Responses to Petitions to Quash

NORDIC CLINICAL, INC.
AND
ENCORE PLUS SOLUTIONS, INC.

FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018

RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE PLUS SOLUTIONS, INC.'S PETITION TO STAY CIVIL INVESTIGATION AND QUASH CIVIL INVESTIGATIVE DEMANDS DATED DECEMBER 19, 2017

By McSWEENY, Commissioner:

Nordic Clinical, Inc. and Encore Plus Solutions, Inc. have filed a Petition seeking to stay a Federal Trade Commission investigation, and to quash two Civil Investigative Demands for Oral Testimony ("CIDs") issued on December 19, 2017. Because replacement CIDs have now been issued, the Petition is therefore moot. Accordingly,

IT IS ORDERED THAT the Petition By Nordic Clinical, Inc. and Encore Plus Solutions, Inc. To Stay Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED** as moot.

By the Commission.

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By McSWEENY, Commissioner:

Nordic Clinical, Inc. ("Nordic Clinical") and Encore Plus Solutions, Inc. ("Encore Plus") have petitioned to (1) stay two Commission investigations; and (2) quash two civil investigative demands ("CIDs") for corporate testimony pending resolution of related criminal investigations. For the reasons stated below, the petition is denied.

I. BACKGROUND

Nordic Clinical is a Delaware corporation owned by two Canadian citizens, Vito Proietti and Vincent DiCriscio. Encore Plus is a Florida corporation owned by Mr. Proietti. The companies are direct mail marketers of nutritional supplements that they claim treat a number of age-related health conditions. Although the companies now contend they principally conduct business in Montreal, Canada, Nordic Clinical responded to an earlier CID interrogatory that its principal address is in Fort Lauderdale, Florida, and Encore Plus likewise acknowledged that its principal address is in Miami, Florida.

In Spring 2017, the Commission began investigating the companies' marketing claims. Nordic Clinical markets its Neurocet product as an extremely strong and long-lasting pain reliever. Encore Plus sells two substantively identical products under the names Regenify and Resetigen-D, which it markets as pain relievers, memory enhancers, and treatments to reverse age-related health problems. The investigations are intended to determine whether the companies have "made false or

unsubstantiated representations about the health-related benefits" of their products in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and whether Commission action to obtain monetary relief for injured consumers is in the public interest. Pet. Exhs. A, B.

On June 15, 2017, the Commission issued CIDs to both companies seeking corporate documents and information regarding, among other things, corporate location, officers and owners, marketing claims, consumer complaints, sales and refunds, and the identities of affiliated entities.[1] The companies produced documents and responded to interrogatory requests in August 2017, and Nordic Clinical produced additional responsive documents in December 2017.

As part of its continuing investigations, on March 9, 2018, the Commission issued CIDs to both companies for oral testimony. Pet. Exhs. A, B. The CIDs seek testimony on a range of topics, including: the companies' responses to the June 2017 CIDs; their business structure; sales and refunds; consumer complaints; endorsements and testimonials; product manufacturing, substantiation, and marketing; and their relationship with affiliated companies and individuals. The CIDs also ask about the roles of Proietti and DiCriscio at the companies, as well as their background, training, and experience. Pet. Exh. A at 2-3, Pet. Exh. B at 2-3. The CIDs require the companies to designate persons who could "testify on [their] behalf" at an investigational hearing in Fort Lauderdale, Florida "about information known or reasonably available to the" companies. Pet. Exh. A at 1-2 (citing 16 C.F.R. § 2.7(h)), Pet. Exh. B at 2 (same).

On April 3, 2018, the companies filed a petition asking the Commission to stay its investigations and temporarily quash the CIDs until criminal investigations purportedly involving their products are resolved. The companies claim there are "at least

[1] The CIDs were issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and were authorized by an August 13, 2009, Commission Resolution, permitting the use of compulsory process in agency investigations into possible false advertising or marketing claims for dietary supplements, foods, or drugs.

three separate criminal investigations related to the nutritional supplements identified in the CIDs." Pet. 2. They support their claim with (1) a search warrant issued by an Idaho court in September 2017 for products located at a facility in Nampa, Idaho; (2) a motion filed by Nordic seeking the return of property seized from the Idaho facility and pleadings related to that motion; and (3) two December 2017 Canadian search warrants for products at two locations in Montreal. Pet. Exhs. C, D, E, F, G.

