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May 31, 2018

VIA COURIER

Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Ave. NW, CC-10528
Washington, D.C. 20580



Re: FTC Matter No. 1723129

Dear Mr. Clark:

On behalf of Mark Young Sr., I have enclosed a Petition to Quash Civil Investigative Demand in response to the FTC matter referenced above.

Sincerely,

A handwritten signature in black ink, appearing to read "J.E. Villafranco".

John Villafranco
S. Spencer Elg

cc: Elizabeth Sanger, Esq.
Laura Sullivan, Esq.

Enclosures

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of
May 8, 2018 Civil Investigative Demand
Issued to Mr. Mark Young Sr.

FTC Matter No. 1723129

**Petition to Quash Civil Investigative Demand
by Mr. Mark Young Sr.**

John E. Villafranco
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May 31, 2018

Counsel for Mr. Mark Young Sr.

I. INTRODUCTION

Mr. Mark Young Sr. respectfully requests that the Commission quash the Civil Investigative Demand issued to him on May 8, 2018, for two reasons. First, the CID is not reasonably relevant because four specifications lack a limitation on time period or nexus to the acts and practices being investigated. Consequently, these specifications reach matters that have nothing to do with this investigation. For example, the specifications cover the relationship of Mr. Young with his adult son since his son's birth over forty years ago, and the past business affairs of Western Communication Corp., the advertising agency where Mr. Young has served as CEO for more than twenty years. For context, Western Communication's and Mr. Young's involvement in the advertising that is the subject of this investigation began in or around 2013.

Second, the CID should be quashed because of unresolved privilege assertions as to communications that are critical to evaluating potential liability in this investigation, and to Mr. Young's and Western Communication's defenses. These privilege assertions have been raised by Physician's Technology LLC—the company that is the primary subject of this investigation and that hired Western Communication in 2013 to advertise its purported pain relief product, the Willow Curve. Although Mr. Young asserts no privilege as to these communications, the proposed “solution” from staff to its privilege dispute with Physician's Technology is for staff to attempt to cut off Mr. Young mid-sentence if he tries to provide a truthful and responsive answer that staff thinks Physician's Technology will argue is privileged. This proposal is unfair to Mr. Young and is unsupported by law or precedent.

For these reasons and as further explained below, Mr. Young respectfully requests that the Commission quash the CID.

II. FACTS

A. Relevant Time Frame and Purportedly Privileged Communications

Mr. Young has been the CEO of Western Communication, a full-service advertising agency, since its formation in 1995. During this time, Western Communication has provided comprehensive advertising services and worked as the advertising agency of record for companies selling thousands of products and services in a variety of industries.

In or around 2013, Mr. David Sutton and Dr. Ron Shapiro of Physician's Technology LLC approached Western Communication about marketing its Willow Curve product, which they explained was FDA approved and had been clinically proven to relieve pain and help with certain conditions. Physician's Technology then retained Western Communication to be its advertising agency of record and to create and manage a comprehensive advertising campaign, with all advertising claims to be cleared and approved by Physician's Technology. Later, Physician's Technology hired a call center company that was owned and managed by Mr. Young's son to provide telephone support.

Western Communication's contractual relationship with Physician's Technology began to unravel in 2015 when Western Communication first became aware that Physician's Technology had misrepresented the Willow Curve device as being FDA-approved, when in fact no such approval existed. After that discovery, and at Western Communication's insistence, Physician's Technology engaged legal counsel to review its advertising claims. Physician's Technology shared some of those attorney communications related to the substantiation of its advertising claims with Mr. Young. It is those communications between Physician's Technology and its

counsel, which were then shared with Mr. Young, that Physician's Technology asserts are privileged.

These and other issues led to Western Communication terminating its contractual relationship with Physician's Technology. They also led to Western Communication and Mr. Young bringing lawsuits against Physician's Technology that included allegations that Physician's Technology lacked substantiation for certain advertising claims. Western Communication has provided no advertising services to Physician's Technology since May 2016, and lost approximately \$4 million through its deal with Physician's Technology. All of these facts have been documented in the interrogatory responses and tens of thousands of pages of documents that Western Communication has already produced to the FTC.

B. History of the Investigation into Willow Curve Advertising

In November 2017, the FTC issued Western Communication a third-party civil investigative demand with document requests and interrogatories. In response, Western Communication produced, at significant expense and effort, more than 15 GB of compressed data with more than 7,000 documents. Some of these documents included communications between Physician's Technology and its legal counsel about substantiation for advertising claims that had later been sent to Mr. Young.

In or around March 2018, FTC staff first contacted counsel for Western Communication and Mr. Young about one of these documents in the Western Communication production. Western Communication and Mr. Young did not assert any privilege as to the communications in that document, or as to any other communications that Physician's Technology may have shared with Mr. Young or others at Western Communication.

