

Interlocutory Orders, Etc.

IN THE MATTER OF

REALCOMP II, LTD.

Docket No. 9320. Order, December 28, 2007

Order granting the parties joint motion for an extension of time in part by granting an extension as to the initial brief and the answering brief.

**ORDER PARTIALLY GRANTING JOINT MOTION FOR EXTENSION
OF TIME THROUGHOUT THE APPELLATE BRIEFING SCHEDULE**

Complaint Counsel and Respondent have filed a Joint Motion for Extension of Time Throughout the Appellate Briefing Schedule (December 21, 2007) (hereinafter “Joint Motion”) requesting that the Commission extend the time for the filing of briefs on the appeal and possible cross-appeal in this matter. For the reasons discussed below, the Commission grants in part the parties’ motion for an extension of time.

Chief Administrative Law Judge McGuire filed his Initial Decision and Order in this matter on December 10, 2007, and Complaint Counsel filed a timely Notice of Appeal on December 19, 2007. If Respondent determines to file a Notice of Appeal (hereinafter “Notice of Cross-Appeal”), it must be filed on or before December 31, 2007. Pursuant to Commission Rule 3.52(g), 16 C.F.R. § 3.52(g) (2007), if such a Notice of Cross-Appeal is filed – and Respondent perfects its Cross-Appeal with the timely filing of a Cross-Appeal Brief – Complaint Counsel will be deemed the Appellant, and Respondent will be deemed the Cross-Appellant/Appellee. Because Complaint Counsel were served with the Initial Decision on December 19, 2007, Complaint Counsel must currently file their Appeal Brief on or before January 18, 2008.¹ If service of that and subsequent briefs is effected on the opposing parties on the date on which each brief is due – and if Respondent

¹ Commission Rule 3.52(b), 16 C.F.R. § 3.52 (b).

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files and perfects a Cross-Appeal² – then Respondent’s Answering and Cross-Appeal Brief would be due on or before February 20, 2008.

The time periods prescribed by the Commission Rules of Practice ordinarily should afford parties to Commission proceedings sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. The proximity of the current briefing schedule to the holidays, however, may interfere with that process. See Order Granting in Part and Denying in Part Joint Motion for Extension of Time and Length of Appeal Briefs, *In re Evanston Northwestern Healthcare Corporation*, Docket No. 9315 (Nov. 18, 2005) available at <http://www.ftc.gov/os/adjpro/d9315/051205orderd9315.pdf>. The Commission has therefore determined to grant an extension as to the initial brief and the answering brief. Because the time for filing the notice of cross-appeal has not expired, the Commission will issue a subsequent order regarding further briefing and a date for the oral argument. Accordingly,

IT IS ORDERED THAT (1) Complaint Counsel shall file their Appeal Brief on or before January 25, 2008, and (2) the appeal of Complaint Counsel shall be deemed perfected “by the timely filing of an appeal brief,” for purposes of Commission Rule 3.51(a), 16 C.F.R. § 3.51(a), if Complaint Counsel file their Appeal Brief by that date;

IT IS FURTHER ORDERED THAT (1) Respondent shall file its Answering Brief (including any Cross-Appeal Brief) on or before February 29, 2008, and (2) if Respondent pursues a cross appeal, it shall be deemed perfected “by the timely filing of an appeal brief” if Respondent files its Answering and Cross-Appeal Brief by that date, whether or not Complaint Counsel have previously perfected their

² For purposes of this Order, if Respondent files a Cross-Appeal, it will be deemed to have been perfected if its initial brief contains its “arguments as to any issues [Respondent] is raising on cross-appeal . . .” Commission Rule 3.52(c), 16 C.F.R. § 3.52(c).

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appeal.

IT IS FURTHER ORDERED THAT all of the foregoing Briefs shall in all other respects conform to the requirements of Commission Rule 3.52, 16 C.F.R. § 3.52.

By the Commission.

ADVISORY OPINION

IN THE MATTER OF

ACA INTERNATIONAL

FTC File No. P064803.

