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Federal Trade Commission

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

Case No. _____

Federal Trade Commission,

Petitioner,

v.

Kushly, LLC,
a limited liability company,

Respondent.

**MEMORANDUM IN SUPPORT
OF PETITION TO ENFORCE
CIVIL INVESTIGATIVE
DEMAND**

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
19 to affect the structure or function of the body; have
20 misrepresented or are misrepresenting the safety or
efficacy of such products or services; or otherwise 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 or 12 of
the Federal Trade Commission Act, 15 U.S.C. §§ 45 and
52, as amended. The investigation is also to determine

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
20

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
20

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”).
20

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. Stefanchik*,
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
11 unfair or deceptive act that also violates Section 5. 15 U.S.C. § 52(b).

12 The FTC Act authorizes the FTC to investigate whether a person is or has
13 been engaged in unfair or deceptive acts or practices in or affecting commerce, and
14 to issue CIDs to any person who may have documents or information relevant to
15 such an FTC investigation. 15 U.S.C. § 57b-1(c)(1). The FTC may “investigate
16 merely on suspicion that the law is being violated, or even just because it wants
17 assurance that it is not.” *Morton Salt*, 338 U.S. at 642.

18 Here, Kushly advertises its CBD products as offering particular health
19 benefits, including claiming that its products can help treat sleep disorders,
20 depression, anxiety, hypertension, Parkinson’s disease, Alzheimer’s disease,

1 epilepsy, and psoriasis. *See, e.g.*, Pet. Exh. 17 at 2-3 (blog post concerning CBD
2 and Parkinson’s disease); Pet. Exh. 18 at 1-2 (blog post concerning CBD and
3 anxiety); *see also* Pet. Exh. 1 at ¶ 4; Pet. Exh. 3 at 10-12. An investigation into the
4 veracity and support for these claims falls squarely within the Commission’s
5 investigatory and enforcement authority, as does an investigation into whether an
6 FTC enforcement action to obtain injunctive and equitable monetary relief serves
7 the public interest. *See* Pet. Exh. 2.

8 **B. The FTC Satisfied the Applicable Procedural Requirements in Issuing**
9 **the CID**

10 The FTC’s CID was issued in compliance with applicable procedural
11 requirements of the FTC Act and its implementing rules. 15 U.S.C. § 57b-1(c); 16
12 C.F.R. § 2.7; *see also* Pet. Exh. 3.

13 Specifically, a CID must:

- 14 • describe with “definiteness and certainty” the documentary material and
information to be produced;
- 15 • provide the respondent a “reasonable period of time” to respond to these
16 requests;
- 17 • identify the nature of the conduct being investigated;
- 18 • “identify the custodian to whom such material shall be made available”;
- 19 • be “signed by a Commissioner” who is “acting pursuant to a Commission
20 resolution”; and

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

15 U.S.C. § 57b-1(c).

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

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

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

1 conduct an investigation. Courts uphold those choices so long as they are not
2 “plainly incompetent or irrelevant” to the investigation. *Golden Valley*, 689 F.3d at
3 1113-14 (citations omitted).

4 Here, the CID requires Kushly to provide, among other things, documents
5 and information concerning Kushly’s substantiation for health claims Kushly made
6 on its website and on social media, sales and revenue records, and information
7 related to the company’s relationships to associated entities and individuals. Pet.
8 Exh. 3 at 6-13. This information is directly relevant and material to the subjects
9 specified in the Resolution and with the Commission’s inquiry into Kushly’s
10 practices, its compliance with Sections 5(a) and 12 of the FTC Act, 15 U.S.C.
11 §§ 45 and 52, and whether a Commission enforcement action to seek injunctive
12 and equitable monetary relief is in the public interest. Pet. Exh. 2; Pet Exh. 1 at
13 ¶¶ 3, 11, and 30.

14 Kushly has not raised any legal challenge to the CID on any of these
15 grounds. Having failed to raise any challenges administratively, Kushly may not
16 raise them here. *See EEOC v. Cuzzens of Ga., Inc.*, 608 F.2d 1062, 1063-64 (5th
17 Cir. 1979). Kushly has elected simply to withhold information until called on it—a
18 response that is legally improper and inconsistent with its obligations under the
19 CID.

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Conclusion

Petitioner FTC respectfully requests that the Court grant its petition and issue the attached order requiring Respondent Kushly, LLC to comply with the CID or to show cause as to why it has failed to do so, and, if Kushly fails to produce the material sought by the CID, to comply fully with the CID within ten days of the entry of such order.

Date: July 30, 2020

Respectfully submitted,

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