On or about April 25, 2018, FTC staff informed counsel for Western Communication that counsel for Physician's Technology demanded that FTC staff stop its review of Western Communication's production. FTC staff also requested that Western Communication and Mr. Young consent to the production of certain documents to Physician's Technology. Western Communication responded on April 27, 2018, that it would not step into the privilege dispute between the FTC and Physician's Technology, and that it would not waive any of its confidentiality rights.

C. Current CID to Mr. Young

Less than two weeks after Western Communication stated that it would not step into the privilege dispute or waive any of rights, the current CID (attached as Exhibit A) was issued to Mr. Young. The CID describes the "Subject of Investigation" as:

Whether Physician's Technology, LLC, the Company (as defined herein), Mark Young, Sr., and associated individuals have made false, deceptive, or unsubstantiated representations about the health benefits, including pain-relief, anti-inflammatory and joint-healing benefits, and the diagnostic capabilities of the product known as the Willow Curve, and about the refund policies and the source or commercial nature of any advertising or endorsements for this product, in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52, and whether Commission action to obtain monetary relief would be in the public interest. See also attached resolution.

Ex. A at p. 3. The referenced resolution (File No. 0023191) describes as the nature and scope of investigation that is authorized:

. . . whether unnamed persons, partnerships, or corporations, or others engaged directly or indirectly in the advertising or marketing of dietary supplements, foods, drugs, devices, or any other product or service intended to provide a health benefit or to affect the structure or function of the body have misrepresented or are misrepresenting the safety or efficacy of such products or services, and therefore 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 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Id. at 8.

The CID includes 19 specifications with subjects for testimony that the investigational hearing “will include.” *Id.* at 3-6. While most of these subjects are tied in some way to the Willow Curve product—*see, e.g.*, specification 7 (. . . the manufacturing of any Willow Curve product), specification 11 (. . . monitoring and awareness of the consumer experience with the performance of any Willow Curve product . . .), and specification 16 (“Expenditures relating to any Willow Curve Product”)—four of the specifications lack any nexus to the Willow Curve product or to Physician’s Technology, and also have no time period limitation. The specifications with no time period limitation or nexus to the Willow Curve product are 1, 2, 3f., and 12:

1. Without regard to time period, the history, structure, organization, funding, and business of the Company, including its officers, directors, managers, employees, agents, contractors, consultants, and investors.
2. Without regard to time period, the roles and responsibilities of you and other persons at the Company.
3. Without regard to time period, your and the Company's relationship to the following persons or entities . . . :
 - f. Mark Young, II
12. Without regard to time period, monitoring of and responses to consumer or government complaints.

Although Western Communication has not been party to FTC staff’s conversations with Physician’s Technology about privilege, and thus does not know all of the communications between it and Mr. Young (or others at Western Communication) that Physician’s Technology asserts are privileged, several of the specifications include subjects that would almost certainly elicit responses from Mr. Young that would include his understanding of legal advice provided to Physician’s Technology by its attorneys. These include specifications 3.a., 3b., 3c., 3d., 3.g, 4, 6,

8, 10, and 18.a. Exploring any of these subjects on more than a superficial level (as is intended by an investigational hearing) would trigger responses from Mr. Young that Physician's Technology argues are privileged.

D. Good-Faith Attempt at Resolving the Issues

As stated in the *Meet and Confer Statement* included at the end of this petition, counsel for Mr. Young and FTC staff had conversations over the phone and exchanged numerous e-mails about the issues raised in this petition. A true and correct copy of the parties e-mail correspondence is attached as Exhibit B. As shown on pages 3-4 of Exhibit B, FTC staff and counsel for petitioner reached a tentative agreement on modifications to specifications 1-3 and 12, which agreement would have resolved issues related to the relevancy of the CID.

In light of the unresolved privilege issues, Mr. Young offered to waive the date of the hearing, with an agreement to stipulate to a later date, so that a new CID would not need to be issued later. Mr. Young also expressed that Mr. Young and Western Communication were willing to continue to provide information to the FTC in the meantime to help move the investigation along. Counsel for Mr. Young also stated its intent to end a hearing if Mr. Young were prohibited from providing a truthful, responsive answer to a question that was presented. *See Ex. B* at p. 3.

A few hours after this, staff sent an e-mail message stating for the first time that its management would not agree to modify the scope of the CID. *See Ex. B* at pp. 2-3. When pressed for a rationale, staff replied with a conclusory answer that it needed more latitude than had been tentatively agreed to. *Id.* at 1-2. In response to the follow-up question of "what time period would you consider to be sufficient?," staff replied that "[o]ur position is that those specifications should not be time limited." *Id.* at 1. Because there appeared to be no recourse with staff, and with a looming deadline to preserve his rights, Mr. Young filed this petition.