Opinion, October 5, 2007

Re: Whether the Fair Debt Collection Practices Act (“FDCPA”) prohibits a debt collector from notifying a consumer who disputed a debt that the collector has ceased its collection efforts.

Dear Mr. Beato:

This is in response to ACA International’s (“ACA’s”) request for a Commission advisory opinion (“Request”) regarding whether the Fair Debt Collection Practices Act (“FDCPA”) prohibits a debt collector from notifying a consumer who disputed a debt that the collector has ceased its collection efforts. ACA submitted the Request pursuant to Sections 1.1-1.4 of the Commission’s Rules of Practice, 16 C.F.R. §§ 1.1-1.4. As explained more fully below, the Commission concludes that a debt collector providing such a notice to a consumer would not violate the FDCPA.

The Request focuses primarily on Section 809 of the FDCPA, 15 U.S.C. § 1692g. Section 809(a) provides that, within five days after its initial communication with a consumer about a debt, a debt collector must send the consumer a written notice. Among other things, this notice must state that “if the consumer notifies the debt collector in writing within [thirty days after receipt of the notice] that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector.” Section 809(b) provides that if a consumer provides such a notice, the debt collector must cease collection until it has obtained verification of the debt or a copy of the judgment and mailed it to the consumer.

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In July 2007, ACA amended its Code of Ethics and Code of Operations (“Ethics Code”). If a debt collector receives a written request for verification and is unable to verify the debt, the Ethics Code now requires “the cessation of all collection efforts, removal of the account from the consumer’s credit report or reporting the account as disputed, and prompt notification of the **creditor or legal owner** of the debt that collection activities have been terminated due to the inability to provide verification information.” Request at 3 (emphasis added). ACA “also has considered amending the Ethics Code to promote the notification of a **consumer** that collection activity has been terminated if the debt collector is unable to verify the debt following the receipt of a written request for verification.” *Id.* (emphasis added). However, ACA has not yet amended its Ethics Code to include such a provision because of “concern that communication with the consumer following a request for verification might be construed as an attempt to collect, even though the intention merely is to inform the consumer that there will no further collections.” *Id.* at 2.

We note first that courts have construed Section 809(b) as giving debt collectors two options when they receive a written dispute or a request for verification¹: (1) provide the requested verification and continue collection activities, or (2) cease all collection activities. If the debt collector ceases collection, it is not required to provide

¹ Courts interpreting Section 809(b) have used the phrases “disputing the debt,” “requesting verification,” and “requesting validation” interchangeably. *See, e.g., Jang v. A.M. Miller and Assocs.*, 122 F.3d 480, 482 (7th Cir. 1997) (collection agencies “ceased collection activities immediately upon receiving the requests for validation, in compliance with [Section 809(b)]”); *Wilhelm v. Credico Inc.*, 426 F. Supp. 2d 1030, 1036 (D.N.D. 2006) (debt collector’s Section 809(b) obligations triggered “once a debt collector receives a request for verification”); *Sambor v. Omnia Credit Servs., Inc.*, 183 F. Supp. 2d 1234, 1243 (D. Haw. 2002) (debt collector’s Section 809(b) obligations triggered “[w]hen timely asked in writing to validate a debt”); *see also Clark’s Jewelers v. Humble*, 823 P.2d 818, 821 (Kan. Ct. App. 1991) (a consumer need not use the word “dispute” to trigger the debt collector’s obligation to cease collection and provide verification of the debt, as long as the consumer’s notice makes clear that the debt is contested).

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verification. See, e.g., *Guerrero v. RJM Acquisitions LLC*, 2007 U.S. App. LEXIS 20072, at *35-36 (9th Cir. Aug. 23, 2007); *Jang v. A.M. Miller & Assocs.*, 122 F.3d 480,483 (7th Cir. 1997); *Wilhelm v. Credico Inc.*, 426 F. Supp. 2d 1030, 1036 (D.N.D. 2006); *Zaborac v. Phillips and Cohen Assocs.*, 330 F. Supp. 2d 962, 966 (N.D. Ill. 2004); *Sambor v. Omnia Credit Servs., Inc.*, 183 F. Supp. 2d 1234, 1243 (D. Haw. 2002).

