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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

|                     |   |                            |
|---------------------|---|----------------------------|
|                     | ) |                            |
| FEDERAL TRADE       | ) |                            |
| COMMISSION,         | ) | Case No. 2:17-cv-7921      |
|                     | ) |                            |
| Petitioner,         | ) |                            |
|                     | ) | FEDERAL TRADE COMMISSION’S |
| v.                  | ) | MEMORANDUM OF POINTS AND   |
|                     | ) | AUTHORITIES IN SUPPORT OF  |
| REDWOOD SCIENTIFIC  | ) | PETITION FOR AN ORDER      |
| TECHNOLOGIES, INC., | ) | ENFORCING CIVIL            |
|                     | ) | INVESTIGATIVE DEMAND       |
| Respondent.         | ) |                            |
|                     | ) |                            |

The Federal Trade Commission brought this proceeding to enforce a civil investigative demand (CID) issued to Redwood Scientific Technologies, Inc., (Redwood) as part of an investigation into its advertising and marketing practices

1 for a smoking cessation product and an appetite suppressant. Redwood has not  
2 provided the materials the CID requires and, in fact, has missed every deadline,  
3 including deadlines that it set for itself. This refusal to cooperate has stymied the  
4 investigation and impeded the Commission's staff from moving forward in the  
5 investigation. The Commission respectfully asks this Court to grant the  
6 Commission's enforcement petition and to enter its own order directing Redwood to  
7 provide the responsive materials within 10 days from the date of an order.

### 8 The Parties

9 The Commission is an administrative agency of the United States, organized  
10 and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq*, with broad statutory  
11 authority to address unfair or deceptive acts or practices. For instance, the FTC is  
12 authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to  
13 prohibit unfair methods of competition and unfair or deceptive acts or practices in  
14 or affecting commerce. Section 12 of the FTC Act, 15 U.S.C. § 52, authorizes the  
15 Commission to prohibit false advertising for the purpose of inducing, directly or  
16 indirectly, the purchase of food, drugs, devices, services, or cosmetics. The Restore  
17 Online Shoppers' Confidence Act (ROSCA) authorizes the Commission to enforce  
18 ROSCA's prohibitions on certain types of online marketing. 15 U.S.C. §§ 8402,  
19 8403, 8404.

20 The FTC is authorized to conduct investigations of possible violations of  
21 these laws. Section 3 of the FTC Act, 15 U.S.C. § 43, empowers the Commission  
22 to prosecute any inquiry necessary to its duties in any part of the United States.  
23 Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission to gather and  
24 compile information concerning, and to investigate from time to time, the  
25 organization, business, conduct, practices and management of, any person,  
26 partnership or corporation engaged in or whose business affects commerce, with  
27 certain exceptions not relevant here. Most relevant here, Section 20 of the FTC  
28

1 Act, 15 U.S.C. § 57b-1, empowers the Commission to require by CID the  
2 production of documents or other information relating to any Commission law  
3 enforcement investigation into unfair or deceptive acts or practices in or affecting  
4 commerce.

5 Respondent Redwood Scientific Technologies, Inc., is based in Claremont,  
6 CA. Redwood markets and sells various dissolvable oral strips, including TBX-  
7 FREE, a purported smoking cessation product, and Eupepsia Thin, a purported  
8 appetite suppressant, throughout the United States. Pet. Ex. 1, ¶ 3. Redwood  
9 advertises these products on its own websites, social media platforms such as  
10 Facebook, third party retailers such as Amazon.com, and infomercials available on  
11 YouTube.com, among other media. *Id.*, ¶ 4.

### 12 **Jurisdiction**

13 The authority of the Commission to issue a CID, and the jurisdiction and  
14 venue of this Court to enter an order enforcing it, are conferred by Section 20(c) of  
15 the FTC Act, 15 U.S.C. § 57b-1(c), which empowers the Commission to issue CIDs  
16 to compel, *inter alia*, the production of documentary evidence and responses to  
17 written interrogatories. Sections 20(e) and (h) of the FTC Act, 15 U.S.C. §§ 57b-  
18 1(e) and (h), authorize the Commission to invoke the aid of the district courts to  
19 enforce a CID in any jurisdiction in which the recipient of a CID “resides, is found,  
20 or transacts business.” In this case, venue and jurisdiction are proper under Section  
21 20(e) because Redwood is found and transacts business in this district.<sup>1</sup> Pet. Ex. 1,  
22 ¶ 3.