III. LAW PROHIBITING DEMANDS FOR IRRELEVANT INFORMATION

The FTC’s “[s]ubpoena enforcement power is not limitless[.]” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). The U.S. Supreme Court has long recognized that, “matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). An administrative subpoena is thus unenforceable where the demand for information is irrelevant. *Id.* “The test for the relevancy of an administrative subpoena . . . is whether the information sought is reasonably relevant to the agency’s inquiry.” *F.T.C. v. Anderson*, 203 U.S. App. D.C. 159, 631 F.2d 741, 745 (D.C. Cir. 1979). The relevance of the requests must be measured against the purpose and scope of the agency’s investigation. *F.T.C. v. Texaco, Inc.*, 180 U.S. App. D.C. 390, 555 F.2d 862, 874 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977). An agency’s own determination of relevance cannot stand where that determination is “obviously wrong.” *FTC v. Carter*, 205 U.S. App. D.C. 73, 636 F.2d 781, 787-88 (D.C. Cir. 1980) (quoting *Texaco*, 555 F.2d at 877 n.32). Federal courts will decline to enforce administrative subpoenas that seek information that is irrelevant to the purpose and scope of the agency’s investigation. *See, e.g., FTC v. Turner*, 609 F.2d 743, 746 (5th Cir. 1980) (affirming district court’s decision not to enforce an administrative subpoena that sought information about the financial assets of a respondent where that information was not reasonably relevant to the FTC’s investigation of whether a law violation had occurred).

IV. ARGUMENT

A. The CID Should be Quashed Because it Demands Irrelevant Information Spanning Decades Prior to the Advertising of the Willow Curve Product

Specifications 1, 2, 3f., and 12 cover topics that are irrelevant because they are plainly outside the scope of the authorizing resolution and the subject of the investigation. The scope of

the authorization is the investigation of marketing of products intended to provide a health benefit or to affect the structure of the function of the body. The subject of the investigation is advertising claims about the marketing sale of the Willow Curve product. Because specifications 1, 2, 3f., and 12 are not limited to any time period or tied to the marketing of any Willow Curve product, they cover swaths of irrelevant information.

As drafted, specification 1 covers nearly all aspects of the business of Western Communication since its establishment in 1995. Specification 2 includes the roles and responsibilities of Mr. Young and other persons at Western Communication since its establishment in 1995. And specification 12 reaches any monitoring of and responses to consumer or government complaints about any product at any point in time in history. Considering that Western Communication and Mr. Young have been involved in the marketing of thousands of products in various industries over the past few decades, the scope of these specifications are plainly overbroad and irrelevant.

Even broader is specification 3f., which covers all aspects of Mr. Young's relationship with his adult son since his birth over forty years ago. Common sense is all that is needed to recognize how this expansive request is irrelevant to the investigation of acts and practices that did not begin until around 2013.

B. The CID Should be Quashed Because it Would be Unfair to Mr. Young for Staff to Prohibit Him From Providing Truthful Responses to Questions that are Within the Scope of the CID

The FTC staff's proposal to cut off Mr. Young if he attempts to provide a truthful and responsive answer that staff thinks Physician's Technology will later argue to be privileged is fundamentally unfair. The question of what Mr. Young knew or didn't know about Physician's Technology's substantiation for claims about its Willow Curve product is central to Western

Communication's and Mr. Young's defenses to any charges that staff may be considering to bring against them.

An advertising agency that actively participates in the marketing of an advertiser's product generally has no duty to independently substantiate advertising claims or reexamine the advertiser's substantiation, although liability may be argued to exist where it has knowledge that claims were false or unsubstantiated. *Bristol-Myers Co.*, 102 F.T.C. 21, 364 (1983). In evaluating advertisers' liability for claims made on behalf of Bristol-Myers, for example, the Commission carefully considered notes and memorandum shared with advertising agencies to determine whether they had knowledge (and thus potential liability) for certain unsubstantiated claims. *Id.*

Similar to the memorandum and notes examined by the Commission in *Bristol-Myers*, the contents of the communications between Physician's Technology and its legal counsel that were shared with Mr. Young are potentially probative of what was known about the substantiation for marketing claims about the Willow Curve product. Counsel for Western Communication and Mr. Young have previously explained to staff that Western Communication unilaterally edited advertising about Willow Curve following these communications. Mr. Young would be unable to testify truthfully and completely about how, when, and why Western Communication modified advertising claims about the Willow Curve product without being permitted to provide testimony about those communications. Attempting to prevent Mr. Young from testifying truthfully and completely about these circumstances would deprive him of the ability to provide facts supporting his and Western Communication's defenses that they had no prior knowledge of any alleged lack of substantiation for claims about the Willow Curve device.

From a burden perspective, it makes little sense to subject Mr. Young to hours (or days) of testimony before deciding threshold issues of whether certain documents and communications are

privileged. If, for example, it is determined after Mr. Young's testimony that the documents and information are not privileged, FTC staff will undoubtedly seek yet another CID for a new hearing to ask Mr. Young about those communications and documents. Although Mr. Young offered to waive the hearing date and agree to later stipulate to a new date (which would obviate the need for a new CID to be issued), his proposal was summarily rejected. Because the staff's proposal for dealing with its unresolved privilege issues with Physician's Technology would be unfair to Mr. Young, the CID should be quashed. Quashing the CID to Mr. Young would not present any risk of ongoing harm to consumers because Mr. Young and Western Communication's involvement in the advertising of the Willow Curve product ended in 2016.