The Request poses the question of whether a debt collector that discontinues debt collection activities after receiving a written request for verification can inform the consumer that it has done so without violating the FDCPA. As noted above, Section 809(b) requires a debt collector to cease collection of a debt until the collector has provided verification of the debt to the consumer if the consumer, in writing within the thirty-day window, has either disputed the debt or requested verification. If a debt collector cannot provide such verification to the consumer, merely informing the consumer that debt collection efforts have been terminated is not an attempt to collect a debt and therefore does not violate the FDCPA.²

We note that Congress enacted Section 809 to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.”³ The provision allows a consumer who does not believe that he or she owes a debt to require that the debt collector obtain and provide verification prior to contacting the consumer again. The purpose of Section 809 therefore is to stop further calls and letters from collectors unless the consumer incurred and continues to owe the

² The Request also raises the question whether a notice informing a consumer that collection efforts have ceased “might be construed as a ‘communication’ in furtherance of collecting the debt.” Request at 5. Regardless of whether such a notice is a “communication” under 15 U.S.C. § 1692a(2), a debt collector telling a consumer that debt collection has ceased is not “in furtherance of collecting the debt.”

³ S. Rep. No. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698.

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debt. Interpreting Section 809 as allowing debt collectors to notify consumers that they have ceased collection efforts, without conveying any other message, is consistent with this purpose. A consumer receiving such a notice would benefit both from having the calls and letters from that collector stop and from knowing that the collector will not renew its collection efforts.⁴

The only other FDCPA provision that could be implicated by the notification that ACA proposes to require of its members is Section 805(c). That provision provides that, if a consumer notifies a debt collector in writing that he or she “refuses to pay a debtor . . . wishes the debt collector to cease further communication,” the debt collector is not permitted to communicate further with the consumer about the debt. However, Section 805(c) includes an express exception to its prohibition on communication that permits a debt collector to “advise the consumer that the debt collector’s further efforts are being terminated.” Thus, even if a consumer demands in writing that a debt collector cease communicating about a debt, the debt collector would not violate Section 805(c) if it notified the consumer that the collector’s collection efforts have ceased.⁵

After reviewing the language of the FDCPA and its legislative history as well as information contained in the Request, the Commission concludes that a debt collector does not violate the FDCPA if, after receiving written notice of a dispute, it informs the consumer that it has ceased collection efforts.

⁴ Even if, as the amended Ethics Code now requires, a debt collector that is unable to provide verification of a debt ceases collection efforts, closes the account, and notifies the credit grantor, client, or owner of legal title to the debt that collection activities have been terminated because the collector could not provide verification of the debt, the credit grantor, client, or debt owner might choose to refer the account to a different debt collector. Thus, although the consumer will no longer be contacted by the first debt collector, he or she might receive collection calls and letters from a different debt collector.

⁵ We note, however, that any such communication must not violate any other FDCPA provision.

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RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

MONTANA REFINING COMPANY, INC.

FTC File No. 071 0163 Decision, August 6, 2007

RESPONSE TO MONTANA REFINING COMPANY, INC.'S ("MRC") PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND AND SUBPOENA DUCES TECUM

Dear Ms. Laughner:

This letter advises you of the disposition of MRC's Petition to Limit Civil Investigative Demand ("CID") and Subpoena *Duces Tecum* ("SDT"). MRC argues that its Petition to Limit should be granted because:

1. the CID and SDT seek information beyond the scope of the investigation, Petition at 2;
2. the CID and SDT provide a return date which is not reasonable under the circumstances, *id.* at 4; and
3. CID Specification 17 is overbroad, vague, ambiguous, and unduly burdensome, *id.* at 5.

