



Office of the Secretary

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

September 10, 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: *Petition of Dr. William V. Judy to Quash Civil  
Investigative Demand – File No. X000069*

Dear Mr. Glynn:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4).

The Petition is **denied** for the reasons stated below. The new date and time for Dr. William V. Judy ("Dr. Judy" or "Petitioner") to appear and give testimony is **Tuesday, October 8, 2002 at 9:00 a.m.**

Petitioner may 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 ruling. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

## **I. BACKGROUND**

In 2000, the Commission filed suit in the United States District Court for the Central District of California against Enforma Natural Products, Inc. ("Enforma") and its president, Andrew Grey, alleging that the defendants had made false and unsubstantiated claims in their advertising of certain purported weight loss products, respectively called "Fat Trapper" and "Exercise In A Bottle." Enforma and Grey stipulated to a final order ("2000 Order") settling the suit which required the defendants, among other things, to pay \$10 million in consumer redress; to possess proper substantiation for future health or weight loss benefits, performance, safety, or efficacy claims they make regarding the covered products; and to disclose in future advertisements for the covered products that dieting and/or exercise is required to lose weight. See *FTC v. Enforma Natural Products, Inc., et al.*, CV 04376-JSL (CWx) (C.D. Cal.). The 2000

Order specifically authorizes the Commission to monitor Enforma's and Grey's compliance by all lawful means, including compulsory process.<sup>1</sup> The CID at issue here was issued as a corollary to that compliance monitoring program.

Based upon recent compliance investigation efforts, the Commission has filed two applications for civil contempt in the District Court. In January of this year, the FTC filed an application for civil contempt against Enforma, Grey, and Michael Ehrman, another Enforma executive, for continuing to advertise Fat Trapper Plus and Exercise In A Bottle, using unsubstantiated and misleading representations, in violation of the 2000 Order. In July of this year, the Commission filed a second application for civil contempt against Enforma and Grey, for continuing to violate the terms of the 2000 Order, and in addition filed civil contempt charges against Twenty-Four Seven, LLC (24/7), an entity formed by Enforma and Grey, and Donna DiFerdinando, Enforma's Director of Marketing. In this second proceeding, the Commission alleges that Enforma, Grey, 24/7, and DiFerdinando are advertising two new purported weight loss products – "Chitozyme" and "Acceleron" – through the use of false and unsubstantiated representations, and without also making the court-required disclosure that reducing caloric intake and/or increasing exercise is required to lose weight. The FTC has asked the Court to issue a preliminary injunction to prohibit dissemination of these and other unsubstantiated claims, to require a recall of all product packaging and labeling, and to require Enforma, Grey, 24/7, and DiFerdinando to give up all revenues received by them as a result of their violations of the 2000 Order. Both civil contempt proceedings are presently pending before the District Court.

The FTC is continuing to investigate Enforma's claims regarding a third new product called "Carb Trapper Plus." In connection with the investigation of Carb Trapper Plus, Enforma 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 two CIDs to Dr. Judy. The first CID, issued on June 11<sup>th</sup>, sought documents from Dr. Judy relating to the Carb Trapper Plus study. In an effort to pursue follow-up questions raised by the documents Dr. Judy produced in response to that CID, on August 5<sup>th</sup>, the FTC issued a second CID to Dr. Judy seeking oral testimony.

On August 20<sup>th</sup>, Dr. Judy filed a Petition to Quash the CID for oral testimony. Petitioner objects to the CID on two grounds: (1) the Commission purportedly lacked authority to issue the CID because its initiation of the contempt proceedings now pending in the federal district court relating to two different products somehow divested the Commission of its authority to continue its administrative investigation of a third product, "Carb Trapper Plus," which is not the subject of the contempt proceedings; and (2) the CID purportedly is void because it fails to specify exactly what information will be sought at the hearing.

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<sup>1</sup> Stipulated Final Order ¶ XIV.B.

Commissioner Anthony carefully reviewed the Petition, and determined that it should be denied for the reasons set forth below.

## II. ANALYSIS

### A. Petitioner Failed to Comply with Rule 2.7(d)(2).

Under Rule 2.7 (d)(2) of the Commission's Rules, 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. More specifically, Rule 2.7(d)(2) provides:

Each petition shall be accompanied by a signed statement representing that counsel for petitioner has conferred with counsel for the Commission in a good faith effort 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.

16 C.F.R. § 2.7(d)(2). Mr. Glynn and his client, Dr. Judy, failed to confer with FTC counsel and to provide the required statement with the Petition. For this reason alone, the Petition is deficient and must be denied.

The conferral requirement is mandatory. Orderly process and judicial economy considerations dictate that efforts to resolve compulsory process disputes be exhausted at the staff level before being brought before the Commission. 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). Petitioner's arguments here may well have been swiftly resolved if his counsel had conferred with FTC counsel as required.

