Responses to Petitions to Quash

NUTRACEUTICALS INTERNATIONAL, LLC

FTC File No. 082 3130 Decision, July 30, 2008

RESPONSE TO NUTRACEUTICALS INTERNATIONAL'S APPEAL OF THE DENIAL BY COMMISSIONER HARBOUR OF THE PETITION BY NUTRACEUTICALS INTERNATIONAL, LLC TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Klivinyi:

This letter advises you of the Commission's disposition of Nutraceuticals International, L.L.C.'s ("NI") Appeal from the Letter Ruling denying the Petition to Quash or Limit Civil Investigative Demand[1] ("Appeal") issued in conjunction with an investigation of NI by the Federal Trade Commission (hereinafter "FTC" or "Commission"). As set forth below, the Appeal is dismissed as moot.[2]

NI's Petition claimed that the Civil Investigative Demand ("CID") seeks information that is "clearly beyond the scope of the investigation as defined by the Commission[,]" and also sought to quash the CID because Commission Staff had allegedly acted inappropriately toward an NI clerical employee on one occasion. Petition at 1.[3] The Letter Ruling denied the Petition on the grounds that it failed to comply with the requirements of Commission Rules 2.7(d)(2) and 4.1(a)(2)(i), 16 C.F.R. §§ 2.7(d)(2) and 4.1(a)(2)(i), which respectively address the

[1] Letter Ruling Denying Petition of Nutraceuticals International, LLC to Quash or Limit Civil Investigative Demand, File No. 082-3130 (Jun. 25, 2008) ("Letter Ruling").

[2] Had we reached the merits of NI' s appeal, we would have affirmed the denial of NI's Petition to Quash or Limit CID for substantially the same reasons set forth in the Letter Ruling,

[3] Like the Letter Ruling, we find no evidence that any alleged misconduct on the part of Commission staff provided any grounds for quashing or limiting the CID.

requirement that a Petitioner must have conferred with Commission staff regarding its objections in advance of filing a petition to quash or limit a CID and the qualification of an NI officer to represent it before the Commission on its Petition. Letter Ruling at 3. The Letter Ruling also denied the Petition on the grounds that NI had failed to satisfy its burden of showing that the information sought was either outside the scope of the investigation or tainted by the alleged misconduct of Commission staff. Letter Ruling at 4-5. The Letter Ruling directed NI to comply with the CID by July 7, 2008. 16 C.F.R., § 2.7(f).

NI's appeal was timely filed on July 1, 2008. In its appeal, NI claims that the Letter Ruling erroneously found that NI's Petition was "procedurally deficient (and) without substantive merit." Appeal at 1. NI also requested a stay of the July 7 return date until after the

Commission had ruled on the appeal as well as for an additional period sufficient for NI "to access the Federal District Court to protect the Company's legal rights and interests."[4] *Id.* NI further advised the Commission that if its request for a stay was not granted prior to July 7, then NI intended to "submit its responses to the second CID directly to the Commissioners to hold in strict confidence and not release to Commission staff investigators" pending the Commission's decision and resolution of any actions initiated by NI in the federal courts.[5] *Id.*

[4] Contrary to Petitioner's apparent belief that such judicial review would be available to it immediately following the Commission's decision of this appeal, it is well established that FTC investigatory process is not self-executing; accordingly, this CID can only be enforced (or denied enforcement) by the district court in a CID enforcement action brought by the Commission – pre-enforcement challenges to Commission CIDs brought by the party being subpoenaed are premature and not ripe for judicial review. *See, e.g., Atlantic Richfield Co. v. Fed. Trade Comm'n*, 546 F.2d 646, 648-50 (5th Cir. 1977) (affirming district court's dismissal of action for declaratory and injunctive relief challenging FTC subpoena); *Anheuser-Busch Inc. v. Fed. Trade Comm'n*, 359 F.2d 487, 490 (8th Cir 1966) (same).

