UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
CIVIL INVESTIGATIVE DEMAND TO DUNHAM'S ATHLEISURE CORPORATION DATED MARCH 8, 2021.	)	File No. 211-0059

ORDER DENYING PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND

By CHOPRA, Commissioner:

Dunham's Athleisure Corporation ("Dunham's") petitions the Commission to quash Specifications 2(a), (b), (e) and (i) in the Civil Investigative Demand ("CID") issued on March 8, 2021. The CID was issued in connection with the Commission's investigation into whether the proposed acquisition of Sportsman's Warehouse Holdings, Inc. ("Sportsman's") by Great Outdoors Group, LLC, d/b/a Great American Outdoors Group ("GAOG"), if consummated, would violate Section 7 of the Clayton A

arises out of the Commission's investigation to determine whether anticompetitive effects are likely to result from the proposed acquisition.

In order to investigate the proposed merger's

a second extension until April 27. *See Email from Peter Arhangelsky to Charles Dickinson* (dated April 20, 2021 at 12:10 PM); *Email from Charles Dickinson to Peter Arhangelsky* (dated April 20, 2021 at 6:46 PM).

Dunham's missed that deadline, instead, in a letter sent the following day, Dunham's agreed to produce information partially responsive to Specification 4, stated it had no information responsive to Specification 3, and (for the first time) objected to responding to Specification 2 based on undue burden, irrelevance, the risk that production would disclose confidential business information, and the purported availability of the requested information elsewhere. *See Email from Jonathan Emord to Charles Dickinson* (dated April 28, 2021 at 3:31 PM). Staff immediately sought to discuss Dunham's newly raised concerns and provided a third extension until May 7 to facilitate that discussion. *See Email from Charles Dickinson to Jonathan Emord* (dated April 28, 2021 at 7:36 PM). Dunham's ignored that request after producing data in partial response to Specification 4. *See Email from Jonathan Emord to Charles Dickinson* (dated April 29, 2021 at 9:53 AM); *Email Charles Dickinson to Jonathan Emord* (dated May 5, 2021 at 1:36 PM); *Email from Peter Arhangelsky to Charles Dickinson* (dated May 6, 2021 at 1:47 PM).

On May 7, Commission staff notified Dunham's that it "is not currently in compliance" with the March 8 CID by the deadline that day in large part because Dunham's "has not produced any data or information in response to Specification 2." *See Email from Charles Dickinson to Peter Arhangelsky* (dated May 7, 2021 at 4:35 PM). Staff granted a fourth extension to May 12 solely to schedule a meet and confer "to come to an agreement on a schedule for compliance with the CID." *Id.* Dunham's agreed to meet on May 11. *See Email from Peter Arhangelsky to Charles Dickinson* (dated May 7, 2021 at 6:57 PM).

At the May 11 conference call, staff agreed to limit the number of Specification 2 subparts that Dunham's currently must respond to, Dunham's agreed to "provide a timetable for compliance by" May 14, and staff granted a fifth extension of the CID deadline to May 14 to facilitate that effort. *See Email from Charles Dickinson to Ryan Andrews, Peter Arhangelsky* (dated May 12, 2021 at 4:38 PM). Shortly afterwards, Dunham's asked for another extension until May 17 because a "key Dunham's employee" necessary to provide the compliance timetable was out of the office. *See Email from Jonathan Emord to Charles Dickinson* (dated May 12, 2021 at 6:27 PM). Staff granted this sixth extension request. *See Email from Charles Dickinson to Jonathan Emord* (dated May 13, 2021 at 8:20 PM). On May 17, Dunham's counsel requested another one-day extension because the employee still [illegible]

II. Analysis

A. Dunham's Petition to Quash Was Untimely

We must first decide whether Dunham's filed its petition after the deadline to do so. We conclude that it did.

As explained above, because Dunham's was served with the Commission's SID on March 11, 2021, it was required to file a petition to quash by March 31, 2021. *See* n.2 *supra* Dunham's did not file its petition to quash until May 17, 2021 – 47

We conclude that Dunham has failed to show that responding to Specifications 2(a), (b), (e), and (i) would impose an undue burden.

2. Relevance

Dunham's also claims that the challenged Specification 2 subparts seek irrelevant information because the company does not compete in the same product market, or the same customers, as the merging parties. Pet. at 1. For example, Dunham's claims that, unlike the merging parties, it has no online sales and that its "markets are peculiarly local." Pet. at 1.

We find Dunham's conception of relevance to the Commission's investigation is unduly limited. Courts have long confirmed that an FTC investigation is lawful where the Commission seeks to learn whether there is *reason to believe* that the law has been violated and, if so, whether issuance of a complaint would be in the public interest. *See Texaco*, 555 F.2d at 872 (citing *Morton Salt Co.*, 338 U.S. at 642–43). The standard for the relevance of administrative compulsory process is, therefore, broader and "more relaxed" than would be in an adjudicatory discovery demand. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). Indeed, the Commission's compulsory process need not be limited to information necessary to prove a specific charge; it can demand any documents or information "relevant to the investigation—the boundary of which may be defined quite generally" by the Commission, *id.* which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Texaco*, 555 F.2d at 872 (citing *Morton Salt*, 338 U.S. at 642–43). The requested information need only be "reasonably relevant" to the agency investigation and an agency explanation that the information is relevant will be upheld as long as it is not "obviously wrong." *Id.* at 876, 877 n.32. *See FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 5–7 (D.D.C. 2010) (agency compulsory process upheld where agency's relevancy explanation was "not 'obviously wrong,'" because documents held by investigative targets or subsidiary

business model," which "would likely cause Dunham's to experience competitive injury." Pet. at 1-2. This claim too must be rejected.

As a general rule, the Commission is prohibited from disclosing any documents and information obtained through compulsory process, including proprietary business and sensitive customer information. *See* 15 U.S.C. §§ 46(f), 57b-2; 16 C.F.R. § 4.10(a). Thus, the mere fact that a subpoena or CID requires production of confidential or sensitive business information is no basis for noncompliance. *See FTC v. Dresser Industries, Inc.*, No. 77-44, 1977 WL 1394, at *5 (D.D.C. Apr. 26, 1977) (citing cases).

Courts have consistently held that these provisions provide adequate protection and that the Commission has a full right to access even the most highly sensitive or confidential business information including trade secrets. "Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with." *FTC v. Invention Submission Corp.*, No. 89-272, 1991 WL 47104, at *4 (D.D.C. 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Gibson Prod. of San Antonio, Inc.*, 569 F. 2d 900, 908 (5th Cir. 1978) (subpoenas at issue were not overly broad "simply because the requests may include confidential information."). The FTC need not make any special showing of relevance to obtain confidential material or trade secrets. *FTC v. Green*, 252 F. Supp. 153, 157 (S.D.N.Y. 1966).

Thus, the mere fact that Specifications 2(a), (e), and (i) might require the production of confidential or sensitive corporate information does not justify Dunham's refusal to comply.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT Dunham's Athleisure Corp.'s Petition to Quash Civil Investigative Demand be, and it hereby is, DENIED.

IT IS FURTHER ORDERED THAT Dunham's Athleisure Corp. shall comply in full with Specifications 2(a), (e), and (i) of the Commission's Civil Investigative Demand no later than July 14, 2021, or at such other date, time, and location as the Commission staff may determine.

By the Commission, Chair Khan not participating.

April J. Tabor
Secretary

SEAL:
ISSUED: June 29, 2021