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Attorneys for Plaintiff Utah Division of Consumer Protection

**THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

UTAH DIVISION OF CONSUMER PROTECTION, Plaintiff, v. TIKTOK INC., Defendant.	MOTION FOR ORDER TO SHOW CAUSE Discovery Tier Two Case No. Judge
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Plaintiff Utah Division of Consumer Protection is investigating whether the business practices of TikTok Inc. that are harming the State's children have violated Utah's consumer protection laws. The Division, through the Office of the Attorney General, brings this action under Utah Code § 78B-6-313 to report that TikTok is in contempt for failure to comply in substantial part with two administrative subpoenas issued by the Division under Utah Code §§ 13-2-6(5) and 13-11-16.

Specifically, TikTok failed (and continues to fail) to provide: (1) complete, verified responses to investigative interrogatories (“Specifications”) in an administrative subpoena the Division issued more than five months ago, on February 6, 2023; and (2) a reasonable schedule for responding to a narrow additional administrative subpoena the Division issued on May 30, 2023. Accordingly, the Division reports TikTok to the Court and moves for a finding of contempt and an Order to Show Cause compelling TikTok to appear and comply with the subpoenas.

I. The Division’s Investigation of TikTok.

TikTok is one of the largest and most popular social media companies in the world, with an estimated 150 million users in the United States alone.¹ TikTok is especially popular among young users, with some estimating that more than one third of its 49 million daily U.S. users are 14 years old or younger,² meaning TikTok likely has hundreds of thousands of users in Utah, including a significant number of children. The company made \$10 billion in ad revenue in 2022 alone, and revenue is projected to continue increasing in 2023—far outpacing other social media platform competitors.³ TikTok’s popularity among young users is concerning and has been linked to a whole host of potential mental health issues among teens and children due to their use of the

¹ TikTok Newsroom, *Celebrating Our Thriving Community of 150 million Americans* (Mar. 21, 2023), <https://newsroom.tiktok.com/en-us/150-m-us-users>.

² Raymond Zhong and Sheera Frenkel, *A Third of TikTok’s U.S. Users May Be 14 or Under, Raising Safety Questions*, NEW YORK TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html>.

³ Prarthana Prakash, *What TikTok Ban? Brands actually increased their ad spending on the app last month despite a high-profile congressional hearing*, FORTUNE (Apr. 6, 2023), <https://fortune.com/2023/04/06/tiktok-ban-china-bytedance-increased-ad-spending/>; *see also* Zheping Huang, *TikTok Turns on the Money Machine*, BLOOMBERG (June 22, 2022), <https://www.bloomberg.com/news/features/2022-06-23/tiktok-becomes-cash-machine-with-revenue-tripling-to-12-billion>.

platform. Indeed, a recent report by the U.S. Surgeon General concerning the impact of social media companies like TikTok on young users concluded that “there are ample indicators that social media can . . . have a profound risk of harm to the mental health and well-being of children and adolescents.”⁴

TikTok also represents to its users that its platform is safe and that it takes enforcement actions to police and remove harmful content, like dangerous “Challenges” that have, among other things, encouraged children to assault others or destroy property. For instance, TikTok’s CEO recently claimed that “[d]angerous Challenges are not allowed on our platform.”⁵ Yet despite these claims, school districts in Utah have reported incidents arising from TikTok Challenges that, for instance, encourage students to sexually harass other students or to assault school employees.⁶ In another incident, a Utah teenager was left with permanent eye damage after being targeted through a TikTok Challenge encouraging teens to shoot each other with polymer beads.⁷ These are not

⁴ U.S. Surgeon General, *Social Media and Youth Mental Health*, The U.S. Surgeon General’s Advisory, at 4 (May 23, 2023), <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> (“[T]he current body of evidence indicates that while social media may have benefits for some children and adolescents, there are ample indicators that social media can also have a profound risk of harm to the mental health and well-being of children and adolescents.”).