Petitioners argue the CIDs demand information about Proietti and DiCriscio that is unrelated to the FTC's investigation, but instead is "obviously designed to glean information for criminal charges against" them. Pet. 5. According to petitioners, compelling such testimony would violate the Fifth Amendment right against self-incrimination, although it is less than clear whether they mean their own or that of Proietti and DiCriscio. Pet. 7-9. The companies assert a stay is necessary in order to "assure that Fifth Amendment rights are not compromised." Pet. 10. Finally, the companies contend the CIDs cannot require their Canadian owners to testify in Florida.

For the reasons stated below, we deny the petition.

II. ANALYSIS

A. The requested testimony is not covered by the Fifth Amendment

The CIDs are directed to two companies—Nordic Clinical and Encore Plus—not to Messrs. Proietti and DiCriscio personally. Pet. Exhs. A, B. The companies have no Fifth Amendment rights against self-incrimination and must designate a representative who faces no such risk to testify on their behalf.

When the Commission issues a CID for oral testimony from a corporation or other business entity, "the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf* * * *." 16 C.F.R. § 2.7(h) (emphasis added). The witnesses appear on

behalf of the company, not in their individual capacities.[2] It has long been established that the Fifth Amendment privilege "is a purely personal one," and that "it cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 U.S. 694, 699 (1944); *see also Bellis v. United States*, 417 U.S. 85, 89-90 (1974) ("the privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.'") (citing *White*, 322 U.S. at 701).

Petitioners nonetheless maintain that the CIDs, issued "in the midst of ongoing criminal investigations, * * * seek[] to compel testimony about" Proietti and DiCriscio that implicate their Fifth Amendment rights. Pet. 7-9. This claim fails for several reasons.

First, the companies have provided no evidence that they or Proietti and DiCriscio have a reasonable fear of self-incrimination or face a real threat of a criminal indictment to justify invoking any Fifth Amendment rights. *See United States v. Argomaniz*, 925 F.2d 1349, 1353 (11th Cir. 1991) (the privilege against self-incrimination "applies only in 'instances where the party has reasonable cause to apprehend danger' of criminal liability") (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

[2] The companies are thus in error when they assert the CIDs are directed to Proietti and DiCriscio "in their individual capacities" because, as owners and officers of the companies, they fall within the CID's definition of the "Company." Pet. 5, 8. To the contrary, the CIDs are directed only to the companies, although they ask for corporate information that employees or other agents would have about the company. That does not transform the CIDs into requests addressed to Proietti and DiCriscio in their personal capacities. The companies also claim the CID queries focused on Proietti and DiCriscio are irrelevant to the FTC's investigation and are being asked only to pursue criminal charges against them. Pet. 6. This claim too is unfounded because the companies' August 2017 CID responses showed that Proietti and DiCriscio, as owners of the companies, played a central role in product development and marketing. Indeed, the companies asserted that Proietti and DiCriscio are not only responsible for product advertising and promotion, but they "conducted their own research," reviewed relevant literature, and even took the products themselves to determine if the products' benefits were consistent with their marketing claims. The CID inquiries as to Proietti and DiCriscio are thus directly relevant to our inquiry into whether the companies' marketing violated the FTC Act.

The supporting materials provided by the petitioners show, at most, that Nordic Clinical may be the subject of criminal investigations into Neurocet and other products, but there is no indication that the company faces a reasonable danger of criminal liability. The United States District Court for the District of Idaho recognized as much this past February when it denied Nordic Clinical's motion to return seized property. As the court noted, no indictments had been issued and "it is unknown whether the Government will prosecute any person or entity involved in its investigation, including Nordic." *In the Matter of the Search of: Specialty Fulfillment Center*, No. 1:17-mc-09979-CWD, 2018 WL 785861, at *7 (D. Idaho Feb. 8, 2018). Petitioners provide no evidence that Encore Plus faces a threat of a criminal indictment.