For the reasons stated herein, MRC's Petition to Limit is denied. Pursuant to 16 C.F.R. § 2.7(e), MRC is ordered to comply with the CID and SDT on or before August 16, 2007, at 5:00 p.m. E.D.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely

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I. Background and Summary

The CID and SDT were issued to MRC on June 21, 2007. The record indicates that MRC received service of the CID and SDT on June 25, 2007. Pursuant to 16 C.F.R. § 2.7(d), any petition to limit or quash should have been filed on or before July 15, 2007; that is, twenty days after service. On July 12, 2007, counsel for MRC faxed a copy of the Petition to Limit to the Commission. The cover letter to that fax indicated that an original and one copy of the Petition to Limit would be delivered by first class mail; however, the Commission did not receive the original and required copies for filing until July 17, 2007. Also on July 17, 2007, the Commission received MRC's Motion to File Petition to Limit Out of Time.²

II. MRC Has Not Established That It Is Entitled to Relief.

MRC claims that the CID and SDT seek information about refined petroleum products other than gasoline, and that such other refined products are beyond the scope of the resolution authorizing the use of compulsory process. Petition at 2-4. MRC also claims that it has been given inadequate time within which to respond in light of its small size and the limited number of people available "who potentially can access files containing responsive documents. Welsh Aff. ¶ 3. Finally, MRC claims that CID Specification 17 is so overbroad, vague, and ambiguous as to impose an undue burden on MRC. *Id.* at 5-6. MRC has not established that materials and information covered by the CID and SDT are beyond the scope of

filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

² The motion recites that MRC faxed and served its Petition to Limit on July 12, 2007, and then states that the Petition to Limit "was not filed within the 20 days of service due to an inadvertent oversight" of not having provided initially the twelve copies required by 16 C.F.R. § 4.2(c). MRC attempted to file in a timely fashion. An inadvertent failure to submit the required number of copies for filing should not prevent the Commission from reaching the merits of this Petition to Limit. Accordingly, MRC's Motion to File Petition to Limit Out of Time is granted.

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the investigation, or that timely compliance with the CID and SDT is not feasible, or that Specification 17 is in any respect improper or unduly burdensome.

A. The Information Requested Is Within the Scope of the Commission’s Resolution and Is Relevant to the Investigation.

The CID was issued pursuant to the Resolution adopted by the Commission on May 18, 2007 permitting Staff to conduct an investigation to determine whether the conduct and practices of “certain oil refiners, marketers, or others have . . . lessened competition in the refining, distribution, and supply of gasoline . . . in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.” MRC claims that this resolution limits the investigation to gasoline, and precludes inquiry regarding other refined light petroleum products produced by MRC, such as, diesel fuel, jet fuel, aviation gasoline, and heating oil. Petition at 3. This contention is wholly without merit.

As MRC’s Petition to Limit notes, the *Invention Submission Corp.* case describes the broad scope of the Commission’s investigatory reach.³ *Federal Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (“It is well established that a district court must enforce a federal agency’s investigative subpoena if the information is reasonably relevant . . . - or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . - and not unduly burdensome to produce.”) (citations and internal quotation marks omitted).

MRC argues that the Commission’s Resolution Authorizing Use of Compulsory Process only “authorizes the use of compulsory process to investigate gasoline, and the subject matter of the authorized investigation cannot be arbitrarily changed or improved upon by the drafters of the CID or Subpoena.” Petition at 3. That

³ Petition at 3-4.

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construction interprets the Resolution far too narrowly. The Resolution directs an inquiry into the conduct of refiners and others in order to determine what, if any, effect their conduct has had upon the supply of gasoline. Petroleum refineries produce a broad range of refined products of which gasoline is but one. Thus, refiners' production decisions regarding non-gasoline products directly affects the supply and price of gasoline. See *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* at 10 - 11 (May 22, 2006) (Choice of Output), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>. The focus of the investigation is the *conduct* of refiners and others. The Resolution clearly supports the definition of "Relevant Products" about which MRC complains. Petition at 3. The Commission, accordingly, declines MRC's invitation to impose an artificial limitation on the scope of the investigation authorized by the Resolution.

