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 ("GAO"), if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended or Section 5 of the Federal Trade Commission ("FTC Act"), 15 U.S.C. § 45, as amended, and whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, will be fulfilled regarding the transaction.

Dunham's argues that the four challenged subparts to Specification 2 should be quashed because: 1) compliance would impose an undue burden by requiring a laborious and costly review by senior managers and production in a format different from that stored ordinarily by the company; 2) the information sought is irrelevant to the Commission's investigation because Dunham's does not compete in the same product market nor serve the same customers as the merging firms; and 3) it has not received adequate assurances that proprietary and confidential business information it produces to the Commission will be protected from disclosure. We also consider whether Dunham's petition was filed timely.

For the reasons stated below, the Commission denies the petition as late filed. Even were it filed properly, the Commission would deny the petition on the merits.

I. Background

In December 2020, GAO entered into an agreement to acquire Sportman's, which if consummated would combine two large specialty outdoor sporting goods retailers. This petition

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 competitive impact, on February 23, 2021, the Commission authorized staff to use compulsory process to obtain relevant information and documents from the merging parties as well as from third parties who might possess such information.

Therefore, as authorized by the Commission's resolution and pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, on March 8, 2021, the Commission issued CIDs to third-party sporting goods retailers, including Dunham's. The CIDs consist of four specifications requesting information and documents to assist Commission staff assess the potential competitive effects of the proposed acquisition and the relevant product and geographic markets. Most relevant here, Specification 2 asks for certain financial information "by department or category" for each company store that sold "a relevant product" for each quarter since January 2015, including the "store number" (subpart a), "gross sales revenue" (subpart b), "Net Sales" (subpart e), and "gross margin" (subpart i). Pet. Exh. A at 1-2.[1]

The March 8 CID was served on Dunham's by overnight delivery service on March 11, 2021. The initial deadline for Dunham's to comply (the "return date") was April 7, 2021, and the deadline to file a petition to quash was March 31, 2021. *See* Pet. Exh. A at 1; 16 C.F.R. § 2.10(a)(1).[2]

After not hearing back from in-house counsel who had agreed to receive a courtesy copy of the CID, *see Email from Charles Dickinson to John Palmier* (dated March 9, 2021 at 2:42 PM); *Email from Charles Dickinson to John Palmier* (dated March 16, 2021 at 5:35 PM), on March 30, staff granted Dunham's recently-retained outside counsel a two-week extension until April 21 to comply with the CID. *See Email from Jonathan Emord to Charles Dickinson* (dated March 30, 2021 at 10:31 AM); *Email from Charles Dickinson to Jonathan Emord* (dated March 31, 2021 at 10:35 AM); *Email from Charles Dickinson to Jonathan Emord* (dated March 31, 2021 at 4:07 PM). On April 9, Dunham's produced a partial response to Specification 1, and reaffirmed its commitment to respond to the rest of the CID by April 21 after receiving staff assurances that information and materials obtained by the Commission as part of a nonpublic investigation receive statutory and regulatory protections from disclosure. *See Letter from Jonathan Emord to Charles Dickinson* (dated April 9, 2021); *Email from Peter Arhangelsky to Charles Dickinson* (dated April. 9, 2021 at 3:12 PM); *Email from Charles Dickinson to Peter Arhangelsky* (dated April. 9, 2021 at 5:59 PM).[3] On April 20, Dunham's requested and received

[1] Specification 1 asks for a list of each company store that sold a relevant product since January 1, 2008. Specification 3 asks for all "online, catalog, and other non-brick-and-mortar sales" of relevant products since January 1, 2015. Specification 4 asks for a list of item codes for each relevant product currently sold by the company.

[2] The CID stated the "[t]he 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." Pet. Exh. A. at 1; *see* 16 C.F.R. § 2.10(a)(1). The April 7 return date was more than 20 days after the CID was served on March 11; therefore, the deadline to file a petition to quash was 20 days after service or March 31, 2021.

[3] Commission staff told Dunham's that these protections include: 1) Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f) (exempting information obtained by the Commission pursuant to subpoena, or voluntarily in lieu of subpoena,

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 needed to contact others "to come up with a production estimate" and "to enable this assessment to be completed." *See Email from Jonathan Emord to Charles Dickinson* (dated May 17, 2021 at 2:37 PM). Instead of providing the requested compliance timetable, Dunham's filed its petition to quash later that day.

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in a Commission investigation from disclosure under the Freedom of Information Act, 5 U.S.C. § 552); *see also* 16 C.F.R. §§ 4.10-4.11; 2) Section 6(f) of the FTC Act, 15 U.S.C. § 46(f) (restricting the Commission's authority to make public trade secrets or confidential commercial or financial information); s*ee also* 16 C.F.R. § 4.10(a)(2); and 3) Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h) (providing confidential treatment of information submitted to the Commission).

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 CID 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 days after its March 31 deadline – and therefore filed the petition late.

Dunham's claims that its motion was "filed within the time limit for response to the Bureau (under authority given by Bureau approved extensions)." Pet. at 1. But the only extensions granted here were extensions to the compliance deadline. Despite having asked for, and received, *six* extensions of the deadline to respond to the CID, Dunham's never requested (nor apparently even suggested a need for) an extension of the deadline in which to file a petition to quash. It thus never received such an extension. *See* 16 C.F.R. § 2.10(a)(5) (providing authority to certain Commission officials to grant extensions for petitions to quash). Dunham's also never moved for leave to late-file its petition after the March 31 deadline by providing a sufficient explanation for its tardiness. *See* 16 C.F.R. § 4.3(b) (Commission may consider a motion to extend made after the expiration date "where the untimely filing was the result of excusable neglect.").

