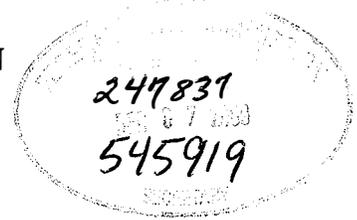


ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

CHURCH & DWIGHT, INC.

FTC FILE 091-0037

To: Donald S. Clark
Secretary of Commission

REQUEST FOR LEAVE TO FILE OUT OF TIME

Church & Dwight Co., Inc. respectfully requests leave of the Commission to file its attached petition to limit or quash the subpoena *duces tecum* out of time. See Proposed Petition to Limit or Quash (Exhibit 1). Leave is warranted because on October 30, 2009, the Commission staff unilaterally ended a good faith agreement between the parties regarding the scope of the subpoena. Before this date, Church & Dwight reasonably believed that the agreement could lead to an amicable resolution of its concerns over the breadth of the FTC's requests for information and the relevance of the documents sought, and would have obviated the necessity to file a petition to limit or quash in the first place.

On June 29, 2009, the FTC formally requested information about Church & Dwight's sale and marketing of male condoms in the United States. Shortly thereafter, counsel for Church & Dwight and the Commission staff began to "meet and confer" about the scope of the subpoena. These discussions addressed, *inter alia*, Church & Dwight's request for permission to redact any confidential and proprietary information regarding products *other than* male condoms in otherwise responsive documents. Based on these discussions, Church & Dwight reasonably

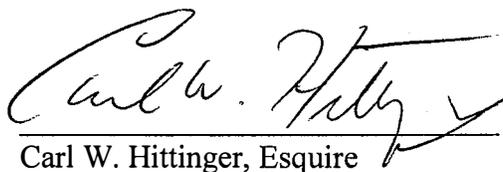
believed that it was operating under a tentative agreement with the Commission staff that redactions of specific documents or categories of documents would be addressed on a document-by-document basis. See October 30, 2009 e-mail from C. Hittinger to S. Kundig and L. Badger (Exhibit 2).

Specifically, the tentative agreement arose after Church & Dwight produced discovery documents from its pending parallel civil litigation with Mayer Laboratories (“Mayer Labs Documents”) addressing the same antitrust issues raised in the FTC’s investigation about male condoms. Aiming to produce these documents as quickly as possible, Church & Dwight informed the Commission staff that it would be producing the Mayer Labs Documents in the same redacted form previously provided to Mayer Labs in the related litigation. The Commission staff, after receiving the Mayer Labs Documents, subsequently raised objections to the redactions in a letter dated July 28, 2009. See July 28, 2009 letter from S. Kundig to C. Hittinger and L. Esposito (Exhibit 3).

After receiving the letter, Church & Dwight again explained to the Commission staff that the documents were produced in redacted form solely in the interest of time, but then agreed, in good faith, to reproduce unredacted versions of the Mayer Labs documents because they did not contain sensitive information. Nevertheless, Church & Dwight, in making the unredacted production, stressed that it was not waiving its right to redact documents in the future. Although the Commission staff asserted that Church & Dwight did not have a right to redact documents, both the Commission staff and Church & Dwight agreed that they would revisit the issue and engage in further discussions at a later date if, during the production, Church & Dwight located documents that it believed warranted redactions.

As Church & Dwight progressed through its document production, it came across certain documents requiring redactions because they contained proprietary information that was both irrelevant (i.e., related to products other than condoms) and highly confidential. The Commission staff, however, continued to object to any redactions. On October 30, 2009, the Commission staff effectively ended the parties' good faith arrangement to address redaction issues on a document-by-document basis in a letter to Church & Dwight's counsel. See October 30, 2009 letter from S. Kundig to L. Esposito and C. Hittinger (Exhibit 4). The Commission staff's recent blanket rejection of any and all redactions moving forward has necessitated the filing of this Petition with the Commission. The FTC staff also refused to agree to allow Church & Dwight to file the instant petition out of time, in a subsequent conference call.