C. If Not Quashed, the CID Should be Limited

If the Commission decides not to quash the CID, at a minimum the specifications should be limited to impose relevancy limits on Mr. Young's testimony and to avoid subjects that cover information that Physician's Technology is likely to argue is privileged. For relevancy limits, Mr. Young proposes the language tentatively agreed to by FTC staff on pp. 3-4 of Ex. B. For the privilege issue, Mr. Young proposes striking specifications 3a., 3b., 3c., 3d., 3g, 4, 6, 8, 10, and 18a.

Although this approach would result in piece-meal questioning of Mr. Young, and would decrease the usefulness of the testimony to staff's determination of potential liability, it would be a fairer approach than exists under the CID as originally issued.

V. CONCLUSION

Mr. Young and Western Communication have cooperated fully with the FTC's investigation to date and continue to intend to do so within the bounds of the law. But because the current CID reaches into areas that are irrelevant to the investigation, and because of the unfairness

to Mr. Young of the proposal to stifle truthful and responsive testimony, he respectfully requests that the Commission quash the CID.

Respectfully Submitted this 31 Day of May, 2018,



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Counsel for Mr. Mark Young Sr.

Meet and Confer Statement

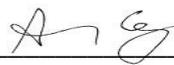
Counsel for petitioner Mark Young Sr. has conferred with FTC staff on multiple occasions in an effort in good faith to resolve by agreement the issues raised by the petition. The meetings took place by telephone between Spencer Elg (counsel for petitioner) and Laura Sullivan and/or Elizabeth Sanger (FTC staff counsel) on May 24, 2018, at approximately 4:30 PM ET and March 29, 2018 at approximately 11:00 AM ET. Multiple e-mails were also exchanged during this time period. A true and correct copy of those e-mails is attached as Exhibit B. Although FTC staff initially expressed an openness to modifying the specifications, staff subsequently stated that their management would not permit modifications to the CID. The issues in controversy were thus unable to be resolved by agreement.



S. Spencer Elg, Esq.

Certificate of Service

On May 31, 2018, I caused an original, a paper copy, and an electronic copy of the *Petition to Quash Civil Investigative Demand by Mr. Mark Young Sr.* to be hand delivered to the Office of the Secretary at 600 Pennsylvania, Ave, NW, Washington, DC, 20580. On this same date, I also caused a paper copy addressed to FTC staff counsel Elizabeth Sanger, Esq. to be hand delivered to 600 Pennsylvania, Ave, NW, CC-10528, Washington, DC, 20580.



S. Spencer Elg, Esq.



CIVIL INVESTIGATIVE DEMAND
Oral Testimony

<p>1. TO</p> <p>Mark Young, Sr. 48202 Manorwood Dr. Northville, MI 48168</p>	<p>2. FROM</p> <p align="center">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p> <hr/> <p>2a. MATTER NUMBER 1723129</p>
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This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 6.

<p>3. LOCATION OF HEARING</p> <p>United States Attorneys Office 211 W. Fort Street, Suite 2001 Detroit, MI 48226</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Laura Sullivan or other duly designated person</p> <hr/> <p>5. DATE AND TIME OF HEARING</p> <p>06/29/2018, 8:30 am to 4:30 pm</p>
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6. SUBJECT OF INVESTIGATION

See attached Schedule and attached resolution.

<p>7. RECORDS CUSTODIAN/DEPUTY CUSTODIAN</p> <p>Lynne Colbert/Donya Jackson Federal Trade Commission 600 Pennsylvania Ave. NW, CC-10528 Washington, D.C. 20580</p>	<p>8. COMMISSION COUNSEL</p> <p>Elizabeth Sanger, 202-326-2757 Federal Trade Commission 600 Pennsylvania Ave. NW, CC-10528 Washington, D.C. 20580 esanger@ftc.gov</p>
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<p>DATE ISSUED</p> <p>5/8/18</p>	<p>COMMISSIONER'S SIGNATURE</p> <p align="center"><i>Joseph J. Sims</i></p>
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INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 8.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

Form of Certificate of Compliance*

I/We do certify that all of the information required by the attached Civil Investigative Demand which is in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted to a custodian named herein.