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23  
24  
25  
26 <sup>1</sup> In addition to the jurisdiction and venue conferred by Section 20 of the FTC  
27 Act, this Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and  
28 1345 and venue is proper under 28 U.S.C. § 1391.

1 **Statement of Facts**

2 The investigation seeks to determine whether several aspects of Redwood’s  
3 advertising and marketing of TBX-FREE and Eupepsia Thin comply with Sections  
4 5 and 12 of the FTC Act and ROSCA. The topics covered by the CID include the  
5 following:

- 6 a. Whether Redwood made false or unsubstantiated representations  
7 concerning TBX-FREE’s efficacy as a smoking cessation product;
- 8 b. Whether Redwood made false or unsubstantiated representations  
9 concerning Eupepsia Thin’s efficacy as an appetite suppressant and  
10 weight loss product;
- 11 c. Whether Redwood falsely represented that certain medical institutions  
12 and publications have endorsed TBX-FREE as a smoking cessation  
13 product;
- 14 d. Whether Redwood falsely represented that TBX-FREE comes with a  
15 money back guarantee; and
- 16 e. Whether Redwood violated ROSCA by enrolling consumers in  
17 automatically-recurring purchase plans (also known as “autoship  
18 plans”) without their express informed consent.

19  
20 Pet. Ex. 2 at 15, 20.<sup>2</sup>

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22  
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25  
26  
27 <sup>2</sup> Cites to page numbers in exhibits are to the consecutive Bates numbers.

1 On August 3, 2017, the Commission issued a CID to Redwood directing it to  
2 produce certain documents and to respond to interrogatories no later than  
3 September 6, 2017. Pet. Ex. 2. This CID was issued under the authority of an  
4 investigatory resolution that authorizes the use of process to investigate the  
5 following practices:

6 [W]hether unnamed persons, partnerships, or corporations, or others  
7 engaged directly or indirectly in the advertising or marketing of  
8 dietary supplements, foods, drugs, devices, or any other product or  
9 service intended to provide a health benefit or to affect the structure or  
10 function of the body have misrepresented or are misrepresenting the  
11 safety or efficacy of such products or services, and therefore have  
12 engaged or are engaging in unfair or deceptive acts or practices or in  
13 the making of false advertisements, in or affecting commerce, in  
14 violation of Sections 5 and 12 of the Federal Trade Commission Act,  
15 15 U.S.C. §§ 45 and 52.

14 *Id.* at 31.

15 In issuing the CID, the Commission followed all the procedures required by  
16 the FTC Act and its Rules of Practice and Procedure. For instance, the CID was  
17 properly signed by a Commissioner acting pursuant to this resolution, as required  
18 by Section 20 of the FTC Act, 15 U.S.C. § 57b-1(i); 16 C.F.R. § 2.7(a). *Id.* at 17.

19 The FTC served the CID on Redwood on August 11, 2017, by directing it to  
20 Jason Cardiff, Redwood's President and Chief Executive Officer. *See* Pet. Ex. 3;  
21 *see also* 15 U.S.C. § 57b-1(c)(8); 16 C.F.R. § 4.4(a)(3). Shortly after, on August  
22 15, 2017, Tracy Green, outside counsel for Redwood, contacted FTC staff to  
23 confirm receipt of the CID. Pet. Ex. 1, ¶ 11.

24 Despite attempts to reach Redwood's counsel on or before the due date,  
25 Redwood failed to provide any information on or before the CID's stated deadline  
26 of September 6, 2017. *Id.*, ¶¶ 12-13; Pet. Ex. 4 at 35-36. On September 11, 2017,  
27 FTC staff informed Redwood's counsel that the company was in default. Pet.

