UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 11, 2002

Dr. William V. Judy
through his counsel
Edward F. Glynn. Jr., Esquire
VENABLE BAETJER HOWARD & CIVILETTI, LLC
1201 New York Ave., N.W., Suite 1000
Washington, D.C. 20005-3917

Re: *Request for Full Commission Review of Denial of Petition of Dr. William V. Judy to Quash Civil Investigative Demand for Testimony – File No. X000069*

Dear Mr. Glynn:

This letter advises you of the Federal Trade Commission's ruling on Dr. William V. Judy's ("Dr. Judy" or "Petitioner") *Appeal From Denial of Petition to Quash Civil Investigative Demand for Testimony* ("Appeal"). The Appeal seeks review of the September 10, 2002, letter ruling by Commissioner Sheila F. Anthony ("Initial Ruling") denying Dr. Judy's August 20, 2002, *Petition to Quash Civil Investigative Demand* ("Petition"). For the reasons set forth below, the Commission affirms the Initial Ruling.

On October 4, 2002, the Commission stayed the October 8th hearing date established in the Initial decision. The new date and time for Dr. Judy to appear and give testimony is **Tuesday, October 22, 2002 at 9:00 a.m.**

I. Background

The Initial Ruling sets forth several of the details relating to the Commission's ongoing investigation of Enforma Natural Products, Inc.'s and Andrew Grey's compliance with the injunctive provisions of the Final Order issued by the United States District Court for the Central District of California in 2000. Initial Ruling at 1-2. We will not repeat those details here.

In connection with that investigation, Enforma and Grey produced an unpublished report of a 60-person clinical study Enforma had commissioned Dr. Judy to perform. After review of this purported substantiation, the FTC issued a civil investigative demand to Dr. Judy requesting documents relating to the study. In an effort to pursue follow-up questions raised by the documents Dr. Judy produced, on August 5th, the FTC issued a second civil investigative demand (the "CID") to Dr. Judy, this time seeking oral testimony.

On August 20th, Dr. Judy filed a Petition to Quash the CID. Petitioner objected to the CID on two grounds: he argued that (1) the Commission lacked authority to issue the CID because its initiation of contempt proceedings in the federal district court relating to two specific Enforma products somehow divested the Commission of its authority to continue its administrative investigation of a third product that was not at issue in the contempt proceedings; and (2) the CID was void because it failed to specify exactly what information would be sought at the hearing.

In her Initial Ruling, Commissioner Anthony denied the Petition. First, she ruled that the Petition was deficient and must be denied on the ground that Petitioner failed to comply with Commission Rule 2.7(d), which requires all petitions to be accompanied by a written statement attesting to and describing Petitioner's efforts to resolve his complaints with staff. In the alternative, Commissioner Anthony ruled that both of Petitioner's arguments – that the Commission lacked authority to issue the CID and that the CID was void for lack of specificity – were incorrect and, therefore, failed to provide a basis for quashing the CID.

On appeal, Dr. Judy (1) contends that he was not required to comply with Rule 2.7(d) by providing the required statement because his complaints could not have been resolved by staff; and (2) reiterates his argument that the CID did not meet the standards for specificity set forth in Section 20(c)(2) of the FTC Act, 15 U.S.C. § 57b(c)(2).[1]

The full Commission is unpersuaded by Dr. Judy's arguments on appeal and affirms the Initial Ruling.

II. ANALYSIS

A. Compliance with Rule 2.7(d)(2) Is Not a Matter Within a Petitioner's Discretion.

Under Rule 2.7 (d)(2) of the Commission's Rules, 16 C.F.R. § 2.7(d)(2)(2002), before filing a petition, a compulsory process recipient must engage in a good faith attempt to resolve any objections with the FTC staff handling the investigation. Any subsequently filed petition must be accompanied by a statement describing the negotiation. Dr. Judy failed to confer with staff or include a statement regarding conferral with his Petition.

On appeal Dr. Judy contends that, in his estimation, it would have been fruitless to engage in such discussions with staff here because his objections could not have been addressed by the staff. Dr. Judy is wrong both factually and legally.

---

[1] On appeal, Dr. Judy apparently concedes his argument regarding the Commission's authority to issue the CID.

As a factual matter, Dr. Judy is wrong regarding his contention that the Commission's staff could not possibly have resolved his objections. For example, Dr. Judy argued that the CID was an improper use of the Commission's investigatory powers because once a federal court proceeding was initiated, any sort of information gathering must be pursued in accordance with the Federal Rules of Civil Procedure. Had he contacted staff to discuss this concern, Dr. Judy would have learned that the product under investigation was not the same as the two products that are the subject of the contempt proceedings. This simple fact should have put Dr. Judy's concern to rest,[2] and thereby would have saved the valuable resources the Commission has now spent addressing what amounted to a meritless argument based upon a basic misapprehension of the subject of the Commission's inquiry.