As it is now obvious that the issue of redaction cannot be resolved through additional good faith negotiations with the Commission staff, Church & Dwight respectfully requests that the Secretary of Commission accept this filing out of time because, at all relevant times, Church & Dwight has acted in good faith, and further, because appropriate grounds for filing a petition to quash or limit the subpoena did not arise before at least October 30, 2009.



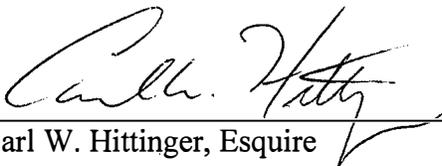
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Attorneys for Petitioner Church & Dwight, Inc.

December 4, 2009

CERTIFICATION OF GOOD FAITH

The undersigned counsel for petitioner Church & Dwight Co., Inc. herein certifies that he has tried in good faith to resolve with the Commission staff the issues raised in this Request for Leave to File Out of Time. However, these efforts have proven unsuccessful and have necessitated the filing of the instant Request.


Carl W. Hittinger, Esquire

Dated: December 4, 2009

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

CHURCH & DWIGHT, INC.

FTC FILE 091-0037

PETITION TO QUASH OR LIMIT SUBPOENA *DUCES TECUM*
ISSUED TO CHURCH & DWIGHT, INC. ON JUNE 29, 2009

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Attorneys for Petitioner Church & Dwight, Inc.

December 4, 2009

INTRODUCTION

Pursuant to 16 C.F.R. § 2.7(d), Church & Dwight Co., Inc. hereby petitions to limit or quash the subpoena *duces tecum* served on June 29, 2009 (attached hereto as Exhibit A). More specifically, Church & Dwight petitions to limit the subpoena to the extent that it requires Church & Dwight to produce confidential information on products that have *absolutely no relevance* to the stated purpose of the FTC's investigation, which is limited to male condoms. Indeed, requiring Church & Dwight to produce confidential information about numerous irrelevant products it also manufactures will harm Church & Dwight's proprietary interests, if such information would somehow make it into the public domain. This is a significant and valid concern, considering that details of the FTC's non-public investigation have already been made public through publications such as the "FTC: WATCH." Therefore, in order to protect this competitively sensitive information, Church & Dwight seeks permission to redact from discoverable documents any confidential information relating to products *other than* male condoms.

BACKGROUND

On June 29, 2009, the FTC issued a subpoena *duces tecum* and a CID to Church & Dwight in connection with its investigation under Section 2 of the Sherman Act and Section 5 of the FTC Act regarding Church & Dwight's marketing practices of its male condoms through retail chains in the United States of America. The accompanying Resolution Authorizing Use of Compulsory Process clearly states that the "Nature and Scope of Investigation" is:

"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.” (Exhibit B) (*emphasis added*).

In turn, the FTC staff’s subsequent CID and subpoena define the “Relevant Product” as only “male latex condoms” and “male non-latex condoms.” See Exhibit A at 8. However, related instruction R(1) in the subpoena state:

“All Documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form:

(1) shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company’s files and shall not be shuffled or otherwise rearranged.”

(Exhibit A at 10) (*emphasis added*)

In order to begin producing documents in good faith, and without delay, Church & Dwight first produced documents exchanged in a parallel pending civil litigation with Mayer Laboratories (“Mayer Labs Documents”) addressing the same antitrust issues related to male condoms raised in the FTC’s investigation.¹ Aiming to produce these documents as quickly as possible, Church & Dwight informed the Commission staff that it would produce the Mayer Labs Documents in the same redacted form provided to Mayer Labs in the related litigation. The Commission staff, after receiving the Mayer Labs Documents, raised objections to the redactions in a letter dated July 28, 2009. (Exhibit C)

¹ This litigation is currently pending in the United States District Court for the District of New Jersey. *Church & Dwight, Inc. v. Mayer Laboratories, Inc.*, Civil Action No. 3:08-cv-05743-FLW-TJB.

After receiving the letter, Church & Dwight again explained to the Commission staff that the documents were produced in redacted form solely in the interest of time, but then agreed, in good faith, to reproduce unredacted versions of the Mayer Labs Documents because they did not contain sensitive information. Nevertheless, Church & Dwight, in making the unredacted production, stressed that it was not waiving its right to redact documents in the future. Although the Commission staff asserted that Church & Dwight did not have a right to redact documents, both the Commission staff and Church & Dwight tentatively agreed, without waiver, that they would revisit the issue and engage in discussions at a later date if, during further document production, Church & Dwight located documents that it believed warranted redactions.