### B. The CID Is Well Within the Commission's Authority.

Even apart from petitioner's failure to comply with the requirements of Rule 2.7(d)(2), his proffered objections to the CID fail to state any ground for relief. First, petitioner argues that the

Commission cannot properly issue new compulsory process requests to investigate a target's conduct once the Commission has filed an action in federal court based upon that conduct. Once in federal court, according to Petitioner, all such information gathering must be conducted in accordance with the Federal Rules of Civil Procedure. These general propositions are largely beyond dispute.<sup>2</sup> Unfortunately for Petitioner, they do nothing to support his argument that the instant CID lies beyond the Commission's authority.

The point that Petitioner seems to have failed to grasp is that the claims and products at issue in the contempt proceedings are different from the claims and products which are being investigated here.<sup>3</sup> The contempt proceedings relate to "Acceleron," "Chitozyme," "Fat Trapper Plus," and "Exercise In A Bottle," while the CID has been issued as a part of the separate ongoing investigation of "Carb Trapper Plus." It is axiomatic that the Commission's authority to investigate one product is not cut off by the filing of a federal lawsuit relating to another. This is true regardless of whether the two products are marketed by the same company or individual.

### C. The CID for Oral Testimony Is Sufficiently Specific.

Petitioner's final argument is that the CID is unreasonable because it lacks sufficient specificity regarding what will be sought or the relevant areas of inquiry. This argument is meritless.

The CID clearly sets forth that it is for the giving of oral testimony. Unlike CIDs requesting documents or written answers to specific questions, a CID for oral testimony need not be specific as to what will be asked at the hearing. Indeed, it is part of the very nature of the testimonial hearing that it is in essence a conversation in which the contours and substance of a given question are determined largely by the witness' answers to preceding questions. Moreover, if a witness wishes to assert an objection or claim a privilege during the questioning, he is free to

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<sup>2</sup> The Commission can imagine circumstances, not relevant here, where it might properly continue to exercise its compulsory process authority despite having authorized a federal court filing arising out of the same conduct. For example, a third party might submit documents in response to an outstanding CID after the Commission has voted to authorize staff to file suit, but before the suit has actually been filed in court. Other similar scenarios likely exist as well, and the Commission's authority in such instances will have to be taken up if and when they actually arise.

<sup>3</sup> Indeed, Petitioner recites language from the Commission's Motion for Contempt stating that Carb Trapper Plus claims are *not* presently part of the contempt proceedings because the investigation into those claims is continuing and that if, after further investigation and analysis, those claims are also found to be unsubstantiated, the Commission "will file a supplemental contempt application requesting appropriate findings and relief." Petition at 2, quoting July 22, 2002 memorandum in Support of Contempt at n. 2.

do so.

Furthermore, the resolution attached to the CID describes the "Nature and Scope" of the Investigation in detail:

To investigate the advertising and marketing of dietary supplements, for the purpose of determining 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.

This description, even standing alone, is legally sufficient.

In fact, however, Dr. Judy knows several additional details. He recently has produced documentary materials in response to the earlier CID he received in connection with this investigation. The specific requests included in that CID for documentary material certainly alerted him to the nature of this investigation, as well as to the likely lines of inquiry that might be pursued during the follow-up testimonial hearing. If Dr. Judy had wanted even more information, the CID also provided him with the names, addresses, and direct telephone numbers of the FTC staff who would be conducting the hearing, and he could easily have contacted them at any time.<sup>4</sup>

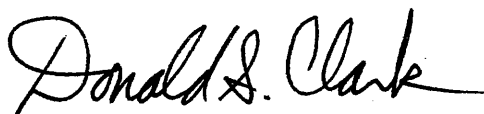
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<sup>4</sup> In an attempt to support his specificity argument, Petitioner cites *In re Macceferri Gabions, Inc. v. United States*, 938 F. Supp. 311 (D. Md. 1995), likens the CID at issue there to the one here, and notes that in that case, "the court refused to quash the CID as written" and instead held that "the parties should negotiate to narrow the scope of the CID." Petition at 7 *quoting* 938 F. Supp. At 320. It is ironic that petitioner would cite this result, and yet fail to implement the teaching of this holding: *talk to opposing counsel to resolve any specificity issues*.

### III. CONCLUSION

For all of the foregoing reasons, the Petition is **denied**, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioner is directed to comply with the Civil Investigative Demand by appearing to give testimony on **Tuesday, October 8, 2002 at 9:00 a.m.**

By direction of the Commission.

A handwritten signature in black ink that reads "Donald S. Clark". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

Donald S. Clark

Secretary