Thus, we deny Dunham's petition because it was not filed timely.

B. Dunham's Petition Fails on the Merits: Burden, Relevance, and Confidentiality.

FTC compulsory process is proper "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant" to the investigation. *United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950). As explained above, Dunham's objects to responding to Specifications 2(a), (b), (e), and (i), which require the company to produce "gross sales revenue," "net sales" and "gross margin" from each of its 260 stores "by department or category" for each quarter from January 2015 to the present. *See* Pet. Exh. A at 1-2. Even if the petition were filed properly, we would deny it on the merits.

1. Burden

Dunham's claims that gathering the gross sales revenue, net sales, and gross margin data for each of its stores would be unduly burdensome and costly by requiring a laborious, disruptive, and lengthy review process that only senior managers could perform and the production of data in a format different than that ordinarily kept by the company. Pet. at 2-3; *see also* Pet. Exh. B. We are unpersuaded by this argument.

As a threshold matter, we reject out of hand Dunham's complaint that responding to Specification 2(b), which requests the stores' gross sales revenue, imposes an undue burden. Staff does not currently seek this information and may never ask for it if staff is satisfied with Dunham's responses to the other three priority subparts of Specification 2.[4]

We further conclude that Dunham's has failed to show it incurs an undue burden by having to respond to just three (out of 14) key subparts to Specification 2: subparts (a), (e), and (i). Commission staff made several attempts to reasonably accommodate Dunham's concerns. Staff repeatedly offered to limit the scope of the CID to reduce Dunham's professed burden, by narrowing the number of Specifications and subparts in an effort to minimize any compliance burden on the company. Yet even the substantial reduction in the amount of store financial data requested of Dunham's has not induced the company to respond to its production obligations.

Dunham's complaint about having to divert some resources to review its corporate records is insufficient to show undue burden. "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, Inc*., 555 F.2d 862, 882 (D.C. Cir. 1977).[5] Indeed, "courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Id*. (citing cases). In order to substantiate its claim of undue burden, the party challenging administrative compulsory process must show that the cost is "unduly burdensome in the light of the company's normal operating costs." *See EEOC v. Md. Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986). Courts routinely require the party claiming undue burden to "submit[] affidavits or offer[] evidence revealing the nature of the burden." *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 688–89 (D. Kan. 2004); *accord Huviron Co.*, *Ltd*. v. *CCTVSTAR, Inc.*, No. 14-cv-01009, 2015 WL 12830387, at *1 (C.D. Cal. Sept. 16, 2015); *Heller v. City of Dallas*, 303 F.R.D. 466, 490 (N.D. Tex. 2014) (citing cases). Commission rules likewise require a petition to quash to set forth all objections to the CID, "including all appropriate . . . affidavits, and other supporting documentation." 16 C.F.R. § 2.10(a).

Dunham's has failed to substantiate its claim that requiring the review and production of store sales or margin data for a limited period of time would unduly disrupt its normal business operations. Instead, it relies solely on its counsel's argument unsupported by an affidavit or any documentary evidence. We cannot accept counsel's bald contention that Dunham's – a retailer with sufficient business acumen to operate 260 stores – operates without the ability to determine what its individual stores' sales, costs, or profits are. Because Dunham's failed to provide an affidavit from a manager or other knowledgeable personnel to explain what information is (and is not) available, the Commission is unable to verify its counsel's description of the burden. Commission staff's experience confirms that similarly situated retailers are able to produce comparable data by tracking sales and margins in a manner that allows them to respond to the CID.

[4] Because staff is not currently seeking a response to Specification 2(b), our order today does not require a response to that subpart of the specification.

[5] Moreover, the Commission is not required to exhaust its efforts to gather responsive materials from the targets of an investigation before it may issue process to other parties that may have information relevant to its investigation. *See Gasoline Pricing Investig.*, 141 F.T.C. 498, 505, 2006 WL 6679070, *4 (2006).

We conclude that Dunham's 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 serve the same customers, as the merging parties. Pet. at 1-3. 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 target's foreign subsidiary could be "reasonably relevant" to investigation as to whether target had engaged in unfair competition by assessing factors that had led to a smaller foreign market share than that in the United States) (citing *Texaco,* 555 F.2d at 873, 877 n. 32), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011).

The challenged Specification 2 subparts easily meet those standards of relevance. Analyzing the store sales and margin data requested in the three key Specification 2 subparts will aid an analysis of the extent to which Dunham's poses a competitive constraint on the merging parties. Though Dunham's disputes that it competes with the merging parties, the CID properly seeks data that will allow Commission staff to undertake a rigorous analysis of this question. The requested information will also form a basis on which staff can define the relevant market or markets in which to assess the effects of the proposed acquisition and calculate market shares. These analyses, in turn, will inform the Commission of the ultimate issue of whether anticompetitive effects are likely to result from the proposed acquisition. The relevance of the requested information is clear.

3. Confidentiality

Dunham's also objects to the challenged Specification 2 subparts on the ground that responding to those inquiries may result in the disclosure of "the proprietary nature of [its]

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 they 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