As Church & Dwight progressed through its document production, it came across certain documents warranting redactions because the documents contained proprietary information that was both irrelevant (*i.e.*, related to products other than condoms) and highly confidential. As a result, Church & Dwight raised the redaction issue again with the Commission staff.² On November 17, 2009, Church & Dwight provided corporate strategic plans in redacted form with the agreement without waiver of the Commission staff. The Commission staff, however, objected to the redactions, citing the subpoena instructions. Moreover, on October 30, 2009, the Commission staff effectively ended the parties' good faith arrangement to address redaction issues on a document-by-document basis in a letter to Church & Dwight's counsel. *See* October 30, 2009 Letter from S. Kundig to L. Esposito and C. Hittinger (Exhibit D). The Commission staff's recent blanket rejection of any and all redactions moving forward has necessitated the filing of this Petition with the Commission.

² To date, Church & Dwight has produced over 287,000 pages of unredacted documents to the FTC staff.

ARGUMENT

I. Information Relating To Products Other Than Male Condoms Is Not Relevant To The FTC's Investigation

The test for the relevancy of an administrative subpoena is “whether the information sought is ‘reasonably relevant’ to the agency’s inquiry.” *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979) (Leventhal, J.). Moreover, “the relevancy of an investigative subpoena is measured against the ‘general purposes of (the agency’s) investigation[.]’” *Id.* Indeed, “[w]hen a conflict exists in the parties’ understanding of the purpose of an agency investigation, *the language of the agency’s resolution must govern.*” *FTC v. Invention Submission Corp.*, No. 89-272, 1991 U.S. Dist. LEXIS 5523, at *8 (D.D.C. Feb. 13, 1991) (Lamberth, J.) (*emphasis added*). As Chief Judge Bazelon held in *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977), “[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.” (*emphasis added*).

Here, information on the various other products that Church & Dwight manufactures³ other than male condoms has absolutely no relation to the stated purpose of the Commission’s investigation. The general purpose of the investigation, as set forth in the Resolution Authorizing Use of Compulsory Process from the four Commissioners and signed by the Secretary of the Commission (as well as in the subpoena and the CID), clearly states that the purpose is to investigate Church & Dwight’s marketing practices with regard to “condoms.” There is only one relevant product in this investigation – condoms. Any other product category

³ For example, Church & Dwight manufactures and distributes various products under the Arm & Hammer label from detergents to cat litter to toothpaste, and also manufactures other well-known brand name products such as Nair, First Response, OxiClean, Close-Up, Aim and Pepsodent toothpastes, Brillo and Orange Glo. Church & Dwight also sells various specialty chemicals.

is outside of the scope of the investigation as specifically set forth in the Commissioner's Resolution, as well as the subpoena and CID, and is, therefore, legally irrelevant. Nor has the Commission staff argued otherwise.

One widely accepted method of excising irrelevant information (including other products) from otherwise responsive documents is through redaction. *See Spano v. Boeing Co.*, No. 3:06-cv-00743-DRH-DGW, 2008 U.S. Dist. LEXIS 31306, at * 7 (S.D. Ill. Apr. 16, 2008) (Wilkerson, J.). Indeed, federal courts across the country have found "redaction appropriate where the information redacted was not relevant to the issues in the case." *Id.* *See Talarigo v. Precision Airmotive Corp.*, No. 06-2885, 2007 U.S. Dist. LEXIS 79444, *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*, No. C08-5513RJB, 2009 U.S. Dist. LEXIS 58171, * 17 (W.D. Wash. June 18, 2009) (Bryan, J.) (permitting plaintiff to produce redacted versions of discoverable documents to the extent they contained irrelevant personal information); *see also Abbott v. Lockheed Martin Corp.*, No. 06-cv-0701, 2009 U.S. Dist. LEXIS 15329, *7 (S.D. Ill Feb. 27, 2009) (Wilkerson, J.) (allowing 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").

