Court. *Id*. Along the way, though, the Court examined the "structure" of the penalty provisions in administrative proceedings to "confirm[] this conclusion." *Id*. at 1348.

Section 19 of the Act, which is invoked here by the Commission, allows the Commission to go to court and enforce an order from an administrative proceeding. *Id*. at 1348-49. The statute provides "district courts the authority to impose *limited* monetary penalties and to award monetary relief in cases where the Commission has issued cease and desist orders, i.e., where the Commission has engaged in administrative proceedings." *Id*. (emphasis added). Indeed, the Court referred to these "more limited, monetary relief provisions" as proof that Congress did not mean for the Commission to have broader powers in a separate provision. *See id*. But to avoid subtlety, the Court described the available penalties as "limited" four times in a single page of its opinion. *See id*. at 1349.

The text of Section 19(b) makes clear what those limits are. In an action brought in federal court after an administrative proceeding, the court may "grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be." 15 U.S.C. § 57b(b). "Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages." *Id*. Any "payment of damages" must therefore be "necessary to redress injury to consumer" and cannot be "exemplary or punitive." *Id*.

"It follows, therefore, that there may be no redress without proof of injury caused by those practices." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). The statute, moreover, "specifically prohibits" "punishment," such as through "disgorgement." *Id*. at 607. Thus, a court cannot order that "unrefunded money be distributed" to an entity that was "not wronged" directly by the forbidden conduct. *Id*. "Calling a fine 'indirect redress' does not make it redress. An adjective, such as 'indirect,' cannot be used to exceed the statutory limitation on the remedy." *Id*.; *see also FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1280 (M.D. Fla. 2012) ("Concerned solely with the plaintiff's injury, Section 19(b) confers no authority to award monetary relief that exceeds redress to consumers."), *aff'd by* 704 F.3d 1323 (11th Cir. 2013).

The unavailability of punitive fines was *why* the Commission began to improperly rely on Section 13 as a backdoor. For example, in *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996), the court sidestepped the limits of Section 19(b) because "that statute is distinguishable from section 13(b) because it explicitly prohibits 'exemplary or punitive damages.'" But, the court said, "section 13(b) has no such limitation." *Id*. at 470. Surely the Supreme Court's subsequent rejection of the abuse of Section 13 as a workaround to the limits imposed in Section 19 should give the Commission majority greater pause in this case.

Perhaps we shouldn't be surprised though. Former Commissioner Chopra, who cast the deciding vote in favor of this consent order, already telegraphed his intention to misuse Section 19. In an article entitled *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, which was published shortly after the Supreme Court granted review in *AMG Capital*, but before the decision was issued, former Commissioner Chopra and his co-author advocated for ways the Commission might be able to continue to extort fines from companies if it lost the power to do so under Section 13. In discussing Section 19 he wrote, "We have been unable to identify a Section 19 matter where the FTC pursued damages, which is traditionally understood to be a legal remedy rather than an equitable remedy. Unlike equitable relief, damages can conceivably capture a broad range of harms, including indirect consequences of deception. As the FTC faces threats to its authority to seek equitable relief, the agency should consider pursuing this alternative form of relief in more cases." *Id*. at 13 n. 37, *available at* https://www.ftc.gov/public-statements/2020/10/case-resurrecting-ftc-acts-penalty-offense-authority. In former Commissioner Chopra's view, the Ninth Circuit was simply wrong in *Figgie*. Now that the Supreme Court swept away the Commission's lawless disgorgement practice under Section 13, it appears that he and the majority have made good on their threat.

The majority defends its use of Section 19, saying that its "settlement is squarely within the Commission's statutory authority." 86 Fed. Reg. at 58280-21. Relying on former Commissioner Chopra's prior article, it insists that the statute's use of the term "damages" does not mean "restoration of money to particular customers," but instead extends to any kind of damages, because "fraud can result in significant consequential damages, both to consumers and, especially, to honest businesses that lose out on sales." *Id*. n. 2. The majority also says that since the statute includes the language that "relief may include, but shall not be limited to" the enumerated payments, it can demand whatever it wants. *See id*.

The problem with these arguments is that they ignore the statute's structure and its consistent interpretation by Article III Courts. Section 19(b) has two sentences. The first says that a court may "grant such relief as the court finds *necessary to redress* injury to other consumers or other persons" from the misconduct. 15 U.S.C. § 57b(b) (emphasis added). The second says that the relief, "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property [or] the payment of damages[.]" *Id*. As the Ninth Circuit held nearly 30 years ago, the first sentence limits the second, and "there may be no redress without proof of injury caused by those practices. And the relief must be necessary to redress the injury." *Figgie*, 994 F.2d at 605. In the end, the Commission has already tried this argument before, and the courts rightly rejected it.

II. The Commission's Decision to Enter an Unlawful Order in a Manner Crafted to Evade Judicial Review Is an Abuse of Power

Even one unlawful act by the Commission is a problem of great significance. "[N]o matter how important, conspicuous, and controversial the issue" "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000). Indeed, "[t]he United States Government has created many federal agencies to help implement important areas of the law. But whatever the agency, it will be a creature of statute and bound by both its authorizing statute and by its own regulations unless they are changed by procedures that are lawful. A federal agency does not have unlimited power to exercise its authority over persons whenever it pleases and without regard to what its enabling statute authorized it to do." *Planned Parenthood of Greater Washington & N. Idaho v. HHS*, 946 F.3d 1100, 1114 n. 3 (9th Cir. 2020). Simply because the majority believes that it "needs to use all its tools to protect consumers and competition," and insists that the settlement will "signal to businesses that [misleading made in USA] abuses—which harm both consumers and honest competitors—will not be tolerated by the FTC," it has attempted to go beyond the limits of its authority. *See* 86 Fed. Reg. at 52821. The Commission may not lawfully do so.