⁵ *TikTok CEO Testifies at House Energy and Commerce Committee Hearing*, C-SPAN, at 2:07:33 (Mar. 23, 2023), <https://www.c-span.org/video/?526609-1/tiktok-ceo-testifies-house-energy-commerce-committee-hearing>.

⁶ Spencer Burt, *Utah school district says new TikTok challenge has kids assaulting teachers, fellow students*, FOX13 SALT LAKE CITY (Oct. 6, 2021), <https://www.fox13now.com/news/local-news/utah-school-district-says-new-tiktok-challenge-has-kids-assaulting-teachers-fellow-students>.

⁷ Cali Jackson, *Dangerous new TikTok challenge hits Utah*, ABC4 (Mar. 28, 2022), [https://www.abc4.com/news/wasatch-front/dangerous-new-tiktok-challenge-hits-utah/#:~:text=SYRACUSE%2C%20Utah%20\(ABC4\)%20%E2%80%93,and%20recording%20the%20victim's%20reactions](https://www.abc4.com/news/wasatch-front/dangerous-new-tiktok-challenge-hits-utah/#:~:text=SYRACUSE%2C%20Utah%20(ABC4)%20%E2%80%93,and%20recording%20the%20victim's%20reactions).

isolated examples.

A. The Division's February 6, 2023, Administrative Subpoena.

Given these and other concerns for the safety of the State's children, the Division sent TikTok an administrative subpoena on February 6, 2023, as part of an investigation to determine if TikTok is complying with Utah's consumer protection laws and seeking the production of documents *and* written responses to several investigative Specifications. *See* Exhibit 1, Feb. 6, 2023 Subpoena. On February 8, 2023, TikTok—through its counsel—agreed to accept service of this subpoena and eventually provided an initial production of documents (which consisted of documents it had already gathered in response to other investigations).⁸ But TikTok did not respond to the Specifications.

On May 8, 2023, after receiving no response to the Specifications for over three months, the Division requested that TikTok respond by May 19, 2023. The Division asked to begin a meet-and-confer process with the company's lawyers on a weekly basis to discuss production issues and a timeline for subpoena responses. During the May 25, 2023 meeting, TikTok agreed to provide responses to Specifications by June 19, 2023. Exhibit 2, Email from Theo Benjamin to Shamis Beckley (May 26, 2023).

On June 19, 2023, the company provided responses to only around 70% of the

⁸ The Division does not currently complain about TikTok's document production pursuant to the Division's February 6, 2023, subpoena here in the present motion. TikTok is the subject of similar investigations from other State consumer enforcers. David Shepardson, *State AG's demand TikTok comply with US consumer protection investigations*, REUTERS (Mar. 6, 2023), <https://www.reuters.com/legal/state-ags-demand-tiktok-comply-with-consumer-protection-investigations-2023-03-06/>. The Division has agreed to accept document productions provided to those other investigators as complying with the Division's initial demand for documents in the first subpoena.

Specifications, and even then, those responses remained unverified by any TikTok employee under oath. Similar to any other interrogatory response, the Division's subpoena required Specification responses to be sworn to by a company representative with personal knowledge to ensure they contain accurate information and to identify those with relevant information if follow-up investigative interviews are necessary.

On June 29, 2023, the company produced responses to additional Specifications, none of which were verified by the company under oath. Through subsequent meet-and-confers, the company has refused to confirm when it will answer the remaining Specifications or when (or even whether) the company will provide verifications for any of its responses—meaning the Division is left with unsworn, initial responses that—despite the company's attorneys' verbal assurances to their accuracy—could simply change if and when someone from TikTok reviews them.