For instance, in *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439 (S.D.N.Y. 1990) (Francis, J.), the district court held that it was proper for a defendant to redact from its produced documents information relating to any products other than the one at issue. There, plaintiff sued an aircraft manufacturer following a crash that was allegedly caused by water in the aircraft's defectively designed fuel system. *Id.* at 440. During discovery, the defendant manufacturer

produced a report entitled “Aircraft Fuel Water Tolerance.” *Id.* at 441. The manufacturer redacted from the produced report any section relating to fuel tanks other than the tank at issue.

Id. While plaintiff objected to the redactions, the manufacturer asserted that the redactions were proper because information about other tanks was irrelevant to the plaintiff’s design defect claim.

Id. In upholding the redactions, the court stated that the plaintiff failed to make a threshold showing of relevance, and thus, the defendant was “ [not] obligated to open to discovery a variety of designs not directly at issue in the litigation.” *Id.* at 443.

Consistent with *Fine*, Church & Dwight should not be required to “open discovery” to a broad array of products other than male condoms, which is the *only* product specifically at issue in the FTC’s investigation. In other words, because information relating to any product other than male condoms is patently irrelevant to the stated scope and general purpose of this investigation, Church & Dwight should be permitted to redact discoverable documents to the extent that they contain confidential information concerning those other products.

Church & Dwight is well aware of the recent controversy presented in *FTC v. Boehringer Ingelheim Pharmaceutical, Inc.*, concerning a party’s ability to redact based on relevancy during an FTC investigation. However, the extreme behavior presented in *Boehringer* is clearly distinguishable from the present case for several key reasons. See Petition of the FTC for an Order Enforcing Subpoena *Duces Tecum* in *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 1:09-MC-00564 (D.D.C.) (2009). Specifically, the defendant in *Boehringer* failed to avail itself of the procedures set forth in Rule 2.7(d) for petitioning to limit or quash the subpoena. Instead, the defendants there appear to have simply produced redacted documents without first invoking the proper procedures to make such redactions. Here, Church & Dwight is fully availing itself of

the FTC's established procedures for modifying subpoenas. By doing so, it is also making a good faith attempt to legally protect its proprietary interests in the information it is seeking to redact.

Moreover, unlike the defendant's redactions in *Boehringer*, Church & Dwight's redactions do not render the produced documents unintelligible. According to the FTC in *Boehringer*, the defendant "made substantial redactions" to the documents, which "made the documents impossible to understand." *Id.* at ¶ 15. Here, the Commission staff is presented with no such issue. Church & Dwight's redactions have and will only delete what is necessary to protect Church & Dwight's interests in the confidential information relating to its other myriad of products. Additionally, the manner in which the redactions are and will be implemented maintain the integrity of the documents and, to date, have been done in such a way that makes clear *exactly* what type of information has been removed and *exactly* what product the redacted information relates to. *See* examples of redacted documents that have been produced to date in the investigation. (Exhibit E).

Finally, unlike the defendants in *Boehringer*, Church & Dwight is not seeking permission to redact information in an attempt to conceal relevant information from the Commission staff. While the defendant in *Boehringer* allegedly redacted information that was "highly relevant to the Commission's investigation . . . including material directly relating to . . . the focus of the Commission's investigation[,]" FTC Petition in *Boehringer* matter at ¶ 16, Church & Dwight is only seeking to redact confidential information relating to products other than the "Relevant Product," *i.e.*, products other than male latex and non-latex condoms.

Simply put, allowing the redactions sought by Church & Dwight in this instance will not weaken the impact and significance of the *Boehringer* decision. Rather, it will actually present an example of how necessary and proper redactions can be carried out in a good faith manner that protects the fundamental interests on both sides of an FTC investigation.