1 Ex. 1, ¶ 14; Pet. Ex. 4 at 35-36. Staff did not receive a response until September 27,  
2 2017, at which time counsel stated that she was working with the company to  
3 prepare its response and requested an extension in the form of weekly rolling  
4 production dates on three dates in October. Pet. Ex. 1, ¶ 16; Pet. Ex. 4 at 38. Staff  
5 denied the request for modification of the CID, but agreed to forbear from seeking  
6 judicial enforcement provided that the company met each of its proposed deadlines.  
7 Pet. Ex. 1, ¶ 17; Pet. Ex. 4 at 39-40. As of this date, however, Redwood has not  
8 produced any information and therefore has failed to meet not only the CID's stated  
9 deadline, but even the deadlines proposed by its own counsel. Pet. Ex. 1, ¶¶ 18-21.

10 The Commission's Rules of Practice allow the recipient of a CID to object to  
11 a CID by filing an administrative petition to limit or quash. *See* 16 C.F.R. § 2.10.  
12 Redwood did not file such a petition and, in fact, disclaimed that it had any such  
13 objections. Pet. Ex. 1, ¶ 22.

### 14 Argument

#### 15 **I. The scope of issues considered in proceedings to enforce compulsory** 16 **process is narrow.**

17 Although "the court's function is 'neither minor nor ministerial,' the scope of  
18 issues which may be litigated in a [compulsory process] enforcement proceeding  
19 must be narrow, because of the important governmental interest in the expeditious  
20 investigation of possible unlawful activity." *FTC v. Texaco, Inc.*, 555 F.2d 862,  
21 872 (D.C. Cir. 1977) (*en banc*) (internal citation omitted); *NLRB v. North Bay*  
22 *Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996).

23 This Court's role in a CID enforcement proceeding is thus limited to  
24 determining whether the Commission demonstrates that: (1) Congress has granted  
25 the authority to investigate; (2) the procedural requirements have been followed;  
26 and (3) the evidence is relevant and material to the investigation. *North Bay*  
27 *Plumbing, Inc.*, 102 F.3d at 1007; *accord FDIC v. Garner*, 126 F.3d 1138, 1142-43  
28

1 (9th Cir. 1997). If the agency establishes these factors, “the subpoena should be  
2 enforced unless the party being investigated proves the inquiry is unreasonable  
3 because it is overbroad or unduly burdensome.” *North Bay Plumbing*, 102 F.3d at  
4 1007.

5 The government’s burden to meet these requirements requires only a “prima  
6 facie showing” and can be demonstrated by an affidavit of a government official.  
7 *Garner*, 126 F.3d at 1143. Here, as set forth in the accompanying Declaration of  
8 Elizabeth Sanger, one of the lead investigating attorneys, the Commission has  
9 readily demonstrated that the requirements for enforcement are satisfied. *See*  
10 *generally* Pet. Ex. 1.

11 An enforcement proceeding is properly instituted by a petition and order to  
12 show cause (rather than by complaint and summons) and is summary in nature;  
13 discovery or evidentiary hearings are generally not permitted, save in extraordinary  
14 circumstances. *See, e.g., EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1078  
15 (9th Cir. 2001) (quoting *EEOC v. St. Regis Paper Co.*, 717 F.2d 1302, 1304 (9th  
16 Cir. 1983)); *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980).

## 17 **II. The civil investigative demand should be enforced.**

### 18 **A. Congress granted the FTC the authority to investigate.**

19 The Commission is authorized to issue the CID and to investigate acts or  
20 practices that may violate Sections 5 or 12 of the FTC Act or ROSCA. *See* 15  
21 U.S.C. §§ 45, 52, 57b-1, 8404; *see also FTC v. Pantron I Corp.*, 33 F.3d 1088,  
22 1095 (9th Cir. 1994); *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 710-11 (9th Cir.  
23 1976).

### 24 **B. The procedural requirements have been followed.**

25 The CID was issued pursuant to a valid Commission resolution authorizing  
26 the issuance of compulsory process for possible violations of the FTC Act. The  
27 CID was signed by a Commissioner and was served by the Commission’s  
28

1 Secretary, as provided by the FTC Act and the Commission's Rules. *See* 15 U.S.C.  
2 §§ 57b-1(c)(7), (c)(8), (i); 16 C.F.R. §§ 2.7, 4.4(a)(3).