B. The Division's May 30, 2023 Administrative Subpoena.

On May 30, 2023, the Division issued an additional, limited administrative subpoena to TikTok containing Specifications and document requests informed by the Division's investigation to date. *See* Exhibit 3, May 30, 2023 subpoena (to be provided *in camera* to the Court).⁹ The company accepted service of this subpoena on June 2, 2023. Given the delays experienced in receiving responses to its initial subpoena, and because other investigations had to seek court assistance to receive even basic information from the company,¹⁰ the Division made clear that it

⁹ Out of an abundance of caution, the Division is providing the May 30, 2023 subpoena to the Court *in camera*, as a non-public filing, in the first instance. The Division's position is that the subpoena is in no way a protected document that cannot be publicly filed. However, in its definitions, the subpoena identifies several business units inside TikTok that are listed in documents TikTok has marked as confidential.

¹⁰ Shepardson, *supra* note 8.

expected TikTok to focus its resources and respond to this limited additional subpoena promptly and that deadlines in this subpoena would only be extended if TikTok provided a reasonable, mutually agreeable schedule for a complete response.

Two weeks later, on June 16, 2023, TikTok proposed a schedule where it would provide “initial” Specification responses to the Division’s May 30 subpoena on a rolling basis starting on July 31, 2023, with initial Specification responses not complete until four months later, on September 29, 2023. TikTok’s proposed schedule also provided no timeline to complete document production. The company further proposed that it would endeavor to provide (but could not guarantee) full objections to this subpoena by September 29, 2023—meaning the Division would not even know until four months after this subpoena’s issuance what information TikTok would refuse to produce.

The Division rejected TikTok’s proposed schedule and, instead, on June 20, 2023, proposed the following schedule (which would have allowed TikTok more than two-and-one half months to fully respond to this subpoena) and provided a process for agreement on search terms and custodians relating to the Division’s document requests:

- Twenty-one (21) days for TikTok to provide its objections and written responses to document requests (by Friday, June 23);
- Thirty (30) days for TikTok to propose custodians, search terms, and hit counts for the document requests (by Friday, June 30). The Division would respond with any additional custodians and search terms by July 5;
- Forty-five (45) days for TikTok to provide responses to the Specifications (by July 15); and
- Seventy-five (75) days for TikTok to complete document productions (by August 15) along with a privilege log.

Exhibit 4, Email from Emily Penkowski Perez to Shamis Beckley (June 20, 2023).

Through subsequent meet-and-confers, TikTok has refused to counter the Division's proposal and since backtracked on its proposed schedule for "initial" responses. Exhibit 5, Email from Daniel Grooms to Theo Benjamin (June 29, 2023); Exhibit 6, Email from Theo Benjamin to Daniel Grooms (July 6, 2023). At present, the Division simply has no idea when TikTok will provide clear written objections or complete responses to the Division's May 30, 2023 subpoena. With no agreement on extension, TikTok is now in contempt of the original subpoena deadlines and the Division seeks the Court's assistance in imposing a definitive schedule for full compliance.

II. TikTok is in Contempt of the Division's Administrative Subpoenas.

The Division is charged with enforcing Utah's consumer protection laws. Utah Code §§ 13-2-1 *et seq.* To that end, the Division is statutorily empowered to issue administrative subpoenas to investigate potential violations of those laws. *Id.* § 13-2-6(5). When "a person . . . with the authority to compel . . . the production of documents issues a subpoena and the person to whom the subpoena is issued refuses to . . . produce the documents ordered, the person shall be considered in contempt." Utah Code § 78B-6-313(1); *see also* Utah Code § 13-11-16(3) (granting the Division authority to "apply to the court for an order compelling compliance."). When a person refuses to comply with a lawfully issued subpoena, the person with authority to compel production through issuance of a subpoena, "may report the person . . . to the judge of the district court. The court may then issue . . . an order to show cause to compel the person's appearance." Utah Code § 78B-6-313(2).

A government investigative subpoena, like the Division's, should be enforced if (1) the investigation and issuance of the subpoena are within the agency's authority, (2) the demands

sought are not too indefinite and are reasonably related to the inquiry, and (3) the demands are not unduly burdensome or unreasonably broad. *See U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also Sec. & Exch. Comm'n v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (adopting the rule from *Morton Salt*).