B. MRC Has Not Shown That It Needs Additional Time Within Which To Respond.

MRC claims that it is a small company and that it has only five employees who can prepare the company's responses to the CID and SDT. It also claims that it will take 300-400 person hours to comply with the CID and SDT, Petition at 4. MRC also claims that its five employees cannot work on CID and SDT production full time, and that 17-21 working days is not a sufficient amount of time in which to comply. *Id.*; Welsh Aff. ¶¶ 4-5. However, MRC's own numbers do not show an inability to meet the return date. Five people could accomplish this task, even assuming 300-400 hours would be required, in less than three weeks without having to devote full-time to the project. In these circumstances, MRC has not established that the return date is unreasonably short. Given the amount of time already lapsed, this order requires compliance with the CID and SDT within 10 days from the date it is issued. Moreover, the Commission is confident that staff will treat any future request for

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more time reasonably, if MRC demonstrates a good faith effort to comply and a genuine need for a brief additional extension.

C. Specification 17 of the CID Is Not Overbroad, Vague, Ambiguous, or Unduly Burdensome.

MRC argues that Specification 17 of the CID is overbroad, vague, and ambiguous, and that it therefore imposes on undue burden on MRC.⁴ MRC's objects to this Specification stating that it "cannot see how [the Specification] can be satisfied or practically

⁴ Specification 17 asks MCR to:

Identify all communications between July 1, 2006 and March 1, 2007, whether written, oral or electronic, between or among the Company and any competitor or other provider of any service (including consultants and industry associations) relating to any Relevant Product, which relate to (a) any specification change in any Relevant Product (including, but not limited to, the transition to ultra-low sulfur diesel ("ULSD") production) and the effect of any such specification change on the bulk, Wholesale, or retail supply or price of any Relevant Product; (b) any Refinery Interruption, pipeline capacity proration or allocation, or any other interruption or disruption in the production, transportation, distribution, or storage of any Relevant Product in any Relevant Area, and the effect of any such disruption on the bulk, wholesale, or retail supply or prices of any Relevant Product in any Relevant Area; or (c) any price, production, volume, inventory level, territorial or market allocation, or customer allocation of any Relevant Product in any Relevant Areas.

For each such communication, identify the following:

- a. the date, location and medium of the communication;
- b. all Persons participating in, observing and/or hearing such communications;
- c. the subject matter and substance of such communication;
- d. all Persons who have knowledge regarding such communication, whether or not such knowledge is based upon first-hand information; and
- e. any document that was the subject of, or records, refers, or relates to, such communication.

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answered . . . [and that] there may have been daily conversations [that] cannot be recalled.” Petition at 6. We find these objections unpersuasive.⁵

Specification 17 seeks information regarding, among other things, certain communications involving MRC employees. The language of the Specification is clear and precise. Like any other interrogatory-type question, it only requires MRC to supply information that it knows, can reconstruct or summarize, or can reasonably recall. Information regarding these communications will assist staff in determining whether increased gasoline prices are in any degree attributable to collusion among refiners, marketers, and others. This information addresses directly a primary focus of staff’s inquiry. Given the centrality of the information to the underlying investigation, MRC’s simple assertion that “it does not see how” it can “practically answer” the specification does not support its heavy burden of persuasion on this issue. *See Federal Trade Commission v. Texaco Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (“The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.”).

⁵ The Commission has reason to believe that MRC did not discuss the scope of Specification 17 with staff prior to filing its Petition to Limit. MRC has therefore failed to comply with the meet and confer provisions of 16 C.F.R. § 2.7(d)(2).

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IV. Conclusion and Order

Accordingly, **IT IS ORDERED THAT** MRC's Motion to File Petition to Limit Out of Time should be, and it hereby is, **GRANTED**;

IT IS FURTHER ORDERED THAT MRC's Petition to Limit should be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT MRC shall respond to the CID and SDT on or before August 16, 2007, at 5:00 p.m. E.D.T.

By Direction of the Commission.

