

Nos. 10-5383, 11-5008

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FEDERAL TRADE COMMISSION,

Appellee,

v.

CHURCH & DWIGHT CO., INC.,

Appellant.

**On Appeal From the United States District Court
For the District of Columbia**

**OPENING BRIEF OF APPELLANT
CHURCH & DWIGHT CO., INC.**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**A. Parties, Intervenors, and *Amici***

Appellant is Church & Dwight Co., Inc. (“Church & Dwight”). Appellee is the Federal Trade Commission (“FTC”). There are no intervenors or *amici* in this action.

B. Rulings Under Review

Church & Dwight seeks a review of the District Court Order and Memorandum Opinion granting the FTC’s petition for an enforcement order, which was entered on October 29, 2010, by Magistrate Judge John M. Facciola of the United States District Court for the District of Columbia. *FTC v. Church & Dwight Co., Inc.*, No.: 1:10-mc-00149-EGS. Church & Dwight appeals the District Court’s ruling directly to this Court pursuant to the District Court’s Minute Order, dated April 14, 2010.

C. Related Cases

The case under review has not been before this Court or any court other than the United States District Court for the District of Columbia, as noted above, from which the appeal is taken. There are no related cases.

/s/ Carl W. Hittinger

Carl W. Hittinger

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Appellant Church & Dwight Co., Inc. makes the following disclosure:

Church & Dwight Co., Inc. certifies that: (1) it is a non-governmental corporate party; (2) it does not have a parent corporation; and (3) there is no publicly held corporation that owns 10% or more of its stock.

GLOSSARY OF TERMS

CID	Civil Investigative Demand
Commission	Federal Trade Commission
FPC	Federal Power Commission
FTC	Federal Trade Commission
JA	Joint Appendix
Mayer	Mayer Laboratories, Inc.
October 29th Order	October 29, 2010 Order
Report	October 29, 2010 Report and Recommendation
Resolution	June 10, 2009 FTC Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation

TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT	1
II.	STATEMENT OF THE ISSUES.....	1
III.	STATEMENT OF THE FACTS.....	2
	A. Background about Church & Dwight	2
	B. The FTC Investigation.....	3
	C. Enforcement Proceedings in the District Court	7
IV.	SUMMARY OF ARGUMENT	10
V.	STANDARD OF REVIEW	11
VI.	ARGUMENT	12
	A. The Magistrate Judge failed to determine the reasonable relevance of the subpoenaed information under the framework established by <i>Texaco</i>	14
	1. Texaco establishes the controlling standard for review of administrative subpoena enforcement requests.....	15
	2. The Magistrate Judge failed to conduct the independent analysis required under <i>Texaco</i>	21
	a. The Magistrate Judge never defined the scope of the FTC Resolution.	22
	b. The Magistrate Judge failed to describe the information sought by the FTC.....	24
	c. The Magistrate Judge applied an improperly invented standard of plausibility—not reasonable relevance— when enforcing the FTC’s subpoena.....	31
	B. Information about non-condom products is not reasonably relevant to the FTC investigation.	35
VII.	CONCLUSION.....	40

TABLE OF AUTHORITIES

CASES

<i>Abbott v. Lockheed Martin Corp.</i> 2009 U.S. Dist. LEXIS 15329 (S.D. Ill. Feb. 27, 2009)	26
<i>AT&T Mobility LLC v. Concepcion</i> 131 S. Ct. 1740 (2011)	37
<i>Church of Scientology, Inc. v. Eli Lilly & Co.</i> 1994 WL 871703 (D.D.C. June 8, 1994)	26
<i>FTC v. Carter</i> 464 F. Supp. 633 (D.D.C. 1979), <i>aff'd</i> , 636 F.2d 781 (D.C. Cir. 1980).....	26, 27, 28
<i>FTC v. GlaxoSmithKline</i> 294 F.3d 141 (D.C. Cir. 2002)	11, 12
<i>FTC v. Invention Submission Corp.</i> 965 F.2d 1086 (D.C. Cir. 1992), <i>cert. denied</i> , 507 U.S. 910 (1993)	17, 20, 23
<i>FTC v. Ken Roberts Co.</i> 276 F.3d 583 (D.C. Cir. 2001), <i>cert. denied</i> , 537 U.S. 820 (2002)	15
<i>FTC v. Owens-Corning Fiberglas Corp.</i> 626 F.2d 966 (D.C. Cir. 1980)	14
* <i>FTC v. Texaco, Inc.</i> 555 F.2d 862 (D.C. Cir. 1977)	1, 10, 12-25, 30-36
<i>FTC v. Texaco, Inc.</i> 517 F.2d 137 (D.C. Cir. 1975), <i>vacated on reh'g</i> , 555 F.2d 862 (D.C. Cir. 1977).....	16, 17
<i>In re Barroso-Herrans</i> 524 F.3d 341 (1st Cir. 2008)	23
<i>In re Sealed Case</i> 146 F.3d 881 (D.C. Cir. 1998)	12

* Authorities upon which we chiefly rely are marked with asterisks.

<i>In re: Sealed Case (Admin. Subpoena)</i> 42 F.3d 1412 (D.C. Cir. 1994)	20, 23, 32
<i>McCready v. Nicholson</i> 465 F.3d 1 (D.C. Cir. 2006)	36
<i>Olson v. City of Bainbridge Island</i> 2009 U.S. Dist. LEXIS 58171 (W.D. Wash. June 18, 2009).....	26
<i>SEC v. Arthur Young & Co.</i> 584 F.2d 1018 (D.C. Cir. 1978), <i>cert. denied</i> , 439 U.S. 1071 (1979) ...	14, 20, 36
<i>Spano v. Boeing Co.</i> 2008 U.S. Dist. LEXIS 31306 (S.D. Ill. Apr. 16, 2008).....	26
<i>Talarigo v. Precision Airmotive Corp.</i> 2007 U.S. Dist. LEXIS 79444 (E.D. Pa. Oct. 25, 2007).....	26
<i>U.S. Int'l Trade Comm'n v. ASAT, Inc.</i> 411 F.3d 245 (D.C. Cir. 2005)	12
<i>United States v. Legal Servs. for N.Y.C.</i> 249 F.3d 1077 (D.C. Cir. 2001)	14
<i>United States v. Stolt-Nielsen S.A.</i> 524 F. Supp. 2d 609 (E.D. Pa. 2007)	23, 24
STATUTES	
28 U.S.C. § 1291	1
Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49	1
OTHER AUTHORITIES	
<u>http://www.Merriam-Webster.com/dictionary/plausibly</u>	34

I. JURISDICTIONAL STATEMENT

The District Court exercised jurisdiction over the petition to enforce the subpoena of the Federal Trade Commission (“FTC”) pursuant to § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. Under 28 U.S.C. § 1291, this Court has appellate jurisdiction over the final order of the Magistrate Judge in that proceeding.¹ *See FTC v. Texaco, Inc.*, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977) (*en banc*).

II. STATEMENT OF THE ISSUES

1. Whether the Magistrate Judge, in contravention of this Court’s controlling decision in *FTC v. Texaco, Inc.*, committed reversible error by failing to (1) interpret the FTC’s Resolution, (2) define the information sought by the Resolution, and (3) determine if the information sought by the FTC was reasonably relevant to the scope of its investigation as defined in the operative Resolution? (JA at 311-12.)
2. Whether the Magistrate Judge, who after observing that the Resolution’s intent “is not so clear,” committed reversible error by adopting the FTC’s interpretation of the ambiguous Resolution that it drafted? (JA at 311.)
3. Whether the Magistrate Judge committed reversible error by requiring Church & Dwight to produce information on irrelevant and separately sold non-condom products, such as cat litter, bulk chemicals, baking soda and toothpaste, based on the FTC’s flawed interpretation of its own Resolution, which only authorized an investigation into Church & Dwight’s “distribution or sale of condoms in the United States”? (JA at 30.)

¹ As is explained in more detail below, after obtaining the parties’ consent, the District Court Judge handling the underlying case referred the matter to a Magistrate Judge for all purposes. (JA at 6.)

III. STATEMENT OF THE FACTS

A. Background about Church & Dwight

Church & Dwight, Co., Inc. (“Church & Dwight”) is a Delaware corporation with its principal place of business in Princeton, New Jersey. (JA at 232.) Church & Dwight manufactures and distributes latex and non-latex male condoms in the United States, primarily under its Trojan brand, as well as other non-Trojan condom products such as Naturalamb and, formerly, Elexa. (JA at 202.) Church & Dwight also manufactures and/or distributes a wide variety of non-condom products both domestically and worldwide. (JA at 202, 221.) These non-condom products include, but are not limited to, toothpaste, depilatories, cat litter, baking soda, various household cleaning products, bulk chemicals, and laundry detergents, many of which are marketed under the Arm & Hammer trade name. (*Id.*) Church & Dwight has never sold, marketed, or co-branded its condoms in conjunction with such products. (JA at 328.)

Church & Dwight sells condoms directly and through distributors to various types of retailers, including grocery and drug stores. (JA at 232.) Church & Dwight incentivizes the placement and shelf-space of its condoms by openly offering planogram rebates, which the company inherited from its predecessor,

Carter Wallace.² (JA at 233.) Planograms are schematic drawings depicting how products will be arranged on retail shelves. (JA at 232-33.)