If an interrogatory or a portion of the request has not been fully answered or portion of the report has not been completed the objection to such interrogatory or uncompleted portion and the reasons for the objection have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for answering the interrogatories or preparing the report, the certificate shall identify the interrogatories or portion of the report for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

**FEDERAL TRADE COMMISSION (FTC)
CIVIL INVESTIGATIVE DEMAND (CID) SCHEDULE FOR ORAL TESTIMONY
FTC File No. 1723129**

Meet and Confer: You must contact **FTC Counsel, Elizabeth Sanger** at **202-326-2757**; **esanger@ftc.gov** or **Laura Sullivan** at **202-326-3327**; **lsullivan@ftc.gov**, as soon as possible to schedule a meeting (telephonic or in person) to be held within fourteen (14) days after you receive this CID. At the meeting, you must discuss with FTC counsel any questions you have regarding this CID or any possible CID modifications that could reduce your cost, burden, or response time yet still provide the FTC with the information it needs to pursue its investigation.

Sharing of Information: The FTC will use information you provide in response to the CID for the purpose of investigating violations of the laws the FTC enforces. We will not disclose such information under the Freedom of Information Act, 5 U.S.C. § 552. We also will not disclose such information, except as allowed under the FTC Act (15 U.S.C. § 57b-2), the Commission's Rules of Practice (16 C.F.R. §§ 4.10 & 4.11), or if required by a legal obligation. Under the FTC Act, we may provide your information in response to a request from Congress or a proper request from another law enforcement agency. However, we will not publicly disclose such information without giving you prior notice.

Definitions and Instructions: Please review carefully the Definitions and Instructions that appear after the Specifications and provide important information regarding compliance with this CID.

SUBJECT OF INVESTIGATION

Whether Physician's Technology, LLC, the Company (as defined herein), Mark Young, Sr., and associated individuals have made false, deceptive, or unsubstantiated representations about the health benefits, including pain-relief, anti-inflammatory and joint-healing benefits, and the diagnostic capabilities of the product known as the Willow Curve, and about the refund policies and the source or commercial nature of any advertising or endorsements for this product, in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52, and whether Commission action to obtain monetary relief would be in the public interest. See also attached resolution.

SPECIFICATIONS

Applicable Time Period: Unless otherwise directed, the applicable time period for the requests set forth below is from three years prior to the date of issuance of this CID until the date of full and complete compliance with this CID.

- A. **Investigational Hearing Testimony:** Subjects for testimony will include the following:
1. Without regard to time period, the history, structure, organization, funding, and business of the Company, including its officers, directors, managers, employees, agents, contractors, consultants, and investors.
 2. Without regard to time period, the roles and responsibilities of you and other persons at the Company.

3. Without regard to time period, your and the Company's relationship to the following persons or entities, and any communications, interactions, and business dealings relating to any Willow Curve product between you or the Company and the following persons or entities:
 - a. Physician's Technology, LLC;
 - b. David Sutton;
 - c. Dr. Ronald Shapiro;
 - d. Dr. Richard Dunlap;
 - e. Take2Telecom, Inc., a/k/a Upsell24;
 - f. Mark Young, II; and
 - g. Edward Barnick.
4. Without regard to time period, the roles and responsibilities of you and the Company with regard to the advertising (including claims substantiation), marketing, promotion, offering for sale, and sale of any Willow Curve product.
5. Without regard to time period, your or the Company's role in the identification, recruitment, use, and compensation, directly or indirectly, of celebrity spokespersons, expert endorsers, or testimonialists for advertising of any Willow Curve product, including but not limited to Chuck Woolery.
6. Without regard to time period, investor outreach and strategic, operational, business, and marketing plans, goals, and reviews relating to any Willow Curve product.
7. Without regard to time period, the manufacturing of any Willow Curve product.
8. Without regard to time period, any study, analysis, experiment, demonstration, or benchmark test examining the effectiveness, performance, or safety of any Willow Curve product.
9. Without regard to time period, any communications, interactions, and business dealings between you or the Company and any broadcast media or shopping channel company, representative, consultant, or other intermediary relating to any clearance standards or approval processes in connection with the advertising, marketing, promotion, offering for sale, and sale of any Willow Curve product.
10. Without regard to time period, the status of any Willow Curve product before a government agency, including the Food and Drug Administration (FDA), Centers for Medicare and Medicaid Services (CMS), Department of Veterans Affairs

(VA), and the United States Patent and Trademark Office (USPTO), including any information or materials provided to or received by any government agency.

11. Without regard to time period, monitoring and awareness of the consumer experience with the performance of any Willow Curve product, including of any product modifications or improvements.
12. Without regard to time period, monitoring of and responses to consumer or government complaints.
13. Without regard to time period, complaints from any consumers, including but not limited to complaints communicated through social media, Better Business Bureaus, or law enforcement agencies, including any offices of state attorneys general, or any litigation relating to any Willow Curve Product.
14. Without regard to time period, the development of customer service policies and scripts and the training and monitoring of customer service representatives relating to any Willow Curve product.
15. Without regard to time period, policies and practices with regard to the processing of return and refund requests and chargebacks relating to any Willow Curve product, including but not limited to:
 - a. The basis for approving or rejecting return or refund requests or chargebacks;
 - b. Time in which return and refund requests and chargebacks were processed;
 - c. The rate at which return and refund and chargeback requests were approved; and
 - d. Physician's Technology's ability to fulfill its refund obligations to consumers.
16. Expenditures relating to any Willow Curve product on:
 - a. Advertising, marketing, or other promotion; and
 - b. Research and development.
17. Without regard to time period, any compensation, remuneration, or other thing of value paid or owed to you or the Company by Physician's Technology and any financial interest that you or the Company have in any Willow Curve product.
18. Without regard to time period, communications, interactions, and business dealings relating to any Willow Curve product between you or the Company and the following persons and entities:

- a. Any advertising agency, advertising placement agency, network marketing agency, public relations agency, online or social media advertising platform, or other entity that created, produced, or disseminated advertisements or promotional communications on Physician's Technology's behalf;
- b. Any telemarketing company, telephone call center, social media marketer, or other company that communicated with consumers on Physician's Technology's or the Company's behalf through telephone, email, social media, online chat, messaging apps, or other means;
- c. Any celebrity spokesperson, expert endorser, or testimonialist, or any person or entity who acts as an intermediary between such endorsers and Physician's Technology or the Company;
- d. Any retailer, reseller, distributor, wholesaler, telephone call center, online selling platform, shopping channel, or other persons or entities who sell any Willow Curve product or who act as an intermediary between the Company and any such person or entity; and
- e. Any manufacturer, supplier, or other company that manufactures, supplies components for, assembles, or repairs any Willow Curve product.

19. Records retention policies of you and the Company.

DEFINITIONS

The following definitions apply to this CID:

D-1. **“Advertisement”** or **“advertising”** or **“ad”** means any written or verbal statement, illustration, or depiction that promotes the sale or use of a good or service or is designed to increase consumer interest in a brand, good, or service. Advertising media includes, but is not limited to: packaging and labeling; promotional materials; print; television; radio; and Internet, social media, and other digital content.

D-2. **“Company”** means **Western Communication Corp., d/b/a Western Creative, Inc., d/b/a Jekyll & Hyde**, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons working for or on behalf of the foregoing, including, but not limited to, Mark Young, II.

D-3. **“Document”** means the complete original, all drafts, and any non-identical copy, whether different from the original because of notations on the copy, different metadata, or otherwise, of any item covered by 15 U.S.C. § 57b-1(a)(5), 16 C.F.R. § 2.7(a)(2), or Federal Rule of Civil Procedure 34(a)(1)(A).

D-4. **“Willow Curve product”** means the Willow Curve, WillMD, MedLite, Willow Touchstone, or any similar product intended to diagnose, relieve, treat, or prevent pain.

INSTRUCTIONS

I-1. **Petitions to Limit or Quash:** You must file any petition to limit or quash this CID with the Secretary of the FTC no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition must set forth all assertions of protected status or other factual and legal objections to the CID and comply with the requirements set forth in 16 C.F.R. § 2.10(a)(1) – (2). **The FTC will not consider petitions to quash or limit if you have not previously met and conferred with FTC staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.** 16 C.F.R. § 2.7(k); *see also* § 2.11(b). **If you file a petition to limit or quash, you must still timely respond to all requests that you do not seek to modify or set aside in your petition.** 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10(b).

I-2. **Oral Testimony Procedures:** The taking of oral testimony pursuant to this CID will be conducted in conformity with Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and with Part 2A of the FTC's Rules, 16 C.F.R. §§ 2.7(f), 2.7(h), and 2.9.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC INVESTIGATION OF UNNAMED PERSONS ENGAGED DIRECTLY OR INDIRECTLY IN THE ADVERTISING OR MARKETING OF DIETARY SUPPLEMENTS, FOODS, DRUGS, DEVICES, OR ANY OTHER PRODUCT OR SERVICE INTENDED TO PROVIDE A HEALTH BENEFIT OR TO AFFECT THE STRUCTURE OR FUNCTION OF THE BODY

File No. 0023191

Nature and Scope of Investigation:

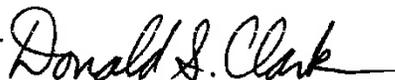
To investigate whether unnamed persons, partnerships, or corporations, or others engaged directly or indirectly in the advertising or marketing of dietary supplements, foods, drugs, devices, or any other product or service intended to provide a health benefit or to affect the structure or function of the body have misrepresented or are misrepresenting the safety or efficacy of such products or services, and therefore 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 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed ten (10) years from the date of issuance of this resolution. The expiration of this ten (10) year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the ten (10) year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after expiration of the ten year period.

Authority to conduct investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1 et seq. and supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

Issued: August 13, 2009

From: Sullivan, Laura M. [mailto:LSULLIVAN@ftc.gov]
Sent: Wednesday, May 30, 2018 12:12 PM
To: Elg, Spencer <SElg@KelleyDrye.com>
Cc: Sanger, Elizabeth <esanger@ftc.gov>; Villafranco, John <JVillafranco@KelleyDrye.com>
Subject: RE: availability for call?