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WELLNESS SUPPORT NETWORK*FTC File No. 072 3179 Decision, October 25, 2007*

RESPONSE TO PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND

Dear Mr. Fuerst:

This letter advises you of the disposition of the Petition to Quash Civil Investigative Demand (“Petition to Quash”) served on Wellness Support Network (hereinafter “Petitioner” or “WSN”) in conjunction with an investigation of WSN’s conduct by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Petition to Quash is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand is November 5, 2007.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. See 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

On July 27, 2007, the Commission issued a Civil Investigative Demand (“CID”) to Petitioner in connection with the Commission’s investigation into advertising claims made by WSN regarding WSN[®] Diabetic Pack and WSN[®] Nerve Support Formula (hereinafter “WSN’s products”). Petition at 5. The CID was issued pursuant to the Commission’s Resolution of May 12, 2006. See

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

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Petition, Exhibit G. On August 27, 2007, WSN timely filed its Petition to Quash.

Petitioner claims that the CID should be quashed for three reasons: (1) the FTC “has neither the authority nor the expertise to make a determination as to whether a product is a drug, medical food or a dietary supplement;” Petition at 4; (2) “the CID was not properly tailored to yield information that is relevant and material to this request for information;” *id.* at 9; and (3) the “CID is unreasonably overbroad and unduly burdensome,” *id.*

II. The FTC Has Jurisdiction to Investigate Petitioner’s Advertising Claims.

This Petition to Quash proceeds from an irrelevant distinction, between medical foods and dietary supplements, to the unsupported conclusion that the FTC lacks the jurisdiction to investigate Petitioner’s advertising claims for its products. Section 5 of the FTC Act, 15 U.S.C. § 45, authorizes the FTC to prohibit “unfair or deceptive acts or practices in or affecting commerce.” Further, Section 12(a) of the FTC Act, 15 U.S.C. § 52(a), declares unlawful the dissemination of “any false advertisement . . . by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.” WSN provides no cogent reason why its products are excluded from the FTC’s jurisdiction.

WSN’s reliance on the Memorandum of Understanding (“MOU”) between the FTC and the Food and Drug Administration (“FDA”), Petition at 9, is wholly misplaced. On its face, the MOU states that the FTC has “primary responsibility with respect to the regulation of the truth or falsity of all advertising (other than labeling) of foods, drugs [other than prescription drugs], devices and cosmetics.” FDA MOU number 225-71-8003. WSN’s claim that its products are medical foods within the meaning of Section 5(b) of the Orphan Drug Act, 21 U.S.C. § 360ee(b)(3), Petition at 7, does not

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include any citation of authority that would oust the FTC's jurisdiction under Section 12(a) of the FTC Act over "foods, drugs, devices, services, or cosmetics." WSN's reliance on the MOU is further misplaced in that the FTC cannot by agreement with the FDA abandon jurisdiction bestowed on the FTC by Congress.

The Petitioner has "the burden of showing that an agency subpoena is unreasonable . . . and, where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (1973), *cert. denied*, 415 U.S. 915 (1974). This is especially so in light of the breadth of inquiry this Commission is permitted to conduct. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."). WSN did not provide sufficient factual or legal support for its claim that the FTC lacks jurisdiction to investigate WSN's advertisements, nor has it given the Commission any reason to believe that the public interest would be served by failing to exercise its jurisdiction to investigate WSN's advertising claims.² WSN's jurisdictional challenge to this CID must, therefore, be denied.

² The Commission may consider a jurisdictional challenge to its compulsory process during the course of an investigation on policy grounds even when such a challenge in the federal courts would not be appropriate. "With rare exceptions (none of which applies here), a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation." *Federal Trade Commission v. Roberts*, 276 F.3d 583, 584 (D.C. Cir. 2001) ("Whatever the merit of Ken Roberts' preemption argument – and we believe they have little – appellants cannot overcome the long-standing doctrine that precludes courts from entertaining challenges to the jurisdiction of administrative agencies during subpoena enforcement proceedings."). "An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction." *Federal Trade Commission v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977); see *Federal Trade Commission v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a [particular defense].").

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III. The Information Sought Is Within the Scope of the Resolution/Investigation.