Church & Dwight's planogram rebate program offers retailers different levels of discounts if the retailers agree to implement a planogram developed by the company. (JA at 233.) The amount of the rebate varies depending on the percentage of shelf space that the retailer devotes to Church & Dwight's condoms and related products. (*Id.*) The rebate program is completely voluntary and designed to encourage Trojan facings on retailers' pegboards or shelves. (*Id.*) The planogram rebates do not result in below-cost pricing, and retailers are not required to enter into an exclusive dealing arrangement with Church & Dwight to receive them. (*Id.*) Church & Dwight does not punish retailers that decline to participate in the planogram rebate program. (*Id.*) In fact, about half of Church & Dwight's condom sales are made to customers that do not participate in the planogram rebate program, including sales to its largest customer, Wal-Mart. (*Id.*)

B. The FTC Investigation

On June 10, 2009, the FTC issued a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation ("Resolution") that initiated an investigation into Church & Dwight's business practices—particularly the planogram rebate program—in the condom market in the United States. The

² Church & Dwight acquired the Trojan brand from Carter Wallace in 2001. (JA at 232.)

Resolution sets forth the purported “[n]ature and [s]cope of [i]nvestigation” as follows:

To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices, including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.

(JA at 30.) On June 29, 2009, the FTC issued a Subpoena and Civil Investigative Demand (“CID”) to Church & Dwight, accompanied by the Resolution. (JA at 30-44, 47-61.) The Subpoena and CID were served on July 2, 2009. (JA at 32, 47.)

The Subpoena and CID demanded production of all documents relating to Church & Dwight’s condom business in the United States from over 200 custodians. (JA at 34-37, 49-57.) The Subpoena and CID also requested similar documents from the company’s subsidiary in Canada. (JA at 39, 58.) The Subpoena seeks, *inter alia*, Church & Dwight documents concerning marketing practices, including “organizational charts (Specification 1); selling aids and promotional materials (Specification 2); business plans, analyses, and data (Specifications 2-3, 6, 12-15); documents relating to contracts and prices (Specifications 7-11); and documents relating to competition in the sale of condoms.” (JA at 34-37.)

The CID seeks, *inter alia*, data concerning the sale of condoms such as “pricing discounts at wholesale and retail, as well as quantities sold and through which channel of distribution (Specifications 2-5, 7, and 8); detailed information about [Church & Dwight’s] marketing programs (Specification 9 and 12); identification of regularly prepared corporate documents (Specification 14); and information about competition in the market for condoms (Specifications 11, 13, 15, and 16).” (JA at 49-57.)

Church & Dwight immediately began complying with the Subpoena. On July 13, 2009, Church & Dwight produced documents from a pending parallel civil litigation with Mayer Laboratories, Inc. (“Mayer”), which addressed the same antitrust issues raised in the FTC’s investigation. (JA at 89.) Church & Dwight produced these documents in the same form as they were produced in the Mayer litigation, which included redactions. On July 28, 2009, two days before the Subpoena return date, the FTC raised objections to the redacted documents. (*Id.*) Shortly thereafter, Church & Dwight conferred with the FTC staff in order to narrow the Subpoena’s scope. (JA at 88.)

During these discussions, Church & Dwight requested permission to redact any confidential and proprietary information regarding non-condom products in otherwise responsive documents. (*Id.*) The FTC responded that Church & Dwight did not have the right to redact documents based on the FTC’s policy. (JA at 89.)

Church & Dwight agreed to produce unredacted versions of the Mayer documents, without waiving its right to redact specific documents in the future. (*Id.*) The parties agreed that they would revisit the issue and engage in further discussions at a later date if Church & Dwight located documents that it believed warranted redactions. (*Id.*) On October 30, 2009, in a letter to Church & Dwight's counsel, the FTC backtracked and stated that it would not allow redactions, thereby effectively ending the parties' good faith agreement to address the redaction issue on a document-by-document basis. (JA at 90.)

On December 23, 2009, after motion practice before the FTC,³ Commissioner Pamela Jones Harbour denied Church & Dwight's Petition to Limit or Quash the Subpoena and Request for Leave to File Out of Time and required full compliance with the Subpoena by January 26, 2010. (JA at 135.) On December 28, 2009, Church & Dwight requested rehearing before the full Commission. (JA at 142.) The FTC denied that request on February 16, 2010 without discussion. (JA at 145-46.) During this time, Church & Dwight informed the FTC that it would not produce documents located in Canada or unredacted documents unless required to do so by a federal court. (JA at 18.)

³ In connection with that motion practice, Church & Dwight submitted samples of redacted documents for the FTC that demonstrated how the proposed redactions could be implemented to protect Church & Dwight's proprietary information concerning non-condom products without compromising the documents' comprehensibility. (JA at 114-17.)

C. Enforcement Proceedings in the District Court

Rather than go back to the Commissioners and request that they issue a new and unambiguous Resolution (if justified) expressly covering non-condom products, the FTC's Staff filed a petition for an order enforcing the Subpoena and CID on February 26, 2010. (JA at 11-162.) The FTC argued that: (1) the Subpoena and CID are lawful; (2) the Subpoena and CID seek documents and information that are reasonably relevant to the Commission's investigation; and (3) compliance with the Subpoena and CID would not unduly burden Church & Dwight. (JA at 156-57, 160.) The FTC requested that the District Court enter an order requiring compliance with the Subpoena and CID within ten days. (JA at 19.)

On May 24, 2010, Church & Dwight filed its opposition to the FTC's petition arguing that: (1) the Canadian documents are irrelevant to the FTC's investigation of practices in the United States; (2) reviewing and producing those documents would impose an undue burden on the company; and (3) non-condom product information is irrelevant and should be redacted from otherwise responsive documents. (JA at 210, 218.) Church & Dwight also recommended that the District Court establish a procedure under which Church & Dwight could redact proprietary information, which allowed the FTC the right to object to particular redactions. (JA at 225-26.) If the parties could not resolve a particular challenge,

Church & Dwight recommended that the redacted document(s) be submitted to the District Court for *in camera* review. (*Id.*) In fact, to illustrate its proposed method of redaction, Church & Dwight submitted sample redacted documents for the District Court's review. (JA at 258-60.) Church & Dwight also requested a hearing and oral argument before the District Court. (JA at 227.)

On April 22, 2010, after obtaining the parties' consent, the District Court Judge handling the case referred the matter to a Magistrate Judge for all purposes. (JA at 6.) Despite this referral, on October 29, 2010, the Magistrate Judge issued a Report and Recommendation ("Report") suggesting that the District Court Judge grant the FTC's petition. (JA at 7.) After the FTC questioned the form of the Report, the Magistrate Judge vacated it that same day via minute order. (*Id.*) He then issued an Order and Memorandum Opinion granting the FTC's petition (hereinafter, the "October 29th Order"). (JA at 301-314.) The Report and the Memorandum Opinion are identical except for the title of the document. (JA at 7, 301-314.)

The Magistrate Judge stated that the Canadian documents were sufficiently relevant to the investigation and that Church & Dwight had failed to show that production of those documents would be unduly burdensome. (JA at 305-310.) However, the Magistrate Judge withheld final judgment on the burden issue regarding the Canada-based documents and ordered the parties to make a "genuine

effort ... to achieve the information demanded at the lowest possible cost.” (JA at 310.) Regarding the redaction issue, the Magistrate Judge held that:

By the broad standards of Morton Salt and Texaco, it is entirely plausible that information appearing in the same document with relevant information concerning C&D’s male condoms would itself be relevant to the investigation. The requested materials, *including those portions that do not obviously concern male condoms*, need only be reasonably relevant to the investigation, not to any potential outcome.

(JA at 311-12 (emphasis added, citation omitted).) In making this statement he did not mention, much less discuss, the sample redacted documents provided by Church & Dwight.

On November 2, 2010, Church & Dwight filed a Notice of Appeal. (JA at 318-19.) On November 22, 2010, Church & Dwight moved to stay the October 29th Order pending appeal. (JA at 321-30.) That same day, the FTC filed an emergency motion to enforce the October 29th Order, claiming that there was no irreparable harm and, therefore, a stay was unwarranted because the documents could be returned by the FTC and re-produced in redacted form if Church & Dwight succeeded on appeal. (JA at 332-67.) On December 23, 2010, based on the FTC’s argument, the Magistrate Judge denied Church & Dwight’s motion for a stay and granted the FTC’s emergency enforcement motion. (JA at 427-38.)

Church & Dwight then asked this Court to stay the Magistrate Judge’s Order pending the outcome of the appeal, but that request was denied on January 27, 2011. (*See* Order dated Jan. 27, 2011, No. 11-5008 (D.C. Cir.), PACER No.

1290088.) That same day, Church & Dwight began producing the disputed documents in unredacted form. Church & Dwight has separately Bates-numbered all disputed documents to facilitate their identification and return to Church & Dwight in the event that this Court vacates the underlying Order. To date, Church & Dwight has produced a total of *over 11 million pages* of documents, including documents from Canada, as part of the FTC's investigation.

