UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Maureen K. Ohlhausen
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter

In the Matter of	)	
MAY 8, 2018 CIVIL INVESTIGATIVE DEMAND ISSUED TO MR. MARK YOUNG, SR.	)	**July 10, 2018**

ORDER GRANTING IN PART AND DENYING IN PART PETITION TO LIMIT AND QUASH CIVIL INVESTIGATIVE DEMAND DATED MAY 8, 2018

By SLAUGHTER, Commissioner:

Mark Young, Sr. ("Young") has petitioned to quash a civil investigative demand for his testimony. For the reasons stated below, the Commission grants the petition in part with respect to Mr. Young's first claim for relief and will modify the CID accordingly. In all other respects, the petition is denied.

I. Background

On May 8, 2018, the Commission issued a civil investigative demand to Mr. Young as part of an investigation into the advertising and marketing of a product known as Willow Curve. Advertising for Willow Curve represents that it uses low levels of laser light to relieve pain, reduce inflammation in the body, and heal damaged joints. Mr. Young serves as the CEO of Western Communication. Western Communication is a full-service advertising agency that from 2013 to 2016 was involved in advertising Willow Curve on behalf of its primary distributor, a company called Physician's Technology. Although the Commission previously issued a CID to Western Communication seeking documents and interrogatory responses, the CID at issue to Mr. Young calls solely for his testimony.

Mr. Young raises two objections. *See* Pet. at 7. First, he claims that four of the CID specifications are overbroad because they lack limiting date ranges or nexus to the acts and practices being investigated. Pet. at 8-9. Second, Mr. Young contends that he is entitled to respond fully to any questions that could potentially elicit "his understanding of legal advice provided to Physician's Technology by its attorneys" and that he will "immediately end any investigative hearing" if the FTC staff attempts to prevent him from responding "truthfully and

completely" about the circumstances of his communications with Physician's Technology and its counsel. *Id.* at 6, 10; *see also* Pet. Ex. B at 3.

II. Analysis

A. The Challenged Specifications Are Relevant To The Subject-Matter Of The Investigation.

Mr. Young challenges Specifications 1, 2, 3.f., and 12, claiming they lack limiting date periods or are not tied to the marketing of Willow Curve. Pet. at 8-9; *see also* Pet. Ex. A at 3-5 (CID specifications). In summary, Specification 1 asks Mr. Young to testify about the history and business of his company, Western Communication. Specification 2 calls for testimony about the roles and responsibilities of Western Communication employees. Specification 3 asks him about his or Western Communication's relationships with several identified individuals and entities. One of these individuals is Mark Young, II, Mr. Young's son, who ran a telephone call center that marketed Willow Curve. Finally, Specification 12 asks Mr. Young about government or consumer complaints. Each of these specifications contains the preface that the topic is "[w]ithout regard to time period." Pet. Ex. A at 3-5.

Mr. Young objects, arguing that because Western Communication was founded in 1995, a response to Specifications 1 and 2 could cover this entire period. Pet. at 9. For Specification 12, Mr. Young claims that due to the lack of a temporal limit, it could reach any monitoring of and responses to consumer or government complaints about any product at any point in time in history. *Id.* He also contends that Specification 3.f. would require him to testify about all aspects of his relationship with Mark Young, II over his son's entire life span. *Id.*

"Relevance" for purposes of an administrative investigation is broader than in district court discovery. To be relevant, a request need only relate to "the investigation," which may be defined "generally." *FTC v. Invention Submission Corp.*, 965 F. 2d 1086, 1090 (D.C. Cir. 1992). Traditionally, the Commission's resolution provides this definition. *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 & n.26 (D.C. Cir. 1977) (*en banc*); *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980). As such, the resolution serves as a type of boundary, defining the subjects that relate to the investigation and thus are within the scope of a proper and enforceable inquiry.

In this case, the CID provides substantial information about the nature of the conduct under investigation. It includes both the Commission's resolution and a separate description of the subject of the investigation. Taken together, we find these statements sufficient to define the scope of information relating to, and thus relevant to, the investigation.

The Commission's resolution authorizes FTC staff to investigate whether entities that are engaged "directly or indirectly in the advertising or marketing of dietary supplements, foods, drugs, devices, or any other product or service intended to provide a health benefit" are "misrepresenting the safety or efficacy" on the grounds that such conduct could amount to "unfair or deceptive acts or practices or in the making of false advertising . . . in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52." Pet. Ex. A at 8.

The CID itself provides an even more specific description of the investigation—namely, to determine whether Physician's Technology, Mr. Young, or his company "made false, deceptive, or unsubstantiated representations about the health benefits . . . and the diagnostic capabilities of the product known as the Willow Curve, and about the refund policies and source or commercial nature of any advertising or endorsements for this product." Pet. Ex. A at 3; *see also* Pet. at 5.

To determine whether Specifications 1, 2, 3.f., and 12 request relevant information, we must interpret the challenged specifications within the context of the provided descriptions of the investigation and the CID as a whole. *FTC v. Rockefeller*, 441 F. Supp. 234, 240–41 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2d Cir. 1979) ("[R]elevance is measured by comparing the specifications of the subpoenas with the resolutions of the Commission, which announced the purpose and scope of the inquiry."). In doing so, we reject Mr. Young's argument with respect to Specifications 1, 2 and 12. The main thrust of his argument is that the specifications, unbounded by any date limitation, encompass irrelevant information unrelated to Western Communication's relationship with Physician's Technology. But even information about events or complaints that pre- or post-date Western Communication's relationship with Physician's Technology "may be relevant" to the subject matter of staff's investigation. *Rockefeller*, 441 F. Supp. at 241 (citing *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir. 1971). For instance, testimony on Specifications 1, 2, and 12 could provide information on products similar to Willow Curve that were also marketed by Western Communication or advertising or marketing techniques that were used to promote other products, in addition to Willow Curve.

