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Federal Trade Commission

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

1 The Federal Trade Commission (FTC) petitions this Court to enforce a civil
2 investigative demand (CID) issued to Respondent Kushly, LLC (Kushly).¹ The
3 CID requires Kushly to produce documents and respond to written questions. *See*
4 Petitioner’s Exhibit (Pet. Exh.) 3. Kushly’s failure to respond to the CID has

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1 district court where the recipient resides, is found, or transacts business for an
2 enforcement order. *Id.* § 57b-1(e) and (h).

3 The FTC issued a CID to Kushly to investigate potential deceptive acts or
4 practices. Kushly has failed to comply with that CID. Because Kushly resides, is
5 found, or transacts business in this district, jurisdiction and venue for this CID
6 enforcement action are properly laid in this Court.

7 **Statement of Facts**

8 On August 9, 2019, the FTC issued a Resolution Directing Use of
9 Compulsory Process in a Non-Public Investigation of Dietary Supplements, Foods,
10 Drugs, Devices, or Any Other Product or Service Intended to Provide a Health
11 Benefit or to Affect the Structure or Function of the Body (Resolution). The
12 purpose of the investigations authorized by the Resolution are:

13 To investigate whether unnamed persons, partnerships, or
14 corporations, or others have engaged or are engaging in
15 deceptive or unfair acts or practices in or affecting
16 commerce in the advertising, marketing, or sale of
17 dietary supplements, foods, drugs, devices, or any other
18 product or service intended to provide a health benefit or

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1 whether Commission action to obtain monetary relief
2 would be in the public interest.

3 Resolution, File No. 002 3191. Pet. Exh. 2.

4 On May 6, 2020, under the authority of the Resolution, the FTC issued a
5 CID to Kushly requiring it to produce specified documents and to respond to
6 written questions. Pet. Exh. 3 at 6 – 13; *see* Pet. Exh. 1 ¶ 9. The FTC issued its CID
7 as part of its investigation into whether certain health-related claims Kushly makes
8 in its marketing and advertising of cannabidiol (CBD) products are deceptive. *See*
9 Pet. Exh. 3 at 1; Pet. Exh. 1 at ¶ 11. The CID required Kushly to respond by June
10 5, 2020. Pet. Exh. 3 at 3; Pet. Exh. 1 at ¶ 9.

11 The FTC served the CID via commercial courier by delivering a copy to
12 Sam Conley, who is listed with the Arizona Corporation Commission (ACC) as the
13 statutory agent for Kushly. Pet. Exh. 4; Pet. Exh. 5; Pet. Exh. 7; Pet. Exh. 1 at ¶ 10.
14 The CID was delivered to Sam Conley at the address specified in Kushly’s ACC
15 filings. Pet. Exh. 7. Conley subsequently confirmed that Kushly received the CID.
16 *See* Pet. Exh. 11 at 3 (Sam Conley email stating he “received the forwarded
17 communication by mail”); *see also* Pet. Exh. 1 at ¶18. However, to date,
18 Kushly has not provided the FTC any document or other information requested by
19 the CID, nor has it filed a motion to quash or limit the CID as provided in the
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1 FTC's Rules of Practice and Procedure. Pet. Exh. 1 at ¶ 29; *see* 15 U.S.C. § 57b-
2 1(f); 16 C.F.R. § 2.10.

3 **The Legal Standard for Enforcement**

4 A court's function in a CID enforcement proceeding is to determine:
5 "(1) whether Congress has granted the authority to investigate; (2) whether
6 procedural requirements have been followed; and (3) whether the evidence is
7 relevant and material to the investigation." *United States v. Golden Valley Elec.*
8 *Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012) (citing *EEOC v. Children's Hosp. Med.*
9 *Ctr. of N. Cal.*, 719 F.2d 1426, 1426 (9th Cir. 1983) (en banc)), *overruled on other*
10 *grounds as recognized in Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir.
11 1994)); *accord United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)
12 (enforcement is warranted as long as "the inquiry is within the authority of the
13 agency, the demand is not too indefinite, and the information sought is reasonably
14 relevant."). Actions to enforce administrative compulsory process are "summary
15 procedure[s] designed to allow 'speedy investigation of [agency] charges'." *EEOC*
16 *v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1078 (9th Cir. 2001) (citation omitted).