Even more important than his error regarding the facts is Dr. Judy's error regarding the law. Rule 2.7 does not contain any provision suggesting that a petitioner may ignore the Rule's requirements if, in the petitioner's own estimation, following the Rule is not warranted in a given circumstance. *See, e.g., Postal Carriers Institute, Corp.*, 125 F.T.C. 1317, 1318-19 (initial ruling denying petition to quash CID) ("The conferral requirement is mandatory. . . . . Those served with compulsory process do not have a choice, but rather, *must* engage in good faith negotiations with the Commission staff regarding their objections to a given request. Furthermore, these negotiations must be documented in the statement required by Rule 2.7(d)(2)."), *aff'd,* 125 F.T.C. 1323 (1998).

Further, the conferral requirement of Rule 2.7 is not time-consuming or costly. It involves little more than a telephone call and the addition of a brief statement to the petition describing the call. Thus, even in instances where a petitioner may believe the prospect of compromise is dim; compliance with the Rule is not unduly burdensome.

In short, every petitioner must comply with Rule 2.7(d)(2). Failure to do so provides ample ground for rejecting a petition outright. Otherwise, process recipients could waste Commission resources by demanding rulings on issues that could have been easily resolved with a simple telephone conversation with staff. Petitioners might also attempt to remain willfully ignorant (*i.e.*, by not asking staff about an issue) so as to permit meritless arguments aimed at little more than delaying a lawful investigation, to the detriment of consumers and taxpayers alike.[3]

---

[2] Indeed, this answer seems to have satisfied Dr. Judy because it was the basis for Commissioner Anthony's ruling rejecting this argument, and Dr. Judy is not pursuing the argument on appeal here.

[3] Of course the Commission also has the power to discipline counsel who violate Commission Rules and engage in abuses of practice by suspending the rights of such counsel to practice before the Commission. *See* 16 C.F.R. § 4.1(e)(2) (disbarment); §4.2(f)(2) (attorney signature constitutes representation that the filing "is not interposed for delay")(2002).

B. The CID Fully Complies with the Requirements of the FTC Act.

Petitioner complains that the CID for oral testimony issued here is not as specific as required under Section 20 (c)(2) of the FTC Act. 15 U.S.C. § 57b-1(c)(2). As Commissioner Anthony stated in her Initial Ruling, this argument is meritless.

Section 20(c)(2) provides, *in its entirety*: "Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." The CID at issue here plainly meets these requirements. The resolution attached to the CID describes the "nature of the conduct under investigation," as well as the "provision of law applicable to such violation," as the statute requires:

> [This is an investigation to determine] whether unnamed persons, partnerships or corporations, or others, engaged in the advertising and marketing of dietary supplements have misrepresented or are misrepresenting the safety or efficacy of the products or services, and therefore have engaged or are engaging in unfair or deceptive acts or practices or in the making of false advertisements, in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

The nature of the conduct – misrepresenting the safety or efficacy of dietary supplements in advertising and marketing – is plain as are the statues such conduct would violate – Sections 5 and 12 of the FTC Act. Section 20(c)(2) requires nothing more. The requirements of the statute have been met. *See F.T.C. v. O'Connell Assoc., Inc.*, 828 F. Supp 165, 170-71 (E.D.N.Y. 1993) (rejecting a compulsory process recipient's argument that an FTC CID was too vague to satisfy the requirements of Section 20(c)(2)). Petitioner's attempts to suggest additional statutory requirements exist based upon vague statements in the legislative history – which merely laud efforts to be more precise in specifying the nature of an investigation and the authority supporting it – are rejected.[4] Indeed, in accordance with its statutory mandate, the Commission often investigates entire industries or industry-wide practices for which omnibus resolutions, like that

---

[4] As the Supreme Court stated in *Ex parte Collett*, 337 U.S. 55 (1949):

> [T]here is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This canon of construction has received consistent adherence in our decisions.

Id. at 61 (internal quotations and citations omitted).

at issue here, are both appropriate and practical.

III. CONCLUSION

The Commission concludes that Commissioner Anthony's ruling fairly and properly considered and addressed all of Petitioner's arguments. Accordingly, the full Commission concurs with, and hereby adopts, the September 10, 2002 letter ruling by Commissioner Anthony in this matter. Petitioner is directed to comply with the Civil Investigative Demand by appearing to give testimony on **Tuesday, October 22, 2002 at 9:00 a.m.**

By direction of the Commission.

Donald S. Clark
Secretary