IV. SUMMARY OF ARGUMENT

The Magistrate Judge erred in two significant respects. First, he failed to apply the correct legal standard in evaluating the FTC's petition to enforce its administrative subpoena. Under *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977), a district court is required to review enforcement requests by: (1) interpreting the underlying resolution to delineate the scope of the administrative investigation; (2) defining the information sought; and (3) evaluating whether that information is reasonably relevant to the investigatory scope defined by the resolution. *See id.* at 875. Here, the Magistrate Judge did not perform any of those independent inquiries. He never interpreted the Resolution to establish the scope of the investigation, and, as a result, could not evaluate whether the information sought fell within that scope. Further, in issuing his ultimate ruling, the Magistrate Judge merely stated that it was *plausible* that information about non-condom products was relevant to the FTC investigation. (JA at 311.) The Magistrate Judge

never issued a finding that such information is or is not *reasonably relevant* to an investigation of condoms.

Second, even if the Magistrate Judge had followed *Texaco*, the decision remains erroneous and should be reversed because non-condom information has no reasonable relevance to the FTC's investigation. Under the operative Resolution in this case, the singular purpose of the FTC's investigation is to determine whether Church & Dwight monopolized or attempted to monopolize the market for male condoms in the United States by "conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products." (JA at 30.) The later reference to "other products" concerns specific non-Trojan brand condoms such as Naturalamb and, formerly, Elexa, also sold by Church & Dwight. Therefore, information about non-condom products, such as cat litter, baking soda and bulk chemicals (all sold separately from condoms), has no effect on the manner in which Church & Dwight markets products that compete in the separate and distinct condom market. The Magistrate Judge therefore committed reversible error by requiring production of that information.

V. STANDARD OF REVIEW

This Court typically reviews a district court's decision to enforce an administrative subpoena for "arbitrariness or abuse of discretion." *FTC v.*

GlaxoSmithKline, 294 F.3d 141, 146 (D.C. Cir. 2002) (Ginsburg, C.J.). However, this Court exercises plenary review over legal rulings issued by the district court in rendering its decision. *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 252-53 (D.C. Cir. 2005) (Rogers, J.). Thus, when a party claims that the district court applied an incorrect legal standard, this Court reviews that question *de novo*. *Id.*

In the underlying Order, the Magistrate Judge failed to adhere to the legal standard under which he was required to independently review the FTC subpoena to determine whether the documents requested were reasonably relevant to the agency's investigative purpose as set forth in its Resolution. Therefore, plenary review is appropriate. *See In re Sealed Case*, 146 F.3d 881, 883 (D.C. Cir. 1998) (Tatel, J.) (“[B]ecause the [appellant] argues that the district court applied the wrong legal standard, our review here is *de novo*.”).

VI. ARGUMENT

At its most basic, this appeal arises from one fundamental problem: the Magistrate Judge failed to exercise meaningful review over the administrative determination of the FTC as is required by this Court's *en banc* decision in *Texaco*. That problem appears in the Magistrate Judge's analysis in two ways. First, the Magistrate Judge failed to review the agency's petition under the proper legal standard and, second, the information sought is not reasonably relevant to the investigation authorized by the operative Resolution.

The first error occurred when the Magistrate Judge failed to apply the legal standard set forth in *Texaco*. As noted above, that standard establishes a three-part analytical framework that enables a district court to properly evaluate a subpoena enforcement petition by: (1) interpreting the scope of the resolution; (2) identifying the materials subpoenaed; and (3) evaluating whether those materials are reasonably relevant to the Resolution. *Id.* at 875. Here, the Magistrate Judge never interpreted the scope of the Resolution. Instead, the Magistrate Judge merely stated that it is “*plausible*” that information about non-condom products was pertinent to the FTC’s investigation. (JA at 311 (emphasis added).) In so holding, the Magistrate Judge improperly applied a lesser standard of *plausibility*, rather than the *reasonable relevance* standard prescribed by *Texaco*.

Second, as a result of misapplying *Texaco*, the Magistrate Judge reached an erroneous outcome. Information about toothpaste, cat litter, and baking soda has no effect on the manner in which Church & Dwight markets and sells condoms, and the Magistrate Judge erred in ordering Church & Dwight to produce to the FTC information concerning those separately sold products and other non-condom products.

Accordingly, the Magistrate Judge’s October 29th Order is erroneous both in its analysis and in its conclusion. This Court should therefore reverse and vacate the underlying Order and require the documents at issue to be returned to Church

& Dwight. Then, the documents can be re-produced to the FTC with proprietary non-condom information redacted. As noted above, Church & Dwight has separately Bates-numbered the subject documents to help facilitate this remedy.

A. The Magistrate Judge failed to determine the reasonable relevance of the subpoenaed information under the framework established by *Texaco*.

An administrative subpoena is valid and enforceable only if the information sought is reasonably relevant to an ongoing agency investigation. *Texaco*, 555 F.2d at 872; *see also SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1025 (D.C. Cir. 1978) (Rogers, J.) (finding that an administrative subpoena was sufficiently definite because it identified particular categories of information to be produced), *cert. denied*, 439 U.S. 1071 (1979). In addition, the request must not be so broad that production would impose an undue burden on the subpoena recipient. *United States v. Legal Servs. for N.Y.C.*, 249 F.3d 1077, 1083 (D.C. Cir. 2001) (Silberman, J.).

Although the “court’s role in a proceeding to enforce an administrative subpoena is a strictly limited one,” *Texaco*, 555 F.2d at 871-72, the power of administrative agencies is not unlimited and the court “should not simply rubber-stamp Commission subpoenas,” *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 974 (D.C. Cir. 1980) (Tamm, J.). Instead, the district court must independently review the subpoena to ensure that it constitutes an appropriate

exercise of the agency's authority. See *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586-87 (D.C. Cir. 2001) (Edwards, J.) (“[A] court must ‘assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency.’” (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981) (Wald, J.)), *cert. denied*, 537 U.S. 820 (2002).

1. *Texaco* establishes the controlling standard for review of administrative subpoena enforcement requests.

As noted above, the *Texaco* court established a three-part analytical framework for district courts to follow in reviewing administrative subpoena enforcement requests to ensure that a party receives *meaningful* judicial review of an executive agency's decision. As explained in the next section below, the Magistrate Judge committed reversible error by improperly applying each part of the *Texaco* framework.

In *Texaco*, the FTC opened an investigation for the purpose of evaluating whether a trade association of natural gas companies had reported its members' proved natural gas reserves to the federal government in a manner that underrepresented the amount of gas actually available. 555 F.2d at 868. Under then-existing federal law, the Federal Power Commission (“FPC”) was required to approve retail prices based on the companies' reports. *Id.* The FTC believed that the trade association may have underreported proved reserves to gain approval of

higher retail prices. *Id.* Proved reserves are those that a producer has identified, through geological testing and mathematical analysis, as reasonably certain of being harvested. *Id.* at 866 n.2. Unproved reserves have not undergone this testing. *Id.* Thus, designation of a source as “unproved” is not an assessment of its expected productivity, and some unproved reserves may, in fact, hold large amounts of harvestable gas.

The FTC served an administrative subpoena on eleven gas producers seeking production of data concerning both proved and unproved reserves. *Id.* at 868-69. The producers refused to comply with the subpoena, and the FTC filed an enforcement action. In the district court, the producers claimed that, by demanding data about unproved reserves, the subpoena exceeded the scope of the investigation, which, they claimed, was focused on the relationship between proved reserves and energy prices. *See FTC v. Texaco, Inc.*, 517 F.2d 137, 143 (D.C. Cir. 1975), *vacated on reh'g*, 555 F.2d 862 (D.C. Cir. 1977) (describing proceedings in the district court). They also claimed that collateral estoppel precluded the FTC from obtaining data about unproved reserves. *Id.* According to the producers, the only possible use for that data was to evaluate how much harvestable gas was available, an inquiry that the FPC had performed during proceedings to approve natural gas rates. *Id.* The producers asserted that the FPC’s determination was binding on the FTC, thereby undermining the latter

agency's need for data about unproved reserves. *Id.* The district court agreed and limited the production to proved reserve data. *Id.* at 144, 159-60. A panel of this Court affirmed on identical grounds. *Id.* at 147.

The full Court, however, vacated the panel's order in an *en banc* opinion and reversed the district court. *Texaco*, 555 F.2d at 885. It concluded that the documents were reasonably relevant to the agency's investigation, and that collateral estoppel did not apply to the FTC's subpoena. *Id.* at 874-75. Though the *Texaco* Court did not segregate its analysis into formal steps, it essentially conducted its review in three phases. During the first phase of the analysis, the district court defined the scope of the FTC resolution that authorized the investigation. *Id.* at 875. Beginning with the resolution itself is crucial because "the validity of Commission subpoenas is to be measured against the purposes stated in the resolution." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (Silberman, J.), *cert. denied*, 507 U.S. 910 (1993); *Texaco*, 555 F.2d at 874. If a subpoena exceeds the scope of the resolution, it is necessarily invalid, even if it would otherwise constitute a permissible exercise of the FTC's investigatory authority were it supported by a valid Commission resolution. *Invention Submission Corp.*, 965 F.2d at 1092.