II. The Present Non-Public Nature of the FTC's Investigation Does Not Warrant a Blanket Rejection of Church & Dwight's Proposed Good Faith Redaction of Competitively Sensitive Information

The Commission staff should not be permitted to make a blanket rejection of Church & Dwight's efforts to redact *only* confidential and irrelevant information relating to other products by relying on the present designated non-public nature of its investigation. Despite the best efforts of the FTC staff, details of the investigation have twice somehow surfaced in the public domain. Specifically, on May 4, 2009, the publication FTC: WATCH featured, on its front page, a story titled "Condom category captain case." See FTC: WATCH, Washington Regulatory Reporting Associates, dated May 4, 2009 (Exhibit F). The story explained that the FTC "is investigating possible restraint of trade in the retail sale of condoms manufactured by Church & Dwight Co. under the Trojan brand name, FTC: WATCH has learned. Specifically, the investigation is into retailers' use of so-called 'category captains' to allocate their shelf space to certain products." *Id.*

Even more specific details of the investigation later surfaced on October 26, 2009 when the FTC: WATCH featured, again on its front page, the story "Aye, aye, Captain?" See FTC: WATCH, Washington Regulatory Reporting Associates, dated October 26, 2009 (Exhibit G). The article stated, among other things:

The FTC has now sent “broad” subpoenas to major retailers in its investigation of the use of ‘category captains’ in the distribution and sale of condoms.

The primary focus of the investigation is on the dominant U.S. condom manufacturer, Church & Dwight Co., which distributes the Trojan brand.

* * *

According to a source familiar with the condom investigation, there are at least three category captain practices which, if proven, could violate either the Sherman Act or the FTC Act by distorting the free market.

* * *

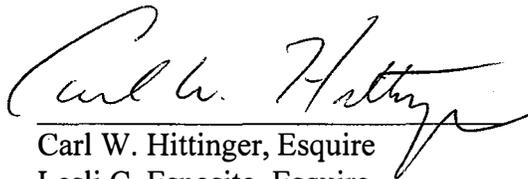
The FTC investigation is being led by the agency’s Western Regional Office in San Francisco.

Id. (internal citation omitted) (*emphasis added*).

Again, despite the best efforts of the FTC staff, confidential aspects of the investigation are now unfortunately in the public record. These reasons *alone* are strong enough to warrant Church & Dwight’s redaction of sensitive information regarding completely irrelevant products. Indeed, the documents being produced in this case include strategic marketing plans, sales and pricing information, and other highly sensitive data that, if publicly disseminated, will irreparably harm the company’s commercial interests. This should not be allowed to occur. In order to protect these interests, which are fundamental and essential to its continued viability as a profitable and competitive enterprise, Church & Dwight should be permitted to redact confidential information regarding irrelevant products in a good faith manner, described above, that will not impede the stated general purpose of the FTC’s investigation.

CONCLUSION

For the foregoing reasons, the subpoena *duces tecum*, issued on June 29, 2009, in connection with the FTC's investigation regarding Church & Dwight's marketing practices in the United States should be quashed or limited to the extent it requires Church & Dwight to produce confidential information regarding non-condom products not included in the "Relevant Product." Additionally, Church & Dwight seeks permission to redact discoverable documents only to the extent the documents contain confidential and proprietary information concerning products other than male condoms.



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Attorneys for Petitioner Church & Dwight, Inc.

December 4, 2009

CERTIFICATION OF GOOD FAITH

The undersigned counsel for petitioner Church & Dwight Co., Inc. herein certifies that he has tried on several occasions, and in good faith, to resolve with the Commission staff the issues raised in this Petition to Quash or Limit Subpoena *Duces Tecum*, dated June 29, 2009. However, these efforts have proven unsuccessful and have necessitated the filing of the instant Petition.



Carl W. Hittinger, Esquire

Dated: December 4, 2009



SUBPOENA DUCES TECUM

1. TO

Church & Dwight Co. Inc.
Carl W. Hittinger, Esq.
DLA Piper
One Liberty Place
1650 Market St., Ste 4900
Philadelphia, PA 19103-7300

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described in Item 6.

3. LOCATION OF HEARING

Federal Trade Commission
Suite 570
901 Market St.
San Francisco, CA 94103

4. YOUR APPEARANCE WILL BE BEFORE

Sylvia Kundig, Esq.

5. DATE AND TIME OF HEARING OR DEPOSITION

July 30, 2009

6. SUBJECT OF INVESTIGATION

FTC File 091-0037 Church & Dwight Co., Inc.

Church & Dwight's marketing practices through retail chains in the United States of America.