Second, even if Proietti or DiCriscio faces a genuine threat of criminal indictment, that would not excuse the companies from compliance with the CID. The companies themselves have no Fifth Amendment privilege as discussed above.[3] Even if the two owners are unavailable to testify, the companies still must select an officer, employee, or "agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Kordel*, 397 U.S. at 8 (citations omitted); *see generally* 8 Charles Alan Wright, Arthur R. Miller, *et al*., Federal

[3] The companies' reliance on *United States v. Hubbell*, 530 U.S. 27 (2000), Pet. 8, is misplaced. *Hubbell* involved a subpoena issued to the target of a criminal investigation in his individual capacity; the Court did not address the Fifth Amendment status of corporations. As courts have consistently recognized, *Hubbell* did not reverse long-standing Supreme Court precedent that corporations lack Fifth Amendment rights. *See, e.g.*, *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 n.2 (3d Cir. 2015); *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006); *Armstrong v. Guccione*, 470 F.3d 89, 98 (2d Cir. 2006). The companies also get no help from *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which they claim also cast doubt on the inapplicability of the Fifth Amendment to corporations. Pet. 9. Those two cases address the application of the *First* Amendment to corporations. Nothing in them signals any departure from century-old precedents recognizing the *Fifth* Amendment privilege against self-incrimination as an individual right. *See, e.g.*, *Grand Jury*, 786 F.3d at 261 & n.1 ("[W]e discern nothing in Supreme Court jurisprudence that suggests the Court has, in any way, signaled its readiness to depart from its longstanding precedent regarding corporate custodians' inability to invoke the Fifth Amendment privilege against self-incrimination.").

Practice & Procedure § 2018 (3d ed. 2010) ("[T]he burden on the corporation is to designate someone to answer on its behalf who can furnish as much of the requested information as is available to the corporation without fear of self-incrimination").[4]

Indeed, the companies cannot resist complying with the CIDs by designating Proietti and DiCriscio as their corporate representatives if the executives will simply assert the Fifth Amendment privilege at the investigational hearings. "In their official capacit[ies]," the executives "have no privilege against self-incrimination." *White*, 322 U.S. at 699. Further, the Supreme Court has held that a corporation may not designate as its representative an officer who could assert a personal Fifth Amendment privilege and, in this way, "secure for the corporation the benefits of a privilege it does not have." *United States v. Kordel*, 397 U.S. 1, 8 (1970) (quoting *U.S. v. 3963 Bottles of Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959)). The Court explained that "[s]uch a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents." *Kordel*, 397 U.S. at 8. Nor may a corporate officer rely on the Fifth Amendment to avoid producing corporate records he holds in a representative capacity, even if those records might incriminate him. *Braswell v. United States*, 487 U.S. 99, 108-09 (1988).

In sum, there is no basis to quash the CIDs on Fifth Amendment grounds.

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[4] Indeed, even where there is no such person at the company who can testify, the company must retain a person with whom it was not previously associated and provide that person with sufficient knowledge to be able to testify on the company's behalf. *See, e.g.*, *City of Chicago, Ill., v. Wolf*, No. 91 C 8161, 1993 WL 177020, at *1-2 (N.D. Ill. May 21, 1993) ("The corporations, however, can be compelled to answer the [30(b)(6)] questions through an agent who will not invoke the privilege") (citations omitted); *Martinez v. Majestic Farms, Inc.*, No. 05-60833-CIV, 2008 WL 239164, at *2 (S.D. Fla. Jan. 28, 2008) (citing *Wolf).* To avoid prejudicing the employee who has a legitimate Fifth Amendment right from testifying indirectly through the designated representative, the employee would not be required to provide information to the corporate designee that is solely contained in the employee's memory and is not implied by a document. *Martinez*, 2008 WL 239164, at *3; *Wolf*, 1993 WL 177020, at *2.

B. A stay of the Commission's investigations is not warranted

The companies relatedly contend that the Commission should stay its investigations of the two companies pending resolution of the criminal investigations. Pet. 10-16. We deny that request for many of the same reasons discussed above.

"[T]he Constitution rarely, if ever, requires * * * 'a stay of civil proceedings pending the outcome of criminal proceedings.'" *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) (internal quotation omitted)). Indeed, "'a stay of a civil case' to permit conclusion of a related criminal prosecution has been characterized as 'an extraordinary remedy,'" although a court has the discretion to do so "when related criminal proceedings are imminent or pending, * * *." *Id*. (citations omitted). The party seeking such "a stay 'bears the burden of establishing its need.'" *Id*. at 97 (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). And contrary to the companies' suggestion, Pet. 12, a criminal defendant "has no absolute right" to remain free "to choose between testifying in a civil matter and asserting his Fifth Amendment privilege." To the contrary, it is "permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege," and "it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).[5]

Courts consider a number of factors when deciding whether to stay a civil proceeding pending a criminal matter. These include: (1) the status of the criminal case, including whether the defendants have been indicted and their Fifth Amendment rights