3 **C. The evidence is relevant and material to the investigation.**

4 The purpose of an FTC investigation is defined by the compulsory process  
5 resolution that authorizes the CID. *FTC v. Invention Submission Corp.*, 965 F.2d  
6 1086, 1088, 1090 (D.C. Cir. 1992); *Texaco*, 555 F.2d at 874. The purpose of the  
7 investigation, as stated in the accompanying resolution, is to determine whether  
8 Redwood has engaged, directly or indirectly, in misrepresentations about the  
9 efficacy of its products TBX-FREE and Eupepsia Thin. Further, the Commission  
10 described the "Subject of Investigation" in the CID itself. This statement reiterated  
11 the nature of the Commission's investigation into the two products and also  
12 informed Redwood that the FTC was investigating its compliance with ROSCA.  
13 *Pet. Ex. 2* at 15, 20.

14 The CID seeks information and documents that are relevant to the purpose of  
15 the investigation. The CID requires information related to Redwood's sales of the  
16 products, its advertising and marketing, and any substantiation Redwood may have  
17 for its claims. The CID also requests information about Redwood itself, consumer  
18 complaints, document custodians, and the names of individuals who are familiar  
19 with the matters under investigation. *Pet. Ex. 2* at 20-28. These requests satisfy the  
20 "broad" and "relaxed" standard of relevance that applies in administrative  
21 investigations. *See Invention Submission*, 965 F.2d at 1090; *Phelps v. Soc. Sec.*  
22 *Admin., Office of the Inspector Gen.*, No. 08CV2092-L (BLM), 2009 WL 862167,  
23 at \*1 (S.D. Cal. Mar. 26, 2009) (citing, *inter alia*, *Sandsend Fin. Consultants, Ltd.*  
24 *v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 882 (5th Cir. 1989)).

1           **D. The information sought is not overbroad or unduly burdensome.**

2           For the reasons stated above, the Commission is entitled to enforcement of its  
3 CID. As provided in *North Bay Plumbing*, however, a court may elect not to  
4 enforce compulsory process if “the party being investigated proves the inquiry is  
5 unreasonable because it is overbroad or unduly burdensome.” *North Bay Plumbing*,  
6 102 F.3d at 1007. There are two reasons Redwood cannot make this showing.

7           First, the CID contains 22 written interrogatory specifications and 16  
8 document production requests. Pet. Ex. 2 at 20-28. As described above, these  
9 specifications relate directly to the stated purposes of the investigation and thus are  
10 not overbroad. Nor are these requests unduly burdensome; instead, these are  
11 tailored to provide staff the information it needs to evaluate Redwood’s conduct and  
12 thus go to the heart of the investigation. Pet. Ex. 1, ¶ 9.

13           Second, at no point has Redwood claimed the CID is overbroad or unduly  
14 burdensome. *Garner*, 126 F.3d at 1145-46 (holding that the party claiming burden  
15 must establish the burden) (citing *United States v. Stuart*, 489 U.S. 353, 360  
16 (1989)). Such a claim is properly made through the filing of an administrative  
17 petition to quash or limit the CID, but Redwood filed no such petition. 16 C.F.R.  
18 § 2.10. Indeed, Redwood’s counsel disclaimed that it had any such objection. Pet.  
19 Ex. 1, ¶ 22. And, even if Redwood faced a burden in meeting the CID’s initial  
20 deadline of September 6, 2017, Commission staff accommodated Redwood by  
21 agreeing to forbear from taking further enforcement action provided that Redwood  
22 met its self-imposed deadlines, a condition that Redwood failed to achieve. Pet. Ex.  
23 1, ¶ 17; Pet. Ex. 4 at 39-40.

24           Having failed to object to breadth or burden of the CID by filing an  
25 administrative motion to quash or limit, Redwood may not raise such a defense  
26 now. *See Casey v. FTC*, 578 F.2d 793, 796 (9th Cir. 1978) (“[F]ailure to exhaust  
27 administrative remedies typically precludes judicial relief.”); *see also Amerco v.*  
28

1 *NLRB*, 458 F.3d 883, 888 (9th Cir. 2006) (citing *Myers v. Bethlehem Shipbuilding*  
2 *Corp.*, 303 U.S. 41, 50-51 (1938)).

3 **Conclusion**

4 For these reasons, the Court should grant the Commission's petition to  
5 enforce the CID and the Court should enter its own order requiring Redwood  
6 Scientific Technologies, Inc. to produce the requested documents and interrogatory  
7 responses within 10 days.

8  
9 Respectfully submitted,

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14  
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