See attached Commission Resolution.

7. RECORDS YOU MUST BRING WITH YOU

See attached definitions, instructions and specifications.

8. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Dean Graybill, Esq. (Custodian)
Sylvia Kundig, Esq. (Deputy Custodian)

9. COMMISSION COUNSEL

Sylvia Kundig, Esq. (415)848-5188

DATE ISSUED

06/29/09

COMMISSIONER'S SIGNATURE

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 9.

TRAVEL EXPENSES

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

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

by registered mail.

by leaving copy at principal office or place of business, to wit:

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

**SUBPOENA DUCES TECUM
ISSUED TO CHURCH & DWIGHT CO., INC.**

Unless modified by agreement with the staff of the Federal Trade Commission, each specification of this Request requires a complete search of "the Company" as defined in Paragraph "A" of the Definitions and Instructions which appear after the following Specifications. If the Company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss such questions and possible modifications with the Commission representatives identified on the last page of this Request. All modifications to this Request must be agreed to in writing by those representatives. You may find it useful to provide the response to Specification 1 of this Request promptly and discuss limiting the required search with the Commission's representatives before you begin your search.

SPECIFICATIONS

1. Submit one copy of each organization chart and personnel directory in effect since January 1, 2001, for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product.
2. For each stock keeping unit ("SKU"), uniform product code ("UPC"), and any other applicable unique identification number of each Relevant Product, submit (a) a sample of the product; and (b) one copy of all selling aids and promotional materials.
3. Submit all Documents relating to the Company's or any other Person's plans relating to any Relevant Product, including, but not limited to, business plans, short term and long range strategies and objectives; budgets and financial projections; plans relating to distribution through different Channels, expansion or retrenchment plans; research and development efforts; and presentations to management committees, executive committees, and boards of directors. For regularly prepared budgets and financial projections, the Company need only submit one copy of final year-end documents and cumulative year to date documents for the current year.
4. Submit all studies, forecasts, surveys, and analyses, e.g., SWOT analyses, relating to competition in the distribution or sale of any Relevant Product, including, but not limited to, documents relating to market share, private label, Channel, access to display space, or relative strengths or weaknesses of the Company or any of its competitors.
5. Submit all Documents since January 1, 2001, relating to allegations by any Person that any Company that manufactures, distributes, or sells any Relevant Product is acting in an unfair or anticompetitive fashion, including, but not limited to, customer and competitor complaints, threatened, pending, or completed lawsuits, and federal and state investigations.

6. Submit all survey, scan, or machine data used in any way to evaluate, market, distribute, or sell any Relevant Product.

All data provided in response to this Specification must be submitted in an electronic format agreed upon by a Commission representative in writing prior to the submission in order to assure that the FTC has the capability of reading and using the data.

7. For each of the Company's customers for each Relevant Product in each Relevant Area, submit a copy of each purchase agreement, pricing agreement, Planogram Program agreement, and contract between the Company and the customer.
8. Submit a copy of each purchase agreement, pricing agreement, and contract between the Company and any Person who manufactures or packages a Relevant Product for the Company.
9. Submit all Documents relating to the Planogram Program, including, but not limited to:
 - a. all Documents relating to the purpose, development, and adoption of the Planogram Program, including all Carter-Wallace Documents, regardless of date;
 - b. all Documents relating to the structure of the Planogram Program, including, but not limited to, the timing of rebate payments, the payment of rebates based on dedicated display space, and the similarities or differences between the Planogram Program and other types of quantity or loyalty discounts;
 - c. all Documents relating to the effects of the Planogram Program on the Company's, or any other Person's market share, shelf space presence or overall competitive position regarding any Relevant Product;
 - d. all Documents relating to the effects of the Planogram Program on customers, competitors, and competition with respect to the Relevant Product, including profit margins, prices, consumer choice, and innovation;
 - e. all Documents relating to any proposed or actual modifications to the Planogram Program's terms and conditions, implementation, or enforcement;
 - f. all Documents relating to the Planogram Program's availability in different Channels and for different customers, including, but not limited to, (i) participation eligibility; (ii) which "tiers" (e.g., 8.5% rebate if 80% of facings are Company Relevant Product) are offered; and (iii) instances where it was modified at a customer's request, e.g., the customer could include non-Company products in its fulfillment of the display space requirement;
 - g. all Documents relating to the total cost of the Planogram Program to the Company, including, but not limited to, its profitability and the cost of the rebates and enforcement;