The same analysis applies to Specification 3.f, which inquires about Mr. Young's relationship with his son. In context, it appears plain that the specification is focused on the business relationship between father and son. However, to clarify its relevance to the investigation, we grant Mr. Young's petition in part and modify Specification 3 as follows, with additional text indicated in brackets:

> Specification 3: Without regard to time period, your and the Company's [business] relationship to the following persons or entities, and any communications, interactions, and business dealings relating to the Willow Curve product between you or the Company and the following persons or entities: . . .
>
> f. Mark Young, II.

We do not modify the challenged specifications in any other respect.

B. Mr. Young Must Appear At The Investigational Hearing And Comply With Commission Rules.

Mr. Young also advances the novel argument that he should be permitted to testify as to communications over which Physician's Technology has asserted attorney-client privilege. He asserts that it would be "fundamentally unfair" for staff to prevent him from "testifying truthfully and completely" about Western Communication's involvement in preparing advertising for Physician's Technology because it "would deprive him of the ability to provide facts supporting

his and Western Communication's defenses that they had no prior knowledge of any alleged lack of substantiation for claims about the Willow Curve device." Pet. at 9, 10. Mr. Young also claims that the mere prospect of being recalled for testimony after Physician's Technology's privilege claims are resolved presents an unreasonable burden. Pet. at 10-11.

The Commission has promulgated rules that govern how an investigational hearing should be conducted and how objections should be raised in the course of such a hearing. 16 C.F.R. § 2.9 ("Rights of witnesses in investigations"); *see also* 16 C.F.R. §§ 2.7(f) ("Investigational hearings"); 2.7(g) ("Depositions").

We start with Rule 2.9(b)(5), which provides that the Commission's hearing official shall conduct the hearing "in a manner that avoids unnecessary delay, and prevents and restrains disorderly or obstructionist conduct." 16 C.F.R. § 2.9(b)(5). In turn, Rules 2.9(b)(1) and (b)(2) set expectations for conduct by the witness and counsel. For instance, objections may be raised but only "in a nonargumentative and nonsuggestive manner," after which the witness must still answer the question. 16 C.F.R. § 2.9(b)(2). The Rules also include explicit protections for material subject to claims of "protected status;" that is to say, privileged material. *See* 16 C.F.R. § 2.7(a)(4). The hearing official shall not require a witness to testify to such information and counsel "may instruct a witness not to answer only when necessary to preserve a claim of protected status." 16 C.F.R. § 2.9(b)(2).

Here, there is an "unresolved" assertion of privilege by an entity that will not be present at the investigational hearing. Pet. at 2. Given the special protections afforded to privileged material, it is not unreasonable if the hearing officer desires to avoid disclosure of communications that are arguably subject to a valid privilege. For instance, the hearing officer can formulate questions in a way intended to avoid such disclosures and stop the witness from providing a response if it appears the answer will potentially reveal privileged material. Counsel could lodge an objection, but the witness would still be required to answer, following any instruction from the hearing officer not to divulge information protected by a potentially valid claim of privilege. *See* 16 C.F.R. § 2.9(b)(2) ("Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of protected status."). FTC staff may make clear on the record that it is not soliciting purportedly protected information through this hearing. The fact that a witness may have a mix of protected and unprotected material that is relevant to an investigation does not make testifying at a hearing designed to elicit the unprotected information unfair.

If, at the end of the hearing, counsel believes clarification of any answer is necessary as a result of the witness being unable to share privileged information, he or she could request permission from the hearing officer to allow the witness to provide such clarification. 16 C.F.R. § 2.9(b)(4). The hearing officer would be required to explain his or her decision on such a request on the record and allow counsel the opportunity to respond. *Id.*

It is true that Mr. Young may be recalled to testify once any privilege issues are resolved. *See* 16 C.F.R. § 2.9(b)(3). Should that happen, the hearing official must provide written notice of the date of the reconvened hearing, after which the witness has five days to file a petition to

limit or quash the hearing. *Id.*; *see also* 16 C.F.R. § 2.10(a)(3). A failure to file such a petition or to reappear are grounds for the Commission to seek judicial enforcement. 16 C.F.R. § 2.9(b)(3). As such, Mr. Young's claim that the potential of being recalled imposes an undue burden on him is premature, resting as it does on multiple assumptions about events that have not yet occurred. Pet. at 10-11. If Mr. Young is in fact recalled to testify, he may file a petition to limit or quash at that time.

For these reasons, we conclude Mr. Young must appear at the hearing and comply with Commission rules.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Mark Young, Sr.'s Petition to Quash Civil Investigative Demand be, and hereby is, **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED THAT Mark Young, Sr., shall comply in full with the Commission's Civil Investigative Demand, as modified herein, and shall appear ready to testify on the specified topics at the designated location on July 20, 2018, at 8:30 a.m., or other such date, time, and location as staff may determine.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: July 10, 2018