The resolution in *Texaco* defined the purpose of the FTC investigation as an assessment into "the acts and practices ... [of natural gas producers] to determine

whether said corporations ... are engaged in conduct in the reporting of natural gas reserves ... which violates Section 5 of the Federal Trade Commission Act.”

Texaco, 555 F.2d at 868. This Court construed this language as “envision[ing] an examination of all phases of the [reserve-]estimating process. In particular, the FTC seeks to compare estimates prepared for various business purposes with those reported to the [trade association]” and, ultimately, to the federal government. *Id.* at 875. Thus, this Court began its analysis by interpreting the resolution to allow the FTC to subpoena all information necessary to understand the producers’ reserve-estimating procedures.

In the second phase of its analysis, the *Texaco* Court identified the materials being sought by the FTC’s subpoena. *Id.* This Court observed that the FTC had requested information about the reporting of the gas producers’ proved and unproved reserves. *Id.* In fact, some of the subpoenaed information pertained to unproved reserves labeled as “speculative, possible, or probable, depending on the stage of development of the [gas] field.” *Id.* Thus, this Court recognized that the information sought by the FTC included both proved reserve data, upon which retail prices were directly based, and unproved reserve data, whose pricing effects were tangential.

At the third and final phase of its analysis, this Court compared the scope of the FTC resolution with the scope of the subpoena to determine whether any link

existed between them. *Id.* at 876-77. This link is necessary to a finding of reasonable relevance. *Id.* at 874 (“[T]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC’s investigation, as set forth in the Commission’s resolution.”). This Court found that data concerning unproved reserves was reasonably relevant to the pricing inquiry envisioned by the resolution, even though that information bore only a secondary effect on pricing. *Id.* at 876-77. This Court held that, under the resolution, “the FTC may fairly inquire whether the companies, through the use of an excessively restrictive approach, have excluded awareness of certain realistic and reliable estimates which are taken into account in making significant business decisions but which are not labeled ‘proved’ and are therefore not included in the [trade association] reports” used by the government to approve retail prices. *Id.* at 875. Similarly, this Court held that “any estimate of reserves—however defined—on which a company relies in the course of its business is relevant to the company’s practices in estimating and reporting reserves,” and therefore is covered by the resolution. *Id.* at 876-77.

In sum, this Court in *Texaco* conducted an independent inquiry of: (1) the resolution’s meaning; (2) the information subpoenaed by the FTC; and then (3) ***made particular findings explaining how that information was reasonably relevant to the agency’s investigation***, as described in its resolution. In this

manner, the Court illustrated that, even though the judiciary's role in reviewing an administrative subpoena is limited, it is substantive and meaningful. In other words, *Texaco* requires that the district court conduct an independent review of the resolution and the materials subpoenaed to determine what link, if any, exists between them.

This Court has regularly followed *Texaco*'s three-part analytical framework in enforcement actions during the decades since that decision was issued. *See, e.g., In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1419-20 (D.C. Cir. 1994) (Tatel, J.) (remanding a case to the district court because the record on appeal failed to establish the relevance of certain information requested by an agency subpoena); *Invention Submission Corp.*, 965 F.2d at 1090 (enumerating the ways in which subpoenaed data might be relevant to the administrative investigation); *Arthur Young & Co.*, 584 F.2d at 1028-31 (identifying the scope of an administrative investigation to include the respondent's preparation of SEC filings on behalf of a particular client and explaining that documents held by the respondent were relevant to that inquiry). These cases illustrate that, while the reasonable relevance standard is favorable to the agency, it is not without teeth. At a minimum, an agency must show—and the district court must independently find—a nexus between the operative resolution and the information subpoenaed.

2. The Magistrate Judge failed to conduct the independent analysis required under *Texaco*.

In this case, the Magistrate Judge erred by not properly performing any of the three phases of *Texaco*'s analysis. First, the Magistrate Judge failed to interpret the permissible scope of investigation under the Resolution at issue. Second, the Magistrate Judge never described the precise information being sought by the FTC, thereby precluding the Magistrate Judge from measuring the FTC's requests against the Resolution. Finally, the Magistrate Judge never made a finding regarding the reasonable relevance of that information based on the scope of the investigation as defined in the Resolution. Instead, the Magistrate Judge merely suggested that it is "plausible" that information about non-condom products could be relevant based *only* on the fact that such information "appear[s] in the same document with relevant [condom] information." (JA at 311.) In short, the Magistrate Judge's discussion fell far short of the legal analysis required by this Court in *Texaco*.

a. The Magistrate Judge never defined the scope of the FTC Resolution.

At the first phase of the *Texaco* analysis, the Magistrate Judge failed to interpret the Resolution to define the scope of the FTC investigation. The Resolution authorizes the FTC's Staff "[t]o determine whether Church & Dwight ... has attempted to acquire, acquired, or maintained a monopoly in the *distribution*

or sale of condoms in the United States ... through ... conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight....”

(JA at 30 (emphasis added).) Church & Dwight argued that the Resolution permitted it to redact “proprietary and confidential information on non-condom products that is entirely irrelevant to the FTC’s investigation involving condoms.” (JA at 311.) The FTC Staff disagreed and claimed that the Resolution covered such information if it appeared alongside responsive data. (JA at 161, 290-92.)

The Magistrate Judge correctly observed the parties’ conflicting interpretations, but then failed to clarify the Resolution’s meaning as required under *Texaco*:

Th[e] intent [of the Resolution], however, is not so clear. As noted above, it is the language of the FTC resolution, not subsequent statements by its staff, that governs the investigation. [*Invention Submission Corp.*], 965 F.2d at 1088. In *Texaco*, [the language of the resolution] was construed broadly. While the resolution in question in that case defined the scope of the investigation to determine whether certain corporations were “engaged in conduct in the reporting of natural gas reserves for Southern Louisiana,” the court held that the subpoena should be enforced against Superior, a company who did not engage in reporting natural gas reserves. *Texaco*, 555 F.2d at 877.

(JA at 311.) The Magistrate Judge said nothing about the language of the Resolution at issue, the Commission’s intent in issuing it, or the scope of products involved in the investigation. Instead, the Magistrate Judge merely observed that

the intent of the Resolution was not clear and then noted that “[i]n *Texaco*, th[e] language [of the resolution] was construed broadly.” (*Id.*)

That omission is critical because, as this Court noted, “when a conflict exists in the parties’ understanding of the purpose of an agency’s investigation, the language of the agency’s resolution, rather than subsequent representations of Commission staff, controls.” *Invention Submission Corp.*, 965 F.2d at 1088 (internal citations omitted); *see also Sealed Case*, 42 F.3d at 1420 (vacating and remanding an enforcement order because the district court failed to explain how the information sought was relevant to the investigation).

Moreover, it is well-settled that when a legal document contains an ambiguity, that ambiguity is typically resolved against the drafter. *See In re Barroso-Herrans*, 524 F.3d 341, 345 (1st Cir. 2008) (Boudin, J.) (“[I]n legal documents ambiguity is traditionally construed against the drafter...” (citing *United States v. Seckinger*, 397 U.S. 203, 210 (1970) (Brennan, J.))). The government is not exempt from this well-settled principle. *See United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 609, 615-616 (E.D. Pa. 2007) (Kauffman, J.) (holding that any ambiguity in a Conditional Leniency Agreement, drafted by the Antitrust Division of the United States Department of Justice, would be resolved in favor of the private party entity and individual defendants.). In *Stolt-Nielsen*, the district court held that “the Division drafted the Agreement, and therefore any

ambiguity must be resolved in favor of Defendants.” *Id.* at 615. In fact, in that case, when considering the plain meaning of the phrase “prompt and effective action” within the Agreement, the court held that “any contractual ambiguity regarding the obligations imposed by Paragraph 1 of the Agreement must be construed against the Division as the drafter, *and must comport with what was reasonably understood by defendant when entering the Agreement.*” *Id.* at 617 (emphasis added) (internal quotations and citations omitted).

Rather than apply these well-established rules, which are equally applicable to private parties and the government, the Magistrate Judge simply adopted the FTC Staff’s asserted interpretation without any independent analysis. This is deficient under the first phase of the *Texaco* analysis, and the Magistrate Judge’s failure to interpret the Resolution entirely derails any finding the Magistrate Judge *could* make at the next two phases of the inquiry.

b. The Magistrate Judge failed to describe the information sought by the FTC.

The Magistrate Judge also completely omitted the second phase of the *Texaco* analysis. Apart from the heading “[t]he redacted materials are sufficiently relevant in light of the resolution,” the Magistrate Judge never described what information was sought by the FTC. (JA at 311.) This omission undercuts the Magistrate Judge’s analysis because the relevance of that information “*must be measured against* the scope and purpose of the FTC’s investigation, as set forth in

the Commission's resolution." *Texaco*, 555 F.2d at 874 (emphasis added).

Without a description of the information sought, the Magistrate Judge's analysis lacks a baseline from which it could proceed to the third step of determining whether the information sought was reasonably relevant to the investigation. 555 F.2d at 875.