As an agency purportedly engaging in law enforcement, merely running into statutory limits on its authority should be enough justification for the majority to stop its practice. But there are more consequences. Consent orders can be an improper form of "arm-twisting" that "saddles parties with more onerous regulatory burdens than Congress had authorized, accompanied by a diminished opportunity to pursue judicial challenges." Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873, 875 (1997). In the "course of settling enforcement actions," the agency can "extract concessions from the companies suspected of violating statutory requirements … that they could not impose directly on a regulated entity." *See id.* at 891-92. This allows the agency to evade constitutional limits on its authority and causes damage to judicial supremacy. *See id.*

Indeed, just because the respondents here have agreed in principle to this settlement doesn't mean it is legal, much less just. Parties settle for any number of reasons, many of which have little, if anything, to do with actual culpability. Particularly in regulatory enforcement matters, where the agency has virtually unlimited resources, but the respondent must pay for its defense, many regulated parties simply can't afford to fight back, even if they truly lack any culpability. For Resident Home LLC, its choice between a certain financial penalty of $753,300 that happens to be unlawful or a years-long proceeding with legal bills that would almost certainly exceed that sum, is easy. Few parties in its position would contest the fine.

In fact, former Commissioner Chopra's separate statement defending the settlement suggests that Resident Home LLC's ability to defend itself may well have factored into the proposed settlement. According to former Commission Chopra, "In this matter, the Commission is proposing a settlement to hold accountable a repeat offender represented by a sophisticated law firm." 86 Fed. Reg. 58282. Every respondent, of course, deserves able legal representation, hopefully from a "sophisticated law firm." But everyone, including the Commission, seems to know that "sophisticated" representation often comes with a hefty price tag. Seeing as how the respondent would need to defend itself in front of the Commission, with at least one member viewing its decision to defend itself as inherently suspect, it's no wonder Resident Home LLC made the reasonable choice to simply pay a fine and settle the allegation rather than risk what might happen if it continued to fight.

As past members of the Commission recognized by requiring proposed consent agreements to be open for public comment, the agency's actions impact the public at large. *See* 15 U.S.C. 46(f); 16 C.F.R. § 2.34(c). This illegal settlement, blessed by the parties (likely out of convenience), has the potential to ossify into established practice, and even into an agency expectation, much the way the Commission's illicit use of disgorgement authority became commonplace. As long as it stays confined to consent orders, moreover, this practice will likely evade judicial review. Thus, the Commission can effectively evade constitutional constraints, invalidate Congressional wishes, and defy federal courts, merely because it thinks its position is important to serve a social ill.

The majority defends the settlement in part, because it thinks that "federal courts may approve settlements that include relief beyond what could have been awarded at trial," and suggests that, even without statutory authority, its settlement would be "lawful[]." 86 Fed. Reg. at 58281 (citing *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial")). This is a remarkable position for an *administrative agency* to take, much less one agreeing to a remedy *prohibited* by a statute. A federal court, unlike an administrative agency, has inherent power "to resolve a dispute within the court's subject-matter jurisdiction." *Firefighters*, 478 U.S. at 525 (citation omitted*); see also Brown v. Plata*, 563 U.S. 493, 538, (2011) ("Once invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.") (citation omitted); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose … submission to their lawful mandates.") (citations omitted). The Commission, of course, has no such inherent or equitable powers. *See Brown & Williamson*, 529 U.S. at 161. Moreover, in the very next sentence of the decision invoked by the majority, the Supreme Court noted that not even federal courts could enter consent decrees when "the parties [] agree to take action that conflicts with or violates the statute upon which the complaint was based." *See Firefighters*, 478 U.S. at 526. As discussed, the penalty provision of the agreement is *forbidden* by the relevant statute as being outside even a federal court's authority to impose. *See* 15 U.S.C. § 57b(b). The Commission cannot lawfully do what a federal court cannot, and the proposed fine is unlawful. The Commission's insistence on imposing this fine anyway does significant damage to the fundamental limits on its authority.

CONCLUSION

The Commission has an opportunity to correct course. Past Commissioners saw fit to require settlement orders to be opened to public comment. *See* 16 C.F.R. § 2.34(c). The Commission may "withdraw" the proposed agreement based on these public comments. *See id.* at § 2.34(d)(1). Moreover, as the complaint has not been formally issued in this matter, should the Commission decide to move forward and "issue and serve its complaint" following the comment period, it may only do so based on an "affirmative vote" by a majority of the commissioners. *See id.* at §§ 2.34(d)(1), 3.11(a).[1] The Commission should take this opportunity to recognize the Congressional limits of its authority, respect federal court interpretation of its power and accept that it is a body of limited powers. It should therefore rescind the proposed fines against the respondent and, in so doing, acknowledge the error in its proposed settlement order. Alternatively, a majority of the four current members of the Commission should not cast affirmative votes to issue and serve the complaint against the respondent.

Sincerely,

CALEB KRUCKENBERG
ATTORNEY
PACIFIC LEGAL FOUNDATION

[1] Commissioners Wilson and Phillips recently expressed concern over the use of former Commissioner Chopra's deciding "zombie vote" in another contentious issue. *See Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders* (October 29, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf. Because issuance of a complaint in this matter requires a new "affirmative vote" by the Commission, a majority of the *current* members of the Commission would need to approve the settlement—a "zombie vote" won't suffice. *See* 16 C.F.R. § 3.11(a).