The scope of the investigation is defined by the resolution authorizing the use of compulsory process. The Petitioner mischaracterizes the resolution authorizing staff's use of compulsory process, Resolution of May 12, 2006 attached to the Petition to Quash as Exhibit G, when it claims that

The Commission is looking for information as it pertains to the advertising of a dietary supplement, and has improperly applied the standard for evaluating dietary supplements to the initial phase investigation conducted prior to the issuance of the CID. As such, it is clear that this investigation is premised on an erroneous conclusion and, therefore, cannot reasonably be tailored to yield information that is relevant or material to the investigation.

Petition at 9. Again, the distinction between dietary supplements and medical foods has no bearing on whether the information required in response to the CID is relevant to the scope of investigation authorized by the resolution. The Resolution defines the scope of the inquiry to include determining "whether unnamed persons . . . engaged directly or indirectly in the advertising or marketing of drugs, devices, dietary supplements or *any other product or service intended to provide a health benefit or to affect the structure or function of the body* have misrepresented or are misrepresenting the safety or efficacy of such products. . . ." Resolution of May 12, 2006 (emphasis supplied). Petitioner admits that its products fit the above description of the Resolution. Petition at 3 ("WSN . . . is in the business of marketing and selling medical foods designed to provide nutrients for the dietary management of Type II diabetes and neuropathy."). The specifications of the CID are relevant to determining whether WSN has misrepresented the safety or efficacy of its products. Petitioner has not demonstrated that any information sought by the CID is legitimately beyond the

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scope of this investigation. In fact, the Commission finds that the materials sought by the CID are relevant to the scope of this investigation. Accordingly, the Petition to Quash on the ground that the CID seeks information not relevant to the investigation must be denied.

IV. The Petition Does Not Show that the CID Is Unduly Burdensome.³

Allegations of burden must be supported with specificity. *National Claims Service, Inc., Petition to Limit Civil Investigative Demand*, 1998 FTC LEXIS 192, *8 (FTC 1998) (“At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue). Petitioner has failed to do any of these things.”). Likewise, Petitioner has failed to do any of these things with any reasonable degree of specificity.

The Petition is supported by an Affidavit from Robert Held, Petition, Exhibit J, which claims in summary fashion that the records sought are voluminous, Aff. ¶ 4, that Held (the CEO of WSN) and his daughter, Robyn Held, are the only two of the firm’s eleven employees who are capable of preparing the response to the CID, Aff. ¶¶ 4, 6-7, and that compliance would make them otherwise unavailable for some unknown period of time to the detriment of the firm. Aff. ¶¶ 6-7. The Petition, including the Affidavit of Held, does not satisfy Petitioner’s burden of demonstrating that compliance would impose an unreasonable burden on WSN. The Commission, therefore, finds that the burden of complying with the

³ Petitioner’s argument that the CID is overbroad was wholly redundant with its argument that the CID sought information not relevant to the investigation and need not be addressed again here.

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CID does not appear unreasonable on this record. *See Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979).

Counsel for WSN makes a further argument that compliance with the CID might result in WSN losing its suppliers of needed materials and products. Petition at 10. This argument is supported by no factual materials. It is claimed that WSN uses vitamins and minerals manufactured “under an exclusive proprietary process” by “a small group of suppliers.” *Id.* It is not clear, however, if the proprietary process at issue is that of WSN or of its suppliers. It is further argued that WSN is one of its suppliers’ smallest customers and that, therefore, the disclosure of information⁴ about this proprietary process creates a “high probability” that the suppliers will cease doing business with WSN and that WSN will be unable to find alternative suppliers – failing which it will cease business operations. Petition at 10. This claim is too speculative and unsupported to serve as the basis for relief.⁵

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition to Quash filed by Petitioner be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), the new date for Petitioner to comply with the CID is November 5, 2007.

By direction of the Commission.

⁴ If information regarding this proprietary process is in fact confidential, then such information should be designated confidential when submitted. Commission staff are bound to comply with set procedures regarding materials so designated. *See generally*, 16 C.F.R. §§ 4.9-4.11. Petitioner provides no evidence that the confidentiality protections provided by 15 U.S.C. § 57b-2 are inadequate to protect this information.

⁵ *See Federal Trade Comm. v. Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962) (finding petitioner had not provided sufficient evidence that compliance would lead to the “virtual destruction” of a business).