Our position is that those specifications should not be time limited.

From: Elg, Spencer [mailto:SElg@KelleyDrye.com]
Sent: Wednesday, May 30, 2018 12:05 PM
To: Sullivan, Laura M.
Cc: Sanger, Elizabeth; Villafranco, John
Subject: Re: availability for call?

Confidential

Thanks Laura, what time period would you consider to be sufficient?

S. SPENCER ELG

Attorney

Kelley Drye & Warren LLP

[\(202\) 342-8466](tel:2023428466)

selg@kelleydrye.com

On May 30, 2018, at 12:03 PM, Sullivan, Laura M. <LSULLIVAN@ftc.gov> wrote:

Hi Spencer -

With the time and subject matter constraints proposed, we are concerned that we will not have the necessary latitude to obtain sufficient information on the company's structure and evolution, the role and responsibilities of persons within the company, and Mr. Young, Sr. and the company's relationships with specific persons and companies. Therefore, we are not inclined to restrict further the scope of the CIDs that the Commission issued.

I apologize I was in meetings this morning but I am available talk this afternoon when you are available.

Laura

-----Original Message-----

From: Elg, Spencer [mailto:SElg@KelleyDrye.com]
Sent: Wednesday, May 30, 2018 9:46 AM
To: Sullivan, Laura M.
Cc: Sanger, Elizabeth; Villafranco, John
Subject: RE: availability for call?

CONFIDENTIAL

Hi Laura,

Can I give you call at 10:30 to discuss?

Thanks,

S. SPENCER ELG
Attorney
Kelley Drye & Warren LLP
(202) 342-8466
selg@kelleydrye.com

-----Original Message-----

From: Elg, Spencer
Sent: Tuesday, May 29, 2018 3:06 PM
To: 'Sullivan, Laura M.' <LSULLIVAN@ftc.gov>
Cc: Sanger, Elizabeth <esanger@ftc.gov>; Villafranco, John <JVillafranco@KelleyDrye.com>
Subject: RE: availability for call?

CONFIDENTIAL

Hi Laura,

Are you saying that your management won't agree to any of the limitations at all that we discussed and emailed about? If so, what is the rationale? As drafted, the scope would include Mr. Young Sr.'s relationship with his son since birth and the company's management and finances for decades prior to marketing of the Willow Curve. Can you help us understand the thinking here?

Thanks,

S. SPENCER ELG
Attorney
Kelley Drye & Warren LLP
(202) 342-8466
selg@kelleydrye.com

From: Sullivan, Laura M. [<mailto:LSULLIVAN@ftc.gov>]
Sent: Tuesday, May 29, 2018 2:55 PM
To: Elg, Spencer <SElg@KelleyDrye.com>
Cc: Sanger, Elizabeth <esanger@ftc.gov>; Villafranco, John <JVillafranco@KelleyDrye.com>
Subject: RE: availability for call?

Hi Spencer –

After having the opportunity to discuss the proposed modifications internally, our management has informed us that we cannot agree to modify the scope of the CID as proposed at this time. Given your expressed intention to move to quash the CID if we could not reach agreement, I wanted to inform you of this as soon as possible. Thank you.

Laura

From: Elg, Spencer [<mailto:SElg@KelleyDrye.com>]
Sent: Tuesday, May 29, 2018 11:41 AM
To: Sullivan, Laura M.
Cc: Sanger, Elizabeth; Villafranco, John
Subject: Re: availability for call?

CONFIDENTIAL

Hi Laura,

Thanks for the call. We agree to the modifications below. With respect to the date, Mr. Young is willing to appear on the date as noticed, or to agree to stipulate to a later date. As discussed, it would be fundamentally unfair to Mr. Young to have his testimony cut off, truncated, or objected to. We intend to immediately end any investigative hearing if Mr. Young is prohibited from providing a truthful, responsive answer to a question that is presented.

As we have offered on multiple occasions, we are happy to provide additional information as you may request in advance of the hearing. Please let us know if you would like to discuss further.

Sincerely, Spencer

S. SPENCER ELG

Attorney

Kelley Drye & Warren LLP

[\(202\) 342-8466](tel:(202)342-8466)

selg@kelleydrye.com

On May 29, 2018, at 10:24 AM, Sullivan, Laura M. <LSULLIVAN@ftc.gov> wrote:

Hi Spencer –

Thank you for digesting this to writing. Below are proposed changes (in red) to the existing CID specifications. I apologize for any misunderstanding but we did not agree to modify Specification 3 outside of restricting the time period. I am available at 11 to speak. I may be calling from a 484 area code so that you are aware. Thanks, Laura.

1. **Since 2012**, the history, structure, organization, funding, and business of the Company, including, its officers, directors, managers, **and** employees and, **to the extent that it relates to any Willow Curve product**, agents, contractors, consultants, and investors.

