



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 8, 2010

VIA E-MAIL AND EXPRESS MAIL

Carl W. Hittinger, Esq.
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RE: *Petition to Quash, Limit or Stay Subpoenas Ad Testificandum Directed to Employees of Church & Dwight Co., Inc. (FTC File No. 091-0037)*

Dear Mr. Hittinger:

On November 5, 2010, the Federal Trade Commission received your petition to quash, limit or stay four subpoenas *ad testificandum* issued by the Commission on October 15, 2010, and directed to employees of your client, Church & Dwight Co., Inc. The Commission issued the subpoenas in connection with its investigation of whether Church & Dwight has engaged in unfair methods of competition in the distribution and sale of condoms or other products. This letter advises you of the Commission's disposition of the petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4).

The petition is denied. The petition advances the same arguments made by Church & Dwight (1) in petitions filed with the Commission in November and December 2009 to quash or limit a subpoena *duces tecum* and a civil investigative demand ("CID"); and (2) in opposition to the Commission's petition, filed in February 2010 in the United States District Court for the District of Columbia, to enforce the subpoena *duces tecum* and CID. In those proceedings, as in the current petition, Church & Dwight argued first that information relating to the marketing of condoms in Canada is not reasonably relevant to the Commission's investigation. In support of this argument, Church & Dwight has focused on the language of the Commission resolution authorizing the use of compulsory process, which specifies the investigation's focus as the

potential monopolization of the “distribution or sale of condoms *in the United States.*” Pet. at 8 (emphasis added).¹

Second, Church and Dwight has argued that information relating to products other than condoms is not reasonably relevant to the Commission’s investigation. Church & Dwight again maintains that the Commission’s authorizing resolution limits the investigation, arguing that its clear focus is on condom products and its reference to “other products” is directed to other non-Trojan brand condom products. Pet. at 11.

Both the Commission and the federal district court have rejected these arguments. The district court held that information relating to Canadian marketing is sufficiently relevant to the FTC’s investigation. *FTC v. Church & Dwight Co., Inc.*, No. 10-mc-149, slip op. at 3 (D.D.C. Oct. 29, 2010). The court found Church & Dwight’s reading of the Commission’s resolution “particularly narrow” and determined that activities in Canada could “shed light on the [FTC’s] investigation.” *Id.* As the court observed, “[i]t cannot be true that in a globalized economy a federal agency may never investigate the activities of [a] foreign subsidiary of an American company merely because the agency’s original grant of authority is the investigation of economic activity that has had an impact on interstate commerce within the United States.” *Id.* at 4.

The district court similarly held that information relating to products other than condoms is sufficiently relevant to the FTC’s investigation, particularly given the standard for relevancy applicable to an FTC investigation. *Id.* at 9-10. The court noted that the Commission resolution explicitly references “other products distributed or sold by Church & Dwight” and rejected as overly narrow Church & Dwight’s reading of this reference as “clearly intended” to address only other non-Trojan brand condom products. *Id.*

The current petition presents no new arguments. Indeed, the petition states that “the basic issues implicated by the instant subpoenas and [the federal district court] Enforcement Action are identical.” Pet. at 14. There is thus no reason to depart from the prior rulings of the district court and the Commission.

Perhaps recognizing this, the petition asks in the alternative that the Commission stay the investigational hearings until all appeals of the district court’s ruling are exhausted. Pet. at 2, 14-15. The petition does not, however, articulate any cognizable harm to Church & Dwight or its

¹ In full, the Commission resolution specifies the scope of the investigation as “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.”

employees from holding the hearings as scheduled. The petition states that Church & Dwight's counsel "will instruct the witnesses to not answer questions" on the disputed topics, and thus the witnesses may have to appear again later if Church & Dwight loses its appeal of the district court's ruling. *Id.* at 14-15. An instruction not to answer would, however, be improper in light of today's ruling. It would also violate applicable regulations. *See* 16 C.F.R. § 2.9(b)(2) (allowing for instructions not to answer on privilege grounds, but providing only for brief objections on scope grounds). The theoretical problem that Church & Dwight raises would thus be of its own making. On the other hand, staying the investigational hearings pending Church & Dwight's appeal would delay the Commission's investigation for a substantial period. Such a delay is not warranted, given the potential ongoing harm to consumers from Church & Dwight's conduct.

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Church & Dwight's Petition to Quash, Limit or Stay the Subpoenas *Ad Testificandum* be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT Adrian Huns and Kelly Zhan appear for investigational hearings on January 13, 2011, and that James Craigie and Paul Siracusa appear for investigational hearings on January 14, 2011, as required by the Commission's Subpoenas *Ad Testificandum*; and

IT IS FURTHER ORDERED THAT counsel shall not instruct any witness not to answer a question posed at the investigational hearings on the grounds that the question relates to the marketing of condoms in Canada or to products other than condoms.

Church & Dwight has the right to request review of this ruling by the full Commission. *See* 16 C.F.R. § 2.7(f). Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.² *Id.* The timely filing of a request for review of this ruling by the full Commission shall not stay the dates for the investigational hearings confirmed by this ruling. *Id.*

By direction of the Commission.

Donald S. Clark
Secretary

² This ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by express mail.