NUTRACEUTICALS INTERNATIONAL, LLC

FTC File No. 082 3130 – Decision, June 25, 2008

RESPONSE TO NUTRACEUTICALS INTERNATIONAL, LLC'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Klivinyi:

This letter advises you of the disposition of the Petition to Quash or Limit Civil Investigative Demand ("Petition") filed by Nutraceuticals International, LLC ("NI" or "Petitioner"). NI's Petition claims that the Civil Investigative Demand ("CID") seeks information that is "clearly beyond the scope of the investigation as defined by the Commission." Petition at 1. The Petition is denied because it is procedurally defective and substantively without merit. Pursuant to 16 C.F.R. § 2.7(e), Petitioner is ordered to comply with the CID on or before July 7, 2008 at 5:00 p.m. E.S.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]

I. Background and Summary

This Petition deals with the second of two CIDs that have been served on NI during the course of this investigation. "The first civil investigative demand served upon the Company was fully answered and submitted in the time agreed. The interrogatories requested the number of employees and the identification of employees involved

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

in the marketing of hoodia gordonii material. The instant CID seeks the names, addresses, email addresses and job description of all employees, whether or not they have been involved in the marketing of hoodia gordonii material. The CID also demands bank account information and the identities of signatory authorities for any such accounts." Petition at 1.[2] The Petition claims that all the information sought by this second CID is "clearly beyond the nature and scope of the investigation as defined by the Commission." *Id.* The CID was issued on May 16, 2008, returnable on June 6, 2008. The Petition, dated June 3, 2008, was received by the Secretary on June 6, 2008.

The Petition consists of a single page letter addressed to the Commission's Secretary that was written on plain, non-letterhead, paper, and a two-page clerical employee's affidavit dealing with investigatory events which are ancillary to, but not a part of, the merits of this Petition. The letter is signed by Zoltan Klivinyi, Managing Director. The Petition indicates that NI is not represented by counsel. Additionally, the Petition does not include the statement required by Commission Rule 2.7(d)(2), 16 C.F.R. § 2.7(d)(2), stating that it had conferred with staff in advance of filing its Petition in an attempt to resolve issues raised in the Petition. NI indicates it has included no such statement because: (1) NI was not represented by counsel who could have engaged in such discussions with counsel for the Commission; and (2) NI "believes that any such attempt would [have been] fruitless given the misconduct of the Commission counsel in this matter as detailed below." Petition at 1.

The Petition also seeks relief on the grounds of the allegedly "appalling, abusive and abhorrent conduct of two members of [the Commission's] staff." *Id.* The Petition describes this conduct as follows,

[2] Petitioner's description of the specifications of CID provide an accurate, but incomplete, summary of the CID specifications.

> A person who only identified herself as "Deb" called the Company's office on May 13, 2008, and threatened the young female receptionists who answered the phone with "obstruction of justice", crimes and arrest by the Constable for not giving the unidentified caller the private cell phone numbers of certain managers of the Company. The caller from the FTC so upset the young lady that she had to leave the office early and was ill for several days with worry that she had committed a crime and was subject to arrest. . . . This is a clear case of abuse of power and authority of a federal employee and attorney over an office clerical worker acting in good faith.

Id. In addition to requesting that the CID be limited or quashed because of this alleged misconduct, the Petition requests an investigation of this conduct by the Commission's Inspector General, and states that a copy of the Petition would be forwarded to the Inspector General under separate cover. *Id.* Finally, the Petition requests that this investigation be reassigned to other attorneys. *Id.*[3]

II. The Petition Is Procedurally Defective

Commission Rule 4.1(a)(2) provides in relevant part that a "corporation or association may be represented by a bone fide officer thereof *upon a showing of adequate authorization."* 16 C.F.R. § 4.1(a)(2) (emphasis supplied). The Petition provides no evidence to satisfy the requirements of our rule other than an indecipherable signature accompanied by a signature block that includes the name "Zoltan Klivinyi" and the title "Managing

[3] The Commission is vigilant in insuring that its employees conduct the Commission's business at all times in a professional manner. However, since NI indicated that it was separately requesting the Inspector General to investigate this episode, it would be premature for the Bureau of Consumer Protection to consider any staffing adjustments or other disciplinary responses prior to receiving a report on this matter from the Inspector General.