Here, the FTC seeks all non-condom product information located in the same document as condom product information. (JA at 224.) In response to the FTC's Subpoena, Church & Dwight offered to produce responsive condom product information while redacting the non-condom product information appearing in the same document without compromising the context. (*Id.*) The FTC rejected this proposal and petitioned the Magistrate Judge for enforcement of the Subpoena consistent with the FTC's demands. (JA at 10-166.) Church & Dwight provided the Magistrate Judge with samples of the redacted documents for review, but there is no indication that the Magistrate Judge ever reviewed them, much less offered an explanation of why the redactions were inadequate to provide the information sought by the FTC.⁴ (JA at 224, 258-260.)

⁴ Church & Dwight also submitted samples of redacted documents to the FTC in Church & Dwight's "Petition to Quash or Limit Subpoena *Duces Tecum* Issued to Church & Dwight, Inc. on June 29, 2009." (JA at 114-117.)

The samples are significant because they amply demonstrate that no information about condoms is lost through redaction.⁵ (JA at 114-117, 258-260.) The FTC's only legal basis for opposing Church & Dwight's redactions comes from one sentence in *FTC v. Carter*, 464 F. Supp. 633, 640 (D.D.C. 1979) (Parker, J.), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980). There, the FTC issued subpoenas pursuant to a resolution concerning "the advertising, promotion, offering for sale, sale, or distribution of cigarettes in violation of Section 5 of the [FTC] Act." *Id.* at 636. The respondent redacted part of a cigarette advertisement, which the court rejected, stating that "[a]ppropriate documents should be submitted in their entirety

⁵ Redaction is a fundamental and widely-accepted method of excising irrelevant information from otherwise responsive documents in federal litigation. *Church of Scientology, Inc. v. Eli Lilly & Co.*, 1994 WL 871703, at *3 (D.D.C. June 8, 1994) (holding that "[a]ny party that wishes to introduce documents should be prepared to redact irrelevant or unduly prejudicial information about the Church of Scientology."); *see also Spano v. Boeing Co.*, 2008 U.S. Dist. LEXIS 31306, at *7 (S.D. Ill. Apr. 16, 2008) (Wilkerson, J.) ("[R]edaction [is] appropriate where the information redacted [is] not relevant to the issues in the case."); *see also Abbott v. Lockheed Martin Corp.*, 2009 U.S. Dist. LEXIS 15329, at *7 (S.D. Ill. Feb. 27, 2009) (Wilkerson, J.) (allowing a defendant to redact information about its benefit plans not at issue in the suit and rejecting the notion that "a general assertion that the documents become confusing with redactions trumps the finding that [the information sought] is not relevant."); *Talarigo v. Precision Airmotive Corp.*, 2007 U.S. Dist. LEXIS 79444, at *8 (E.D. Pa. Oct. 25, 2007) (Hart, J.) (allowing defendant to "redact out irrelevant portions of discoverable documents"); *Olson v. City of Bainbridge Island*, 2009 U.S. Dist. LEXIS 58171, at *17 (W.D. Wash. June 18, 2009) (Bryan, J.) (permitting a plaintiff to produce redacted versions of discoverable documents to the extent they contained irrelevant personal information).

to ensure comprehensibility, rather than being edited by respondents.” *Id.* at 640 (emphasis added).

Here, the documents and redactions differ dramatically from those at issue in *Carter*. First, Church & Dwight’s documents are vastly different from *Carter*’s single page, single product advertisements that contained information *explicitly* cited in the operative resolution. Rather, a substantial number of Church & Dwight’s documents consist of hundreds—and sometimes thousands—of pages concerning multiple products, which have nothing to do with condoms whatsoever.⁶ Second, as compared to the redactions in *Carter*, Church & Dwight’s redactions do not conceal relevant information or adversely affect a document’s comprehensibility. The ruling in that case was logical because redacting part of a cigarette advertisement presents issues of comprehensibility, particularly when the advertisement concerns only cigarettes, and cigarette advertising is cited explicitly in the operative resolution. *Id.* at 636. That is not that case here.

⁶ One example is a PowerPoint file that provides, *inter alia*, sales figures for each of Church & Dwight’s departments ranging from household to oral care to sexual health. (JA at 114-117.) Church & Dwight provided part of this document to the FTC to demonstrate how its redactions preserved comprehensibility. (*Id.*) This particular document is 58 pages long, yet only 10 pages concern condom-related information. (*Id.*) Still, the only redacted information is proprietary sales figures concerning non-condom departments and/or products. (*Id.*) The department, name of product, and subject fields concerning the general type of sales figure remain. (*Id.*) This particular document references, *inter alia*, non-condom related departments such as fabric care, home care, oral care covering non-condom products such as cat litter, detergents, toothpaste, and depilatories. (*Id.*)

Unlike *Carter*, Church & Dwight's redactions preserve comprehensibility.

Church & Dwight provided an example of such redactions for the Magistrate Judge's review as follows:

Weekly Sales and Inventory
 Sales Unit: GT 0
 Week 2007-03 WK 3 COMP=2007-03 WK 2
Target Weekly Report 03-24-07

Dept #	Class	Item	Sales Units	Sales \$	EOH+OW Units	EOH+OW \$	SKU Instock %	Tracked	Avg Sell Price	Avg Sell Price % Chg	MOS	Units per Store	Dollars per Store
3003-04	AIR FRESHNERS	003-04-0327 ARM N HAMMER 42 6OZ CRPT PWDR PET											
3003-04	AIR FRESHNERS	003-04-0959 ARM N HAMMER 24OZ FRESH POWER MIST											
3003-04	AIR FRESHNERS	003-04-0960 ARM N HAMMER 24OZ PET FRESH PWR MST											
3003-04	AIR FRESHNERS	003-04-0341 ARM HAMMER 42 6OZ CRPT PWD MTR RN											
3003-04	AIR FRESHNERS	003-04-0009 ARM N HAMMER 1CT FRIDGE FRSH BKNG											
3003-04	AIR FRESHNERS	003-04-0111 ARM N HAMMER 1LB BAKING SODA											
3003-04	AIR FRESHNERS	003-04-0112 ARM N HAMMER 1LB FRDG/FRZ BKNG TOP											
3003-05	CLEANING CHEMICALS	003-05-0988 PARSONS 58 FLOZ LEM AMMONIA											
3003-05	CLEANING CHEMICALS	003-05-0329 CLEAN SHOWER 32FLOZ MOUNTAIN RAIN											
3003-05	CLEANING CHEMICALS	003-05-0920 CLEAN SHOWER 64FLOZ MTRN RAIN RFL											
3003-05	CLEANING CHEMICALS	003-05-0237 KABOOM 22FLOZ SHWRTILE CLR											
3003-05	CLEANING CHEMICALS	003-05-0380 KABOOM 24 OZ ULTRA SCRUB											
3003-05	CLEANING CHEMICALS	003-05-0219 SCRUB FREE 32FLOZ BATH LEMON TOP											
3003-05	CLEANING CHEMICALS	003-05-0513 CLEAN SHOWER 58FLOZ VAL PK FRSH											
3003-05	CLEANING CHEMICALS	003-05-0094 KABOOM 2LB TOILET FOAM											
3003-05	CLEANING CHEMICALS	003-05-0382 KABOOM 1CT NEVER SCRUB SYS TEM											
3003-05	CLEANING CHEMICALS	003-05-0386 KABOOM 1CT NEVER SCRUB RFL											
3003-05	CLEANING CHEMICALS	003-05-0122 SNO BOL 16OZ TOILET BWL CLR											
3003-05	CLEANING CHEMICALS	003-05-0193 ORANGE GLO 24OZ WOOD FLR PLSH CLR											
3003-05	CLEANING CHEMICALS	003-05-0257 ORANGE GLO 22FLOZ WOOD FLOOR CLR											
3003-05	CLEANING CHEMICALS	003-05-0182 ORANGE GLO 1CT WOOD CLRN SRTTR KIT											
3003-06	DISH DETERGENTS	003-06-0071 BRILLO 18CT S WOOL SOAP PADS											
3003-07	LAUNDRY ADDITIVES	003-07-0523 ARM N HAMMER 144CT ESSENTIALS MTRN RN											
3003-07	LAUNDRY ADDITIVES	003-07-0308 OXI CLEAN 1.5LB STAIN REMOVER											
3003-07	LAUNDRY ADDITIVES	003-07-0423 OXI CLEAN 1.5LB BABY STN RMVR											
3003-07	LAUNDRY ADDITIVES	003-07-0132 OXI CLEAN 0.47OZ SPRAY AWY STAIN											
3003-07	LAUNDRY ADDITIVES	003-07-0405 OXI CLEAN 21.5FLOZ STAIN REMOVER											
3003-07	LAUNDRY ADDITIVES	003-07-0024 OXI CLEAN 3.5LB FREE											
3003-07	LAUNDRY ADDITIVES	003-07-0006 OXICLEAN 42FLOZ STAINFIGHTER											
3003-07	LAUNDRY ADDITIVES	003-07-0447 OXI CLEAN 42OZ TRIPLE FREE POUR											
3003-07	LAUNDRY ADDITIVES	003-07-0243 OXI CLEAN 6LB MP STAIN REMOVER											
3003-08	LAUNDRY DETERGENTS	003-08-0274 ARM N HAMMER 100OZ/32LD SP BRZ WBL											
3003-08	LAUNDRY DETERGENTS	003-08-0528 ARM N HAMMER 100OZ/32LD FREE											
3003-08	LAUNDRY DETERGENTS	003-08-0106 ARM N HAMMER 100OZ/24LD CRCT D BLM											
3003-08	LAUNDRY DETERGENTS	003-08-0010 ARM N HAMMER 200OZ/64LD CLN BURST											
3003-08	LAUNDRY DETERGENTS	003-08-0382 ARM N HAMMER 200OZ/64LD LQ FREE											
3003-08	LAUNDRY DETERGENTS	003-08-0522 ARM N HAMMER 50OZ/32LD LQ ESSENTLS											
3003-08	LAUNDRY DETERGENTS	003-08-0543 ARM N HAMMER 50OZ/32LD 2XL CLN BRT											
3003-08	LAUNDRY DETERGENTS	003-08-0544 ARM N HAMMER 50OZ/32LD 2X LIQ FREE											
3003-08	LAUNDRY DETERGENTS	003-08-0692 ARM N HAMMER 30LD FABRICARE CLN BUR											
3003-08	LAUNDRY DETERGENTS	003-08-0014 ARM N HAMMER 50LD CLEAN BURST POWDR											
3003-08	LAUNDRY DETERGENTS	003-08-0225 ARM N HAMMER 200LD PWDR COOL BREEZE											
3003-08	LAUNDRY DETERGENTS	003-08-0697 ARM N HAMMER 145LD PWD ALPINE CLN											
3003-08	LAUNDRY DETERGENTS	003-08-0042 OXI 25LD LNDRY BALL MOUNTN											
3003-08	LAUNDRY DETERGENTS	003-08-0212 OXI CLEAN 60LD LNDRY BALL MTRN RF											
3 Total													
49049-01	DEODORANT	049-01-0424 ARRID SOLID REGULAR TWIN-PACK											
49049-01	DEODORANT	049-01-0425 ARRID SOLID FRESH TWIN-PACK											
49049-01	DEODORANT	049-01-0426 ARRID AERO U C/UF TWIN-PACK											
49049-01	DEODORANT	049-01-0827 ARM HAMMER 2.8OZ SPORT INV SLD											
49049-01	DEODORANT	049-01-0522 ARRID XX MRN G CLEAN 6OZ											
49049-01	DEODORANT	049-01-0579 ARRID XX 2.7OZ REG A/P WIDE SLD											
49049-01	DEODORANT	049-01-0580 ARRID XX 2.7OZ A/P FSH WIDE SLD											
49049-01	DEODORANT	049-01-0808 ARRID GEL 2.8OZ COOL SHOWER GEL											
49049-01	DEODORANT	049-01-0047 ARRID XX 6.0OZ AERO CLR FRSH											
49049-01	DEODORANT	049-01-0396 ARRID AERO 6OZ EXTRA DRY REGUL											