If the investigating agency shows its requests satisfy the *Morton Salt* three-prong test, “the burden shifts to the respondent to show cause why it should not be compelled to comply with the subpoena.” *Bureau of Consumer Fin. Prot. v. Ctr. For Excellence in Higher Educ.*, No. 2:19-CV-00877-RJS-CMR, 2022 WL 4182301, at *6 (D. Utah Sept. 13, 2022) (internal quotation marks and citation omitted); *see also Blackfoot Bituminous*, 622 F.2d at 515 (“The burden of showing abuse is upon respondents.”); *U.S. v. 400 Acres of Land*, No. 2:18-MC-586-RJS, 2018 WL 3862758, at *2 n.9 (D. Utah Aug. 14, 2018) (citing *U.S. v. Stuart*, 489 U.S. 353, 360 (1989)) (holding that the party seeking to assert a subpoena is overbroad or unduly burdensome bears the burden).

The *Morton Salt* test is easily met here, and TikTok should be ordered to appear and show cause why it is not in contempt for failing to comply with the Division’s subpoenas.

A. The Division’s Investigation and Issuance of the Subpoenas Are Lawful and Within Its Authority.

The Division’s authority to investigate TikTok for potential consumer protection violations is without doubt. An agency’s “authority to request records and undertake other investigatory functions is extremely broad.” *U.S. v. United Park City Mines Co.*, 827 F. App’x 871, 881 (10th Cir. 2020) (quoting *Santa Fe Energy Prods. Co. v. McCutcheon*, 90 F.3d 409, 414 (10th Cir. 1996)); *see also Phillips Petrol. Co. v. Lujan*, 951 F.2d 257, 260 (10th Cir. 1991) (holding a “court must enforce an administrative subpoena unless the evidence sought was ‘plainly

incompetent or irrelevant to any legal purpose’ of the agency” (citing *Endicott Johnson v. Perkins*, 317 U.S. 501, 509 (1943))). An agency “may investigate either to develop the existence of a violation or to assure itself that none exists.” *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 875 (D.C. Cir. 1977) (en banc) (citing *Morton Salt*, 338 U.S. at 652). Conversely, a court’s role in evaluating an enforcement request is “strictly limited.” *Id.* at 871–72.

Under this case law, it is clear the administrative subpoenas issued by the Division are lawful and within its authority. With hundreds of thousands of Utah users, TikTok is clearly a potential target for the Division to investigate to understand its business practices and whether its conduct may or may not be lawful in the State. Indeed, by accepting its administrative subpoenas and beginning to produce documents, it does not appear TikTok even contests the Division’s authority to investigate its conduct.

B. The Subpoenas Are Specific, Not Indefinite, and Relevant to the Inquiry.

The Division’s subpoenas also easily meet the low bar set for being specific, definite, and relevant to the investigation. A sufficiently definite subpoena must identify the information and documents sought. *F.T.C. v. Complete Merch. Sols.*, No. 2:19-cv-00996-HCN-EJF, 2020 WL 2059847, at *4 (D. Utah Apr. 28, 2020) (stating that “an administrative subpoena is ‘sufficiently definite’ where it contains a description of the documents sought ‘so that a person can in good faith understand which documents must be produced’” (citing *Resolution Tr. Corp. v. Greif*, 906 F. Supp. 1446, 1452 (D. Kan. 1995))).

In evaluating relevance of administrative subpoenas, a court should enforce unless it finds there is “no reasonable possibility” that the materials will produce information relevant to the investigation. *U.S. v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991); *Endicott Johnson*, 317 U.S. at 509

(stating that a subpoena should be enforced so long as the information sought is “not plainly incompetent or irrelevant” to the investigation); *see also Brixen & Christopher Architects, P.C. v. State*, 29 P.3d 650, 663–64 (citing *U.S. v. Markwood*, 48 F.3d 969, 975–80 (6th Cir. 1995) and adopting *R. Enters.*). “Accordingly, the State has a low hurdle to overcome when showing how the information sought is relevant.” *Id.* at 664.