[5] Contrary to the companies' contentions, Pet. 5, there is nothing improper with the FTC sharing information it receives pursuant to process with another domestic or foreign law enforcement agency if the information is used for official law enforcement purposes as authorized by the FTC Act, 15 U.S.C. §§ 46(f), 57b-2(b)(6), and 16 C.F.R. §§ 4.11(c) and (j).

are implicated;[6] (2) the plaintiff's interest in proceeding expeditiously in the civil matter and the potential prejudice to the plaintiff of a delay; (3) the extent to which the issues in the criminal and civil cases overlap; (4) the private interests of and burden on the defendants; (5) the interests of non-parties and the public; and (6) the convenience to the court and judicial economy. *See Malletier*, 676 F.3d at 99-100 & nn.13-14 (declining to stay civil counterfeiting case pending related criminal proceeding); *Keating*, 45 F.3d at 324-25 (declining to stay civil case pending resolution of criminal action because burden on the defendant was outweighed by "the public's interest in a speedy resolution of the [civil] controversy") (citing *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989)); *see also Dresser Industries*, 628 F.2d at 1374 (allowing parallel civil and criminal suits to continue "[i]n the absence of substantial prejudice to the rights of the parties involved, * * *.").

Those factors plainly counsel against a stay here. First, as discussed above, petitioners point only to possible future criminal proceedings; neither the companies themselves nor their owners have been indicted—and they have shown no genuine threat of criminal liability at this point. Even if they did, no Fifth Amendment rights would be implicated by our investigation of the companies, because the companies have no Fifth Amendment rights as explained above. The very cases cited by petitioners recognize that "a stay in a civil proceeding when no indictment has yet issued in the criminal proceeding is rare, * * *." *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003). While some courts have granted pre-indictment stays, Pet. 12-13,

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[6] The strongest case for staying a civil proceeding is where the defendant "is already under indictment for a serious criminal offense" involving the same matter, *Malletier*, 676 F.3d at 101; *SEC v. Dresser Industries, Inc*., 628 F.2d 1368, 1375-76 (D.C. Cir. 1980), or at least is facing a "real and appreciable" risk of criminal liability. *Kordel*, 397 U.S. at 9. But as discussed below, courts often decline to stay civil cases even in the face of related criminal proceedings. By contrast, "[p]re-indictment requests to stay parallel civil litigation are routinely denied." *United States v. Bauer*, No. 1:14-CV-1660, 2014 WL 5493184, at *2 (M.D. Pa. Oct. 30, 2014) (citations omitted). "[T]he risk of self-incrimination is reduced at the pre-indictment stage," and it is uncertain "when, if ever, indictments will be issued." *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, No. CIV.A 01-5530, 2002 WL 31111766, at *2 (E.D. Pa. Sept. 18, 2002) (citations omitted).

those cases nearly always involved imminent or near-certain indictments. *See, e.g.*, *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1039-40 (W.D. Mich. 2007) (granting short stay of civil case where government had indicated "that it has sufficient evidence to seek an indictment," such that an indictment was "but 'an eventuality'"); *Healthsouth*, 261 F. Supp. 2d at 1326 (stay issued in civil case where indictment is "but an eventuality").

Further, both the Commission and the public have a very strong interest that the civil investigation proceed expeditiously given the potentially false claims made by the companies that their products can prevent and treat a variety of serious health conditions. *See, e.g.*, *Kordel*, 397 U.S. at 11 (denying stay of civil action that sought to prevent distribution of misbranded drugs); *Dresser Industries*, 628 F.2d at 1377 (denying stay where doing so might permit the "[d]issemination of false or misleading information by companies" to investors). The Commission and the public would be prejudiced by being "force[d] * * * to wait until the unknown culmination of a criminal case, for which no indictment has even been issued." *FTC v. Adept Mgmt., Inc*., No 1:16-cv-00720-CL, 2017 WL 722586, at *4 (D. Or. Feb. 23, 2017).

For these reasons, we deny the companies' request to stay the Commission's investigations pending resolution of the criminal investigations.