2. Since 2012, the roles and responsibilities of you and other persons at the Company relating to any Willow Curve product.
 3. Since 2012, your and the Company's relationship to the following persons or entities and any communications, interactions, and business dealings relating to any Willow Curve product between you or the Company and the following persons or entities:
 - a. Physician's Technology, LLC;
 - b. David Sutton;
 - c. Dr. Ronald Shapiro;
 - d. Dr. Richard Dunlap;
 - e. Take2Telecom, Inc., a/k/a Upsell1124;
 - f. Mark Young, II; and
 - g. Edward Barnick.
12. Without regard to time period, monitoring of and responses to consumer or government complaints relating to any Willow Curve product.

From: Elg, Spencer [<mailto:SElg@KelleyDrye.com>]
Sent: Thursday, May 24, 2018 6:52 PM
To: Sanger, Elizabeth; Sullivan, Laura M.
Cc: Villafranco, John
Subject: RE: availability for call?

PRIVILEGED & CONFIDENTIAL

Hi Laura and Liz,

Thank you very much for the call. Lots to consider and discuss with our client. For the specifications, given the holiday weekend and the Thursday deadline for objections, I am including below where I think we ended up on the call. Please let me know if I've missed anything. Thanks!

Spencer

1. Since 2012, the history, structure, organization, funding, and business of the Company, including, [FTC TO PROPOSE LANGUAGE FOR SCOPE], its officers, directors, managers, employees, agents, contractors, consultants, and investors.

2. Since 2012, the roles and responsibilities of you and other persons at the Company, to the extent they relate to any Willow Curve Product.
3. Since 2012, your and the Company's relationship to the following persons or entities, to the extent it relates to any Willow Curve Product, and any communications, interactions, and business dealings relating to any Willow Curve product between you or the Company and the following persons or entities:
 - a. Physician's Technology, LLC;
 - b. David Sutton;
 - c. Dr. Ronald Shapiro;
 - d. Dr. Richard Dunlap;
 - e. Take2Telecom, Inc., a/k/a Upsell1124;
 - f. Mark Young, II; and
 - g. Edward Barnick.

12. Without regard to time period, monitoring of and responses to consumer or government complaints related to any Willow Curve product.

S. SPENCER ELG

Attorney

Kelley Drye & Warren LLP

(202) 342-8466

selg@kelleydrye.com

From: Elg, Spencer

Sent: Thursday, May 24, 2018 12:25 PM

To: 'Sanger, Elizabeth' <esanger@ftc.gov>

Cc: 'Sullivan, Laura M.' <LSULLIVAN@ftc.gov>; Villafranco, John <JVillafranco@KelleyDrye.com>

Subject: RE: availability for call?

CONFIDENTIAL

Hi Liz and Laura,

In advance of our call later today, we wanted to flag Specifications 1, 2, 3, and 12, all of which include topics without any time limitation or nexus to Willow Curve. Our proposed modifications to those specification are:

* * *

1. ~~Without regard to time period~~ Since 2013, the history, structure, organization, funding, and business of the Company, including, to the extent it relates to advertising of any Willow Curve Product, its officers, directors, managers, employees, agents, contractors, consultants, and investors.
2. ~~Without regard to time period~~ Since 2013, the roles and responsibilities of you and other persons at the Company, to the extent they relate to advertising of any Willow Curve Product.
3. ~~Without regard to time period~~ Since 2013, your and the Company's relationship to the following persons or entities, to the extent it relates to advertising of any Willow Curve Product, and any communications, interactions, and business dealings relating to any Willow Curve product between you or the Company and the following persons or entities:
 - a. Physician's Technology, LLC;
 - b. David Sutton;
 - c. Dr. Ronald Shapiro;
 - d. Dr. Richard Dunlap;
 - e. Take2Telecom, Inc., a/k/a Upsell1124;
 - f. Mark Young, II; and
 - g. Edward Barnick.
12. Without regard to time period, monitoring of and responses to consumer or government complaints related to any Willow Curve product.

* * *

We look forward to discussing.

Thanks,

Spencer

S. SPENCER ELG

Attorney

Kelley Drye & Warren LLP

(202) 342-8466

selg@kelleydrye.com

From: Elg, Spencer

Sent: Tuesday, May 22, 2018 5:56 PM

To: 'Sanger, Elizabeth' <esanger@ftc.gov>

Cc: Sullivan, Laura M. <LSULLIVAN@ftc.gov>; Villafranco, John <JVillafranco@KelleyDrye.com>

Subject: RE: availability for call?

CONFIDENTIAL

Hi Laura & Liz,

Looks like the meet and confer deadline is this Friday. Are you available Friday afternoon?

Thanks,

S. SPENCER ELG

Attorney

Kelley Drye & Warren LLP

(202) 342-8466

selg@kelleydrye.com