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Weekly Sales and Inventory
 Sales Units: GT 0
 Week: 2007-03-WK 1 COMP-2007-03-WK 2
Target Weekly Report 03-24-07

Dept #	Class	Item	Sales Units	Sales \$	EOH+OW Units	EOH+OW \$	Instock %	SKU Tracked	Avg Sell Price	Avg Sell Price % Chg	WOS	Units per Store	Dollars per Store
49049-01	DEODORANT	049-01-0717 ARRID XX 2.5FLOZ REG A/P ROLLON											
49049-04	TRIAL SIZE	049-04-0081 ARM N HAMMER 9OZ ADV WHT BAKG PERX											
49049-06	SHAVE	049-06-0038 NAIR FOR MEN 8OZ BODY CREAM											
49049-06	SHAVE	049-06-0129 NAIR LOTION 6OZ MEN ROLL ON LOTION											
49049-06	SHAVE	049-06-0594 NAIR BABY OI L 9OZ LOTION											
49049-06	SHAVE	049-06-0764 NAIR 2OZ CREAM FOR FACE											
49049-06	SHAVE	049-06-0777 NAIR ALOE 9O Z LOTION											
49049-06	SHAVE	049-06-0970 NAIR BIKINI CREAM 2 OZ											
49049-06	SHAVE	049-06-1373 NAIR 5.1OZ ROLLON WAXER KIT											
49049-06	SHAVE	049-06-1413 NAIR WAX 17CT CLOTHS STRIPS											
49049-06	SHAVE	049-06-1414 NAIR 5.3OZ CREAM BLADELESS											
49049-06	SHAVE	049-06-1936 NAIR .69FLOZ UPPER LIP CREM											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-1351 ARM&HAMMER 4.3OZ ENAMEL NATRL WHT											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0098 MENTADENT 3.5OZADV WHTNING PUMP											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0499 MENTADENT 2PK 10.5OZ ADV WHTNG											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0582 MENTADENT 2PK 10.5 OZ ADVN CLN											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0470 AIRM 6OZ GEL TOOTHPASTE											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-1375 CLOSE UP 8.0OZ RED GEL											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0907 ARM&HAMMER 7.5OZ PEROXICARE WTC											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0935 ARM&HAMMER 7.8OZ DENTAL CARE											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0824 ARMANDHAMMER 6OZ BS AND PEROX											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0825 ARMANDHAMMER 6OZ BRIL SPRK											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0025 CREST SPINBRUSH SLIM LINE											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0174 SPINBRUSH CL ASSIC CLEAN											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0846 SPIN BRUSH CLASSIC											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0386 CREST CHKLINE SPINBRSH PROWHT W/CINN											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-1182 SPINBRUSH PRO CLEAN SOFT											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-1183 SPINBRUSH PRO CLEAN MEDIUM											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-1184 SPINBRUSH PRO CLEAN REFILL											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-1265 SPINBRUSH MULTI ANGLE											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0227 SPINBRUSH MU LTIANGLE MED											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0723 SPINBRUSH PRO WHITE MFD											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0905 SPINBRUSH PRO WHITE SOFT											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0906 SPINBRUSH PRO WHITE REFILL											
49049-09	TOOTHPASTE/TOOTHBRUSH	049-09-0412 CREST KIDS 7CT SPIDERMAN SPINBRSH											
49 Total													
63063-08	HAND & BODY/BATH	063-08-0790 NAIR 6OZ ROLL ON W/BABY OIL											
63 Total													
83083-02	CAT SUPPLIES	083-02-0069 A&H LITTER 30LB MULTI-CAT LITTER											
83083-02	CAT SUPPLIES	083-02-0071 CAT LITTER 21LB SUPER SCOOP											
83083-02	CAT SUPPLIES	083-02-0296 SCENTED 30LB A&H CAT LITTER											
83083-02	CAT SUPPLIES	083-02-0297 A&H CAT LTTR 30LB -UNSCENTED											
83083-02	CAT SUPPLIES	083-02-0463 A&H LITTER MULTI CAT 21LB LITTER											
83083-02	CAT SUPPLIES	083-02-0541 ARM N HAMMER 14LB SCENTED LITTER											
83083-02	CAT SUPPLIES	083-02-0540 ARM N HAMMER PERF PLUS NTRL 10.5 LB											
83083-02	CAT SUPPLIES	083-02-0542 ARM N HAMMER NCF PERF PLS NTRL 16LB											
83083-02	CAT SUPPLIES	083-02-0021 LITTER ODOR 20 OZ A&H CAT DEOD TOP											
83083-05	PET LIFESTYLES	083-05-0057 ARM N HAMMER PET FRSH CRPT DEO 30OZ											
83083-05	PET LIFESTYLES	083-05-2320 ARM N HAMMER PET HAIR UPSTRY 10.5OZ											
83083-05	PET LIFESTYLES	083-05-0035 ARM N HAMMER PET ODR STN RWVR 32OZ											
83083-05	PET LIFESTYLES	083-05-0090 ARM N HAMMER 10CT PUPPY PADS											
83083-05	PET LIFESTYLES	083-05-0542 14 PUP PADS 14CT HOUSEBREAKING PAD											
83083-05	PET LIFESTYLES	083-05-0544 ARM N HAMMER 30CT PUPPY PADS											
83083-05	PET LIFESTYLES	083-05-0545 ARM N HAMMER 50CT PUPPY PADS											
83083-05	PET LIFESTYLES	083-05-0546 ARM N HAMMER 80CT PUPPY PADS											
83083-05	PET LIFESTYLES	083-05-1853 ARM N HAMMER 36CT ADULT DOG PAD											

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(JA at 259-60.) Both the Class (e.g., “Air Fresheners”) and Item (e.g., “Arm N Hammer 24OZ Fresh Power Mist”) are readily identifiable. (*Id.*) This particular document is 3 pages long, yet only part of the last page references condoms:

Weekly Sales and Inventory
Sales Unit: GT 0
Week: 2007-03 WK 3 DCOMP: 2007-03 WK 2