Director." That signature by itself, however, fails to satisfy our Rule in that it does not factually demonstrate that:

1. Zoltan Klivinyi is the signatory of the letter; or

2. Zoltan Klivinyi is a bone fide officer of NI, a Delaware limited liability corporation; or

3. Zoltan Klivinyi has been authorized by corporate resolution or otherwise to represent the corporation before the Commission in this matter.

Further, the managing director title is not, insofar as the Commission is aware, a term of art under the laws of Delaware with respect to corporate governance such that it would inherently connote authorization to speak on behalf of a Delaware corporation. At a minimum, our Rule requires that a corporate officer seeking to represent a corporation before the Commission must submit a sworn statement or other proofs setting forth the officer's status as a corporate officer and the source of his or her authority to appear before the Commission on behalf of the corporation. NI has provided no such evidence supporting its Petition.

Commission Rule 2.7(d)(2) requires that every petition to quash or limit a CID must be accompanied by a statement showing that the petitioner has attempted to resolve the issues raised by the petition with Commission counsel in advance of filing the petition. 16 C.F.R. § 2.7(d)(2). The purpose for this rule to avoid unnecessary challenges to investigatory process. The Commission generally lacks advanced knowledge of the records of a particular company. As a result, the specifications of process might, inadvertently, create avoidable compliance problems that might not have arisen if staff had possessed better knowledge of the recipient's actual information storage and retrieval procedures. To address such problems and burdens, Rule 2.7(c), 16 C.F.R. § 2.7(c), grants particular staff managers authority to modify the terms of compliance with investigatory CIDs during such discussions. Neither the use of the word "counsel" in Rule 2.7(d)(2) nor an earlier episode of allegedly

abusive behavior by one or more Commission attorneys excused NI from its obligation to confer with Commission staff to resolve, if possible, its problems with the CID in advance of the filing of its Petition.[4]

III. The Petition Is Otherwise Without Merit

Even if NI had filed a procedurally sufficient Petition, its Petition is otherwise without merit. The information sought by the CID is not outside the scope of the investigation. The CID was issued pursuant to the Resolution adopted by the Commission on May 12, 2006.[5] NI's claim that the CID demands information "clearly beyond the nature and scope of investigation as defined by the Commission," Petition at 1, is wholly lacking in merit. The resolution, not a prior CID issued to NI, defines the scope of the investigation.

The *Morton Salt* and *Invention Submission Corp.* cases state the broad scope of the Commission's investigatory reach. *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."), and *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

[4] The Rule reads, "Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference." *Id.* The fact that NI is represented here by one of its officers, rather than counsel, does not excuse its non-compliance with the Rule.

[5] Resolution Directing the Use of Compulsory Process in a Non-Public Investigation of 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 (May 12, 2006).

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).

Apparently in reliance on the scope of an earlier CID, NI is construing the scope of the investigation in a manner that would artificially limit the investigation to include only NI's marketing and sales of "hoodia gordonii."[6] *See* Petition at 1. The scope of the investigation is determined by the terms of the resolution authorizing the CID. *Invention Submission Corp.,* 965 F.2d at 1091-92 ("The Commission's compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that 'the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.'") (citations omitted). The scope of the investigation includes, therefore, all of the goods and services described in the resolution; it is not limited to a single product, such as hoodia gordonii. A review of the specifications of the CID shows that the information requested is relevant to the subject of the Commission's investigation as defined by the resolution. Accordingly, we find that the information sought by the CID is reasonably relevant to the investigation.

With regard to the allegations of staff misconduct, even assuming the Petition and Affidavit accurately describe events that transpired between Commission attorney(s) and an NI employee on May 13, 2008, the Commission has no reason to believe that such conduct affected in any way the issuance of the CID or its contents. In the absence of any evidence that the CID was itself the product of FTC misconduct, this episode provides no grounds for quashing or limiting the CID.

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[6] The Petition offers no explanation for its claim that the identities of its employees and the details of its banking arrangements are "clearly beyond the nature and scope of the investigation as defined by the Commission." *Id.* NI's claim has been construed in the light most favorable to it, based on inferences drawn from what little information NI has provided regarding this claim.

IV. Order

For the reasons set forth herein, **IT IS ORDERED** thatNI's Petition should be, and it hereby is, **DENIED**. NI shall respond to the CID on or before July 7, 2008 at 5:00 p.m. E.S.T.

By direction of the Commission.