[5] NI cites no legal authority to support its request that its CID responses be

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On July 8, 2008, the Secretary received NI's Response to the Second Civil Investigative Demand, dated July 3, 2008, The Commission has reason to believe that NI has substantially complied with the CID, Thus, the relief requested by the Petition – that NI be excused from complying with the CID, or that the CID be substantially modified prior to such compliance – was rendered moot by NI's substantial compliance with the commandments of the CID.

For the reasons set forth above, **IT IS ORDERED** that NI's Appeal should be, and it hereby is, **DISMISSED**.

By Direction of the Commission.

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withheld from the "Commission staff investigators" during the pendency of this appeal. The Commission's Rules have no provision for such relief, and the Commission is unaware of any other legal authority which would support that relief.

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CVS CAREMARK CORPORATION

FTC File No. 072 3119 Decision, August 6, 2008

RESPONSE TO CVS CAREMARK CORPORATION'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMAND

Dear Mr. DiResta:

This letter advises you of the disposition of CVS Caremark Corp.'s ("Petitioner" or "CVS") Petition to Limit or Quash Civil Investigative Demand ("Petition") served on it in conjunction with the Federal Trade Commission's ("FTC" or "Commission") investigation of CVS's consumer privacy and data security practices. The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand ("CID") is August 18, 2008.

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

The Commission and the Office of Civil Rights of the Department of Health and Human Services ("HHS") are conducting coordinated investigations of CVS's consumer privacy and data security practices. Petition at 2. Television reports detailed CVS's failure to properly dispose of sensitive consumer information that was discovered in publicly-accessible garbage

[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 should be calculated from the date you received the original by express mail.

containers located behind CVS pharmacies in Indianapolis, IN between June and September 2006. *Id*. at 5. Additionally, between September 2006 and May 2007, additional media reports indicated that sensitive consumer information was found in the trash containers behind CVS pharmacies in Indiana, Ohio, Kentucky, Arizona, and Texas.[2] *Id*. at 8.[3] By letter dated September 27, 2007, FTC staff advised CVS that the Commission was conducting an inquiry "to determine whether CVS's handling of sensitive information from or about its consumers in connection with the preparation and sale of prescription medicines and supplies raises any issues under Section 5." *Id*. at 5 (quoting from Exhibit C to the Petition at 1-2 [Letter from Alain Sheer, FTC Div. of Privacy and Identity Protection, to Christine L. Egan, Esquire, Asst. Gen. Counsel, for CVS]). That letter further asked CVS to voluntarily provide information identified in the letter to the FTC and/or HHS for their use in their coordinated investigations. Petition, Exh. C at 2-8. Paragraph 9 of the specification in the letter included "documents sufficient to identify all policies and statements made by CVS regarding its collection, disclosure, use, and protection of personal information. . . ." *Id*. at 4. CVS claims that it cooperated with the FTC's investigation, and voluntarily "provided information and voluminous documents relevant to the inquiry. . . ."[4] Petition at 2.

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[2] CVS has over 6,000 retail pharmacies, *compare* Petition at 5 ("over 6,200") *with* Petition at 7 ("now more than 6300"), in forty (40) states and the District of Columbia, and has more than 190,000 employees in its retail pharmacy operations. Petition at 5.

[3] CVS refers to these reports collectively as the "Dumpster Incidents." Petition at 7. For the sake of convenience, the FTC will use this same phrase to refer to these events. In addition, a June, 2005 *Computerworld* article reported a potential security vulnerability in the CVS ExtraCare FSA program. *Id.* at 9-10. ExtraCare is the name CVS uses for its loyalty card program. *See id.* at 9. CVS indicates that its own investigation revealed no disclosure of personally identifiable information as a result of this vulnerability. *Id*. at 10.

[4] Exhibit E to the Petition (letter of December 14, 2007, from FTC Attorney Loretta Garrison to Anthony DiResta) indicates that Commission staff did not believe CVS had fully responded to its information requests.