Target Weekly Report 03-24-07

Dept #	Class	Item	Sales		EOH+OW		Instock %	SKU Tracked	Avg Sell Price	Avg Sell Price %		Units per Store	Dollars per Store
			Units	Sales \$	Units	EOH+OW \$				Chg	WOS		
83 Total													
83D83-05 PET LIFESTYLES			Redacted										
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0006 TROJAN 3CT LUBRICATED CONDOM	79,750	\$ 768,748	489,027	\$ 4,763,212							
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0329 TROJAN 3CT NATURALAMB	3,429	\$ 6,468	20,675	\$ 39,076	91.6	1,502	1.89	0	6	2.3	\$ 4.31
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0665 TROJAN SUPRA 6CT LUBE	1,246	\$ 9,111	7,577	\$ 55,815	89.9	1,502	7.31	-0.4	6.1	0.8	\$ 6.07
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0153 TROJAN 24CT MAGNUM CONDOMS	1,719	\$ 11,026	10,152	\$ 65,153	92.5	1,502	6.41	0.2	5.9	1.1	\$ 7.34
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0154 TROJAN 24CT ULTRA THIN CONDOMS	883	\$ 8,785	10,970	\$ 109,590	96.2	1,498	9.95	-0.1	12.4	0.6	\$ 5.86
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0042 TROJAN 12CT HER PLEASURE LUBRICATED	1,053	\$ 10,505	11,787	\$ 117,752	95.9	1,498	9.98	0	11.2	0.7	\$ 7.01
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0083 TROJAN 12 CT MAGNUM TWISTER	1,413	\$ 8,542	7,170	\$ 44,011 N/A		0	6.05	-1.6	5.1		
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0090 TROJAN 12CT NATURALAMB CONDOMS	948	\$ 6,233	12,112	\$ 79,808	91.6	1,499	6.57	0	12.8	0.6	\$ 4.16
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0181 TROJAN 12CT RIBBED/LUBRICATED	24	\$ 562	240	\$ 5,733	100	2	23.43	-16.3	10	12.0	\$ 281.00
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0227 TROJAN 12CT SENSITIVE/LUBRICATED	2,383	\$ 13,310	9,954	\$ 55,643	92.9	1,502	5.59	0	4.2	1.6	\$ 8.86
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0217 TROJAN 12CT MAGNUM 12CT LUBRICATED LARGE	1,072	\$ 6,505	6,134	\$ 37,239 N/A		0	6.07	-1.3	5.7		
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0317 TROJAN 12CT TWISTED PLEASURE LUBRC	3,077	\$ 16,838	16,924	\$ 92,522	95.9	1,502	5.47	0.1	5.5	2.0	\$ 11.21
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0319 TROJAN ENZ 12CT LUBRICATED	1,406	\$ 7,909	8,453	\$ 47,703	92.5	1,502	5.63	0	6	0.93609	\$ 2,265.55
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0354 TROJAN ENZ 12CT SPERM/LUBRICATED	2,429	\$ 13,564	10,479	\$ 58,559	92.3	1,502	5.58	-0.2	4.3	1.6	\$ 9.03
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0361 TROJAN 12CT THIN SPERMICIDE W/LUB	2,080	\$ 11,720	8,999	\$ 50,796	89.7	1,502	5.63	0	4.3	1.4	\$ 7.80
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0363 TROJAN 12CT VERY THIN LUBRICATED	2,984	\$ 16,812	14,100	\$ 79,577	92.8	1,502	5.63	0	4.7	2.0	\$ 11.19
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0423 TROJAN 12CT HER PL WARM SENSATION	5,023	\$ 28,066	15,837	\$ 88,546	93.2	1,502	5.59	-0.1	3.2	3.3	\$ 18.89
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0738 TROJAN 12CT EXT PLEASURE LUBRICANT	1,335	\$ 8,785	8,490	\$ 55,928	93	1,499	6.68	0	6.4	0.9	\$ 5.86
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0840 TROJAN 12CT SHARED PLEASURE CONDOM	3	\$ 9	172	\$ 630 N/A		0	2.87 N/A		57.3		
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0841 TROJAN 12CT PLEASURE PACK CONDOM	1,865	\$ 10,505	9,319	\$ 52,591	93.1	1,502	5.63	0	5	1.2	\$ 6.99
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0842 TROJAN 12CT MAGNUM WARM SEN CONDOM	4,021	\$ 21,659	14,748	\$ 79,632	91.9	1,502	5.39	0.1	3.7	2.7	\$ 14.42
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0902 TROJAN ENZ 36CT SPERM/LUB	1,461	\$ 8,219	9,934	\$ 56,082	93.2	1,502	5.63	0.1	6.8	1.0	\$ 5.47
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0025 TROJAN ENZ 36CT LUBRICATED	934	\$ 12,375	8,823	\$ 88,036	95.5	1,502	13.25	0.2	7.1	0.8	\$ 8.24
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0312 TROJAN 36CT RIBBED/LUBRICATED	1,318	\$ 7,434	8,524	\$ 113,260	93.2	1,502	13.23	-0.2	6.5	0.9	\$ 14.17
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0864 TROJAN ULTRA 36CT SPERM/LUB CONDOM	1,608	\$ 21,278	8,445	\$ 112,326	91.7	1,502	13.23	0	5.3	1.1	\$ 14.17
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0036 FIRST RESPON RAPID RESULTS	1,327	\$ 18,673	8,069	\$ 113,868	92.3	1,502	14.07	0	6.1	0.9	\$ 12.43
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0186 FIRST RESPNS 3CT PREGNANCY TEST											
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0188 FIRST RESPON 2CT PREGNANCY TEST											
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0330 FIRST RESPNS 1 STEP OVULATION TEST											
245245-03	PLAN/PROTECT & FEM TREATMENTS	245-03-0095 ANSWER 3CT PREGNANCY TEST BONUS											
245 Total													
261	261-05 BAKING NEEDS	261-05-0334 ARM HAMMER BAKING SODA 8-OZ											
261	261-05 BAKING NEEDS	261-05-0335 ARM HAMMER BAKING SODA SHAKER 12											
261 Total													
Grand Total			790,319	\$ 3,316,788	2,579,393	\$ 12,990,794							

Redacted

Moreover, the only redacted column information in items 1 and 2 above concerns proprietary non-condom sales figures, while the identifying descriptions for such figures remain. (*Id.*) As demonstrated above in item 3, any information concerning condoms in this document is not redacted.

These examples also illustrate the vexing problem created by the Magistrate Judge’s failure to define the information sought. The Magistrate Judge ordered Church & Dwight to produce thousands of documents without any explanation as to whether they contain information that is reasonably relevant or irrelevant to the FTC’s inquiry. The *Texaco* standard, however, requires production only if the information is reasonably relevant to an administrative inquiry. 555 F.2d at 872. *Texaco does not* hold that irrelevant information becomes responsive merely

because it appears in a *document* containing relevant information. Yet, as discussed more fully below, that is the main reason why the Magistrate Judge concluded that all documents requested by the FTC were relevant. (JA at 311 (“[I]t is entirely *plausible* that information appearing in the same document with relevant information *concerning C&D’s male condoms would itself be relevant to the investigation.*” (emphasis added).)

The Magistrate Judge performed a flawed analysis because he did not identify and define the information sought, and, as a result of that failure, ordered the production of a vast quantity of information that has no bearing on the FTC’s investigation of condoms. *Texaco* requires a more exacting analysis by the district courts.

c. The Magistrate Judge applied an improperly invented standard of plausibility—not reasonable relevance—when enforcing the FTC’s subpoena.

The Magistrate Judge’s failures in performing the first two steps of *Texaco*’s analytical framework are compounded by his failure to apply *Texaco*’s reasonable relevance standard. (JA at 311.) As noted above, *Texaco* requires the court to evaluate whether the “information sought is reasonably relevant” to the scope of the inquiry. 555 F.2d at 872. Here, the Magistrate Judge never made a finding of *reasonable relevance* but instead applied a lesser standard of *plausibility* when ordering the production of non-condom information:

By the broad standards of Morton Salt and Texaco, it is entirely *plausible that information appearing in the same document with relevant information concerning C&D's male condoms would itself be relevant to the investigation*. The requested materials, including those portions that do not obviously concern male condoms, need only be reasonably relevant to the investigation, not to any potential outcome.

(JA at 311-12 (emphasis added, citation omitted).) While the Magistrate Judge's opinion includes the words "*Texaco*" and "reasonably relevant," the Magistrate Judge made no finding whatsoever of reasonable relevance of non-condom information to the FTC's inquiry, nor did he explain how such information could be reasonably relevant to the alleged monopolization of the condom market. *See Sealed Case*, 42 F.3d at 1420 (vacating an remanding an enforcement order because the court and the agency failed to explain how certain evidence was relevant to the investigation).

Instead, the Magistrate Judge merely suggested that it was "plausible" that the non-condom product information *could be* relevant to the investigation. (JA at 311.) The only identifiable basis for this suggestion is the Magistrate Judge's acknowledgment that the applicable standards are "broad" and that such "information appear[s] in the same document with relevant information concerning C&D's male condoms." (*Id.*)

The reasonable relevance standard may be broad, but it is not meaningless, and it does not support the Magistrate Judge's holding in this case. In *Texaco*, this Court demonstrated the link between the information sought and the scope of the

investigation, and illustrated the type of finding that a court should issue when evaluating relevance:

In order to assess whether proved reserve figures accurately reflect economic reality, reserve estimates with other labels [besides “proved”] may be important; the same or substantially similar underlying data may give rise to distinctly denominated reserve estimates. In other words, the FTC may fairly inquire whether the companies, through the use of an excessively restrictive approach, have excluded awareness of certain realistic and reliable estimates which are taken into account in making significant business decisions but which are not labeled ‘proved’ and are therefore not included in the [trade association] reports.

