UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of **OCTOBER 30, 2013 CIVIL INVESTIGATIVE DEMAND ISSUED TO HEALTHYLIFE SCIENCES, LLC**	**PUBLIC** **File Number: 122 3287 (I02)** **December 20, 2013**

OPINION AND ORDER DENYING PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

By WRIGHT, Commissioner:

On November 22, 2013, petitioner HealthyLife Sciences, LLC ("HLS") filed a petition to limit a Civil Investigative Demand ("CID") issued by the Commission in connection with its investigation of certain HLS products and policies. For the reasons stated below, the Commission denies the petition.

I. BACKGROUND

Through a variety of advertising and marketing platforms, HLS claims that its "Healthe Trim" brand dietary supplements help users lose weight. In response to these claims and other marketing practices, the Commission's Division of Advertising Practices opened an investigation to determine whether HLS may have violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.

On October 30, 2013, as part of this investigation, the Commission issued a CID seeking materials relating to Healthe Trim products ("Specified Products"), including Healthe Trim Original Formula ("Original Formula") and three derivative products.[1] The CID seeks information and materials relating to HLS and its products, including copies of advertisements and HLS's substantiation for its weight-loss claims. The CID also seeks copies of any documents reflecting relevant communications between HLS and regulatory authorities or consumer protection entities, including the Food and Drug Administration, the U.S. Postal

[1] Instruction O defines "Specified Products" as "all Healthe Trim dietary supplements promoted for weight loss, including but not limited to Healthe Trim Original Formula, Healthe Trim powered by Raspberry Ketone, Healthe Trim powered by Green Coffee Bean, and Healthe Trim powered by Garcinia Cambogia."

Service, the Better Business Bureau, and the National Advertising Division ("NAD"), which is one of four self-regulatory advertising programs administered by the Council of Better Business Bureaus. The CID directed HLS to produce the responsive materials and information by November 25, 2013.

On November 21, 2013, counsel for HLS sent a letter to FTC staff regarding Original Formula's inclusion in the CID's definition of "Specified Products." HLS sought to exclude Original Formula from the scope of the CID because HLS had already produced some responsive documents to the NAD in response to that organization's own review of HLS's substantiation for the weight-loss claims for Original Formula.[2] HLS argued that requiring it to produce these documents to the FTC as well would impose an undue burden. FTC staff and HLS counsel were unable to resolve the dispute. The following day, HLS filed this Petition to Limit Civil Investigative Demand ("Petition"), asking the Commission to exclude Original Formula from that definition. (Pet. at 1).

II. ANALYSIS

HLS principally contends that compliance with the CID would be unduly burdensome because HLS previously submitted some of the materials regarding Original Formula to the NAD in connection with NAD's ongoing inquiry. (Pet. at 3-5). That assertion lacks merit.

As a preliminary matter, HLS has not met its evidentiary burden in seeking to limit the CID because it has not provided any affidavits or other evidence that would establish that producing these materials would unduly disrupt or seriously hinder its normal operations. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). Indeed, one would expect that producing materials that HLS has already largely compiled for the NAD proceedings would involve minimal additional effort.

In addition, HLS's petition rests on a false premise: that an NAD investigation into deceptive advertising somehow obviates the need for an FTC investigation. In fact, an FTC investigation is typically broader in its substantive scope. For example, FTC staff will consider a marketer's entire advertising campaign in multiple media channels over a long period, whereas the NAD usually examines only selected components of a marketer's advertising. Moreover, as

[2] That review had begun in July 2012, after the NAD received a letter from the Council for Responsible Nutrition challenging thirteen claims appearing in HLS's advertising. Participation in an NAD inquiry is voluntary, and advertisers may decide whether they wish to comply with the NAD's recommendations to discontinue advertising claims. If an advertiser refuses to participate in the NAD process (*i.e.*, if it does not respond to the NAD's request to produce substantiation for advertising claims), or declines to follow the recommendations of the NAD, the advertiser may be referred to the appropriate government agency (generally the FTC) for consideration of further action. *See* Policies and Procedures by the Advertising Self-Regulatory Council (as amended Sept. 24, 2012) ¶¶ 2.10(B) and 4.1(B), *available at* http://www.asrcreviews.org/wp-content/uploads/2012/10/NAD-CARU-NARB-Procedures-Updated-10-9-12.pdf.

shown by the CID's specifications, FTC staff is examining a wide variety of issues that NAD did not fully study, such as HLS's continuity programs, its "free" trial offers, and its material connections with endorsers. Also, the CID seeks information and materials relating to a broader set of remedies, such as consumer redress, that FTC staff may want to consider after completing its review of HLS's practices.

In any event, even were the NAD and FTC investigations identical in scope, an advertiser's participation in a parallel self-regulatory program cannot limit an FTC inquiry. To be sure, the NAD is an important partner in protecting American consumers from deceptive advertising. As the Commission has noted, it "will not necessarily defer, however, to a finding by a self-regulation group," and instead must discharge its responsibilities by "mak[ing] its judgment independently, evaluating each case on its merits." *Policy Statement Regarding Advertising Substantiation* (appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)).[3]

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Limit Civil Investigative Demand filed by HealthyLife Sciences, LLC be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to HealthyLife Sciences, LLC, must be produced on or before January 17, 2014.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: December 20, 2013

[3] *Available at* http://www ftc.gov/ftc-policy-statement-regarding-advertising-substantiation. HLS contends that compliance with the CID, to the extent it overlaps with the NAD's inquiry, would "significantly reduce[] the motivation and incentive for companies to participate in the NAD self-regulatory process in the first place." (Pet. at 5). We disagree. The risk of public exposure and referral to authorities should provide ample incentive for advertisers to cooperate with the NAD.