17 When the above requirements are met, courts "must enforce administrative
18 subpoenas unless the evidence sought by the subpoena is plainly incompetent or
19 irrelevant to any lawful purpose of the agency," *Golden Valley*, 689 F.3d at 1112
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1 (quoting *Karuk Tribe Hous. Auth.*, 260 F.3d at 1076), or where the investigated
2 party can show the inquiry “is unreasonable because it is overbroad or unduly
3 burdensome.” *Children’s Hosp. Med. Ctr.*, 719 F.2d at 1428 (citing *Okla. Press*
4 *Pub. Co. v. Walling*, 327 U.S. 186, 217 (1946)). The government’s burden to
5 support enforcement is a “slight one” and “may be satisfied by a declaration from
6 an investigating agent.” *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1413 (9th Cir.
7 1993).

8 **Legal Argument**

9 The FTC easily satisfies the legal standards for enforcement, as discussed
10 below and shown by its supporting declaration. *See* Pet. Exh. 1. The FTC is
11 authorized to conduct the investigation, it followed all applicable procedural
12 requirements in issuing the CID, and the documents and information sought are
13 relevant to the FTC’s investigation. Accordingly, the CID should be enforced
14 without delay.

15 **A. The Commission Is Authorized to Conduct the Present Investigation**

16 This investigation and the related CID fall within the FTC’s statutory
17 authority. The FTC has authority to enforce the provisions of the FTC Act, 15
18 U.S.C. §§ 41–58. Specifically at issue in this investigation are Sections 5(a) and 12
19 of the FTC Act. *See* Pet. Exh. 3 at 6 (identifying the “Subject of Investigation”).
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1 Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices in
2 or affecting commerce. 15 U.S.C. 45(a). A statement is deceptive and violates
3 Section 5(a) if it is material and is likely to mislead a consumer acting reasonably.
4 *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Stefanich*,
5 559 F.3d 924, 928 (9th Cir. 2009); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001).
6 A statement may be deceptive because it is false or because the claimant lacked a
7 reasonable basis, or substantiation, for the claim. *Pantron I Corp.*, 33 F.3d at 1096.
8 Section 12 of the FTC Act prohibits the dissemination of any false advertisement
9 used to induce the purchase of food, drugs, devices, services, or cosmetics. 15
10 U.S.C. § 52. The dissemination of a false advertisement is construed to be an

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epilepsy, and psoriasis. *See, e.g.*, Pet. Exh. 17 at 2-3 (blog post concerning CBD and Parkinson’s disease); Pet. Exh. 18 at 1-2 (blog post concerning CBD and anxiety); *see also* t56D.0013 Tc15m. u3TjTT3 1oF32492TDo7PE3 1Z.2E3j14.3D90d60ig

1 be delivered “to the principal office or place of business of the
2 partnership, corporation, association, or other legal entity to be served.”

3 15 U.S.C. § 57b-1(c).

4 The FTC’s CID satisfies all of these requirements. *See* Pet. Exh. 3. The CID
5 specified with “definiteness and certainty” the kinds of documents and information
6 to be produced. *See* Pet. Exh. 3 at 6-13. It provided Kushly a “reasonable period of
7 time” to respond by providing a return date four weeks after issuance. Pet. Exh. 3
8 at 3. The CID outlined the specific nature of the FTC’s investigation and the law at
9 issue. *Id.* at 6 (identifying the “Subject of Investigation”). It identified the specific
10 records custodians to whom the responses were to be sent. *Id.* at 3. Further, the
11 CID was validly signed by Commissioner Noah J. Phillips acting pursuant to
12 Resolution, File No. 002 3191. Pet. Exh. 3 at 3 and 20; Pet. Exh. 1 at ¶ 9. Finally,
13 the CID was properly served by being delivered to Kushly’s “COO” and statutory
14 agent, Sam Conley. Pet. Exh. 1 at ¶¶ 10 and 18; Pet. Exh. 4; Pet. Exh. 5; Pet. Exh.
15 7; *see also* Pet. Exh. 11 (several emails from Sam Conley identifying himself as
16 “COO” of Kushly).

17 **C. The Evidence Sought is Relevant and Material to the Investigation**

18 Finally, the information sought pursuant to the CID is relevant and material
19 to the FTC’s investigation. In assessing relevancy, courts give wide latitude to an
20 administrative agency’s determination concerning what materials it needs to

Conclusion

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