C. The CIDs properly seek testimony in Florida

Petitioners assert that they cannot be compelled to provide testimony in Florida. The CIDs require each company to provide oral testimony where the company "resides, is found, or transacts business." 15 U.S.C. § 57b-1(c)(14)(C). Both companies previously stated in their August 2017 CID interrogatory responses that the "principal address" for each one is in Florida: Nordic Clinical in Fort Lauderdale and Encore Plus in Miami. Now, in direct contrast to these answers, they claim they principally conduct business in Montreal. Pet. 2. Petitioners having previously told us that their principal addresses were both in Florida, we see no reason why they cannot designate a witness to testify there.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Nordic Clinical, Inc. and Encore Plus Solutions, Inc. to Stay Civil Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED**, and

IT IS FURTHER ORDERED THAT Petitioners Nordic Clinical, Inc. and Encore Plus Solutions, Inc., shall comply with the Commission's CIDs and designate a corporate representative who will testify on their behalf, on a date set after consultation with Commission staff.

By the Commission.

Responses to Petitions to Quash

CORPUS CHRISTI POLYMERS LLC, ALFA S.A.B. DE C.V., INDORAMA VENTURES PLC, FAR EASTERN NEW CENTURY CORPORATION, ALOKE LOHIA AND SUCHITRA LOHIA

FTC File No. 181 0030 – Decision, June 26, 2018

RESPONSE TO BANIBU II HOLDINGS, INC.'S PETITION TO LIMIT OR QUASH SUBPOENAS DATED MAY 7, 2018

By SLAUGHTER, Commissioner:

Banibu II Holdings, Inc. ("Banibu") has filed a petition to limit and quash a subpoena *duces tecum* ("SDT") and a subpoena *ad testificandum* ("SAT") issued by the Commission on May 7, 2018. The SDT and SAT ask "the Company" – defined to include Banibu, its parents (most notably, Banco Inbursa, S.A. ("Inbursa")), and its officers and employees – to produce documents and provide testimony. Inbursa created Banibu for the sole purpose of bidding in a bankruptcy auction for certain manufacturing assets in Corpus Christi, Texas. Banibu refuses to provide, however, what it considers to be "Inbursa-related" information.

Banibu's petition to limit and quash advances three arguments: (1) that the request for any documents maintained by Inbursa is not valid because Inbursa was not served in Mexico; (2) that Banibu does not possess or control subpoenaed documents maintained by Inbursa; and (3) that the Federal Trade Commission ("FTC" or "Commission") lacks the authority to compel Banibu's Mexican principals to travel to the United States to testify at an investigational hearing. For the reasons described below, we deny Banibu's petition to limit and quash, although we modify the location of the SAT.

I. BACKGROUND

The FTC is investigating a proposed acquisition of a Corpus Christi-based production facility for polyethylene terephthalate ("PET") resin, a plastic polymer used to make synthetic clothing fibers (referred to by its common name, polyester), bottles, and food packaging. The North American PET resin market is highly concentrated and dominated by only a few market participants.

The transaction under investigation arises out of a bankruptcy proceeding. M&G USA Corporation, Inc. ("M&G"), an American subsidiary of an Italian corporation, was building, in Corpus Christi, Texas, what was expected to be the largest and most efficient vertically integrated PET resin facility in North America. Before the project was completed, M&G filed for Chapter 11 bankruptcy protection on October 30, 2017. *In re: M&G USA Corp*., No. 17-12307-BLS (Bankr. D. Del.). On March 29, 2018, the bankruptcy court approved the sale of the Corpus Christi assets for $1.1 billion to a trilateral joint venture named Corpus Christi Polymers LLC, consisting of Indorama Ventures USA ("Indorama"), DAK Americas LLC ("DAK"), and Far Eastern New Century Corporation. FTC staff is investigating the potential competitive effects of this proposed transaction. The bankruptcy court also approved Banibu as the backup bidder for the Corpus Christi assets. *See M&G USA Corp*., *supra* (Doc. No. 1300). Banibu will acquire the assets if the joint venture fails to close the transaction.

On February 27, 2018, Inbursa, a Mexican financial institution, created Banibu, a Delaware corporation, as its wholly owned subsidiary, specifically to bid on the Corpus Christi assets. Pet. 2-3. Banibu has four directors, who also serve as its only officers: Javier Foncerrada Izquierdo (President), Luis Roberto Frias Humphrey (Vice President, Treasurer), Guillermo Rene Caballero Padilla (Vice President, Secretary), and Frank Ernesto Aguado Martinez (Vice President). Pet. 3. These same four individuals are also officers, directors, or senior employees of Inbursa. Inbursa was the principal lender for M&G's PET resin facility project, and it is the primary lienholder and largest secured creditor on the Corpus Christi assets. [redacted]