The “standard for judging relevancy in an investigatory proceeding is also more relaxed than in an adjudicatory one”—information sought “need only be relevant to the *investigation*—the boundary of which may be defined quite generally.” *F.T.C. v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992); *Complete Merch. Sols.*, 2020 WL 2059847, at *5 (applying the *Invention Submission* “reasonably relevant” standard). An agency’s appraisal of relevancy must also generally be accepted so long as it is not “obviously wrong.” *Invention Submission*, 965 F.2d at 290 (citing *F.T.C. v. Carter*, 636 F.2d 781, 787–88 (D.C. Cir. 1980)).

Again, against this lenient standard, the Division’s decision to investigate TikTok to understand its business practices as they relate to potentially hundreds of thousands of Utah users (many of which are teens and children) cannot be seriously questioned.

C. TikTok Has Not Met the Stringent Standard for Showing the Division’s Subpoenas Are a Burden on the Company.

Finally, TikTok has not provided the Division justification for why complying with the portions of its administrative subpoenas at issue here is a burden under applicable case law. It should be required to do so to this Court. The party opposing enforcement of an administrative subpoena has the burden of proving the subpoena is burdensome. *Ctr. For Excellence*, 2022 WL 4182301, at *6. This is a very high standard in the context of a government investigation: courts should enforce investigative subpoenas “unless compliance threatens to unduly disrupt or seriously

hinder normal operations of a business.” *Texaco*, 555 F.2d at 882; *see also E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986) (to establish that a subpoena is unduly burdensome and should not be enforced, a “party subject to [an investigative] subpoena must show that producing the documents would seriously disrupt its normal business operations”); *E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) (adopting the rule from *Maryland Cup Corp.*); *400 Acres of Land*, 2018 WL 3862758 at *2 n.10 (same).

TikTok is one of the world’s largest technology companies and is represented by one of the country’s largest law firms. This investigation also concerns whether TikTok’s business practices are potentially harming Utah’s teens and children. Complying with the two aspects of the administrative subpoenas at issue here cannot credibly be a burden.

First, as it relates to the Division’s February 6 subpoena’s Specifications, TikTok has failed to provide responses that are verified under oath by anyone at the company. The Division views any unverified Specification responses received to date as merely preliminary and out of compliance with the subpoena issued nearly five months ago. The date by which to fully respond to those Specifications (June 19, 2023) has now come and gone. Having the company verify that these responses are accurate cannot be a burden under applicable case law.

Second, as to the Division’s May 30, 2023 subpoena, it largely seeks basic written responses to Specifications about TikTok’s business and user base in Utah, core business functions, and organizational structure. Most of its Specifications seek information that is easily gathered—like the size of the company’s user base in Utah, the amount of revenue it generates from Utah users, and basic descriptions of its key business units. Its document requests are also straightforward. The Division offered TikTok a reasonable schedule for responding that allowed:

- Twenty-one (21) days for TikTok to provide full written objections to these requests;
- Forty-five (45) days for TikTok to provide responses to the subpoena's additional Specifications; and
- Seventy-five (75) days to fully respond with any additional documents.

Through multiple meet-and-confers, TikTok has simply failed to credibly explain why one of the world's largest technology companies cannot respond to these requests within this time, instead offering a counter schedule offering ambiguous "initial" responses almost four months from the subpoena's issuance and further reserving the right to unilaterally kick out its proposed schedule even further. For good reasons, the Division has rejected that schedule, and asks this Court to force TikTok to justify it as part of a show cause hearing.

Respectfully submitted,

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Dated: July 25, 2023

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**Pro Hac Vice applications forthcoming*

CERTIFICATE OF SERVICE

I, Douglas Crapo, certify that I caused to be filed the above **MOTION FOR ORDER TO SHOW CAUSE** with the Court's electronic filing system on July 25, 2023, and also provided service by email to the following counsel for TikTok Inc.:

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