* * *

Thus, even if the FTC were investigating only the reporting of proved reserves (and we conclude that the inquiry is not so narrow), the analysis would certainly not be limited to whether the gas producers have accurately calculated their proved reserves. It is possible that such calculations are entirely in accord with the [trade association]’s definition of proved reserves, but that, in light of other estimates considered significant by the producers, this definition has an anticompetitive effect.

* * *

It is thus clear that the development and reporting of estimates at various stages of the investment and development process is reasonably relevant to the FTC’s purpose.

555 F.2d at 875-76. Thus, *Texaco* demonstrates that a district court must conduct an independent review of the information sought and make a particular finding as to how that information is reasonably relevant to the “scope of the investigation, as set forth in the Commission’s resolution.” *Id.* at 874.

Here, the Magistrate Judge's cursory discussion stands in stark contrast to the careful analysis applied in *Texaco*. Whereas the *Texaco* court explained that discovery into unproved reserves was relevant to establish whether the producer's proved reserves actually represented a fair estimate of untapped natural gas, 555 F.2d at 875, the Magistrate Judge here offered no explanation for how information about non-condom products would aid the FTC's investigation of condoms, (JA at 311-12). Whereas the *Texaco* court explained that discovery into the relationship between proved and unproved natural gas reserves was necessary to gain a complete picture of the natural gas market, 555 F.2d at 875, the Magistrate Judge here offered no explanation for why information on toothpaste, cat litter, baking soda, or even bulk chemicals, could be reasonably relevant to condoms, a product that is wholly unrelated to Church & Dwight's other product lines and that is sold in a completely different market, (JA at 311-12).

Whereas the *Texaco* court held that "any estimate of reserves ... *is relevant* to a company's practices in estimating and reporting reserves," 555 F.2d at 876-77, the Magistrate Judge here merely held that is "plausible" that a relationship exists between condoms and other products simply because the two "appear[] in the same document," (JA at 311). First, *plausibility* is not the same as *relevance*,⁷ and it is

⁷ Indeed, Merriam-Webster defines "plausibility" as something that is "superficially" fair or reasonable "but often specious[.]" See <http://www.merriam-webster.com/dictionary/plausibly>.

the latter—not the former—that *Texaco* requires. 555 F.2d at 872. Second, nowhere does *Texaco* hold that irrelevant information becomes relevant merely because it is found in the same document as relevant information. For these reasons, the Magistrate Judge’s opinion should not stand.

In sum, the Magistrate Judge failed to offer a meaningful analysis of the issues raised by FTC’s enforcement petition in accordance with *Texaco*’s three-part analytical framework. Foremost, the Magistrate Judge never interpreted the FTC’s Resolution to define the scope of permissible inquiry, nor did he identify the extent of the information sought by the FTC. Most significantly, the Magistrate Judge applied an improper, less rigorous standard of plausibility rather than *Texaco*’s standard of reasonable relevance. Accordingly, this Court should reverse and vacate the Order of the Magistrate Judge granting the FTC’s enforcement petition.

B. Information about non-condom products is not reasonably relevant to the FTC investigation.

The Magistrate Judge’s flawed analysis resulted in prejudice to Church & Dwight because the company was forced to produce thousands of documents containing information that is not reasonably relevant to the FTC’s investigation. Assuming, for the sake of argument, that the Magistrate Judge’s analysis did not deviate from the *Texaco* framework, the enforcement order should nevertheless be

reversed because the information sought by the FTC is not reasonably relevant to its investigation.

In assessing whether a subpoena is reasonably relevant to an investigation, the court must be satisfied that a nexus exists between the requested information and the investigatory purpose. The agency may subpoena only information that is “adequate, *but not excessive*, for the purposes of the relevant inquiry.” *Arthur Young & Co.*, 584 F.2d at 1030 (emphasis added) (quoting *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946) (Rutledge, J.)). When enforcing a petition, the district court must review that information and articulate the reasons underlying a finding of relevancy on the record. *See McCready v. Nicholson*, 465 F.3d 1, 15 (D.C. Cir. 2006) (Griffith, J.) (“[W]hen ‘we review a district court’s decision ... for an abuse of discretion, it is imperative that a district court articulate its reasons’ for acting as it did. (citing *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1410 (D.C. Cir. 1996) (Sentelle, J.))). In essence, the court must perform an independent review and explain why the materials requested by the agency are reasonably relevant to its investigation under *Texaco*.

In this case, there is no nexus between non-condom information and the FTC investigation. The stated purpose of the Resolution is to determine whether Church & Dwight attempted to monopolize “*the distribution or sale of condoms in the United States ... [by] conditioning discounts or rebates to retailers on the*

percentage of shelf or display space dedicated to *Trojan brand condoms and other products....*” (JA at 30 (emphasis added).)

On its face, the plain language of the Resolution issued by the Commission shows that the investigation targets the “*distribution or sale of condoms* [generally] in the United States.” (JA at 30 (emphasis added).) The Resolution says nothing about Church & Dwight’s sales practices with respect to toothpaste, cat litter, baking soda, laundry detergents, cleaning products, and bulk chemicals, among a vast number of other products, that bear no conceptual relationship to condoms. While the final clause of the Resolution refers to “other products,” that language must be viewed in the context of the Resolution as a whole. Justice Thomas reiterated this fundamental tenet of interpretation in a recent concurring opinion:

Statutory interpretation focuses on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1754 (2011) (Thomas, J., concurring) (internal quotations and citations omitted).

Here, the first clause of the Resolution focuses on the *condom* market, the second clause addresses retail shelf space devoted to *condoms*, and that same clause identifies *Trojan condoms* as the primary product at issue. (JA at 30.)

Under these circumstances, the later reference to “other products” can be interpreted logically only as an extension of the multiple condom references that precede it. (*Id.*) The only reasonable interpretation of this phrase is to refer to specific non-Trojan brand condoms “sold or distributed by Church & Dwight” such as Naturalamb and, formerly, Elexa. (*Id.*) It is unreasonable to construe that language as a reference to products such as cat litter, baking soda, and bulk chemicals, which appear nowhere in the Resolution, are not marketed alongside condoms, and have no bearing whatsoever on the condom market in the United States. (JA 328.)

In fact, the FTC Staff has acknowledged that, “[a]ccording to the Resolution, the Commission seeks to determine whether [Church & Dwight] has engaged in unfair methods of competition *with respect to its Trojan brand condoms.*” (JA at 156 (emphasis added).) After months of costly litigation, the FTC Staff has never explained why information about any specific non-condom product has any bearing on the methods Church & Dwight uses to distribute Trojan brand condoms and related condom products. This is hardly surprising because Church & Dwight does not—and has never—packaged condoms and non-condom products together, promoted them through a joint-marketing campaign, or conditioned a retailer’s planogram rebates upon its purchase of non-condom products. Indeed, condoms represent a discrete product line that, due to the very nature of the product cannot

easily be promoted alongside the other products manufactured and distributed by Church & Dwight. (JA at 232.)

By failing to interpret the Resolution, the Magistrate Judge simply adopted the FTC Staff's reading of the Resolution, without any accompanying analysis, which is improper because it implicates every single product sold by Church & Dwight. This reading severs the "other products" language from its context and divorces it from the heart of the investigation—articulated only forty words earlier—concerning "the distribution or sale of condoms in the United States." (JA at 30.) Under this interpretation, it is difficult to imagine any limit on the scope of the investigation. Such an interpretation essentially renders the reasonable relevance standard meaningless because it allows an agency to obtain information about any product manufactured by a company merely because the products share a common distributor. The reasonable relevance standard set forth in *Texaco* requires a more significant link. Under these circumstances, information about other non-condom products is not reasonably relevant to the FTC's stated administrative inquiry, and the Magistrate Judge's Order to the contrary should be reversed and vacated.⁸

⁸ Church & Dwight also notes that the FTC staff could, at any time, seek from the Commissioners a new Resolution if it believes that other products are specifically covered by its investigation into "the sale or distribution of condoms in the United States." (JA at 30.) The Commissioners, of course, would first need to be satisfied that, under the circumstances, issuance of a new Resolution covering

VII. CONCLUSION

The Magistrate Judge failed to discharge his duty under *Texaco* to ensure that the subpoenaed materials were reasonably relevant to the FTC's investigation. For all of the reasons set forth above, Church & Dwight respectfully requests that this Court reverse and vacate the enforcement Order giving rise to this appeal. In addition, this Court should direct the FTC to return the already identified documents at issue to Church & Dwight. Then, the documents can be re-produced to the FTC with proprietary non-condom information redacted.

non-condom products was reasonably relevant to an investigation of condoms and otherwise justified.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 8,859 words as determined by the word-counting feature of Microsoft Word 2003.

/s/ Carl W. Hittinger

Carl W. Hittinger

Dated: June 1, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 1st day of June, 2011, served a copy of the foregoing documents electronically through the Court's CM/ECF system on all registered counsel.

/s/ Carl W. Hittinger

Carl W. Hittinger