- h. all Documents relating to the acceptance or rejection of the Program by the Company's customers or potential customers, including, but not limited to, WalMart;
 - i. all Documents relating to instances where a customer removed a competitor's Relevant Product and added one of the Company's Relevant Products to adhere to the Planogram Program's display space requirement;
 - j. all Documents relating to the Company's employees or agents goals relating to customer acceptance of the Planogram Program, including but not limited to, sales force training and goals; and
 - k. all Documents relating to the Company's share of Relevant Product sales through customers subject to the Planogram Program.
10. Submit all Documents relating to the Company's or any other Person's price lists (wholesale and retail), pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, and pricing decisions relating to any Relevant Product.
 11. For each Relevant Product, submit all Documents relating to the Company's direct or indirect involvement relating to product placement, category management, category captaincy, or other promotional or display space activities.
 12. Submit all research or survey Documents relating to brand or customer product preferences, purchasing patterns, or switching behavior.
 13. Submit all Documents relating to the strategies behind, effectiveness or impact of, any proposed or disseminated advertisement, promotional activity, and shelf placement strategies (such as the Planogram Program), including, but not limited to, any marketing analyses, consumer research, evaluations, sales force training materials, and sales force goals.
 14. Submit Documents sufficient to show the promotional or other fees, and the bases for their calculation, paid or credited to any retailer, warehouse, or distributor of any Relevant Product, including, but not limited to, slotting allowances, "pay-to-stay" fees, coupons, promotional allowances, cooperative advertising allowances, temporary price reductions, rebates, "Catalina" coupons, and marketing reimbursements.
 15. Submit all studies, analyses, and reports relating to price sensitivity, price elasticity, or product substitution of any Relevant Products and all underlying data compilations.

All data provided in response to this Specification must be submitted in an electronic format agreed upon by a Commission representative in writing prior to the submission in order to assure that the FTC has the capability of reading and using the data.

16. Submit all Documents referring to the actual or potential differences in distributing Relevant Products through each Channel, including costs, advantages or disadvantages, and supply and demand conditions.
17. Submit all Documents referring to entry into the manufacture or sale of the Relevant Product, including, but not limited to, establishment of a brand name and access to display space, importation requirements, and the time and cost necessary to meet each such requirement.
18. Submit all Documents analyzing imports into, or exports from, each Relevant Area of any Relevant Product, including, but not limited to, Documents showing the names of importers or exporters; the market share or position of such importers or exporters; the quality or quantity of products imported or exported in total or by any Person; and any costs or barriers to imports or exports.
19. Submit all Documents relating to instances since January 1, 2001, in which the Company or competitor entered or discontinued a new Relevant Product SKU or UPC (including private label Relevant Products), including all studies, surveys, analyses and reports that were prepared by or for the Company, and all Documents used or relied on to prepare such studies, surveys, analyses, and reports.
20. Submit Documents sufficient to show, since January 1, 2005, every instance in which the Company has bid, has been solicited to bid, or has considered bidding to develop, manufacture, distribute or supply any Relevant Product (including private label Relevant Products), or has negotiated, in lieu of bidding, to review or present pricing, promotional funding, or other terms.
21. Submit one copy of each financial statement, budget, profit and loss statement, cost center report, profitability report, and other financial report regularly prepared by or for the Company on a quarterly or annual basis relating to (a) the Company as a whole; (b) each of the Company's production facilities, sales offices, and distribution facilities that relate to the production and sale of any Relevant Product; and (c) any Relevant Product line or customer for any Relevant Product.
22. Submit Documents sufficient to show the Company's policies and procedures relating to the retention and destruction of documents.
23. Submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this Request. Where oral instructions were given, identify the person who gave the instructions and describe the content of the instructions and the person(s) to whom the instructions were given. For each specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the persons (identified by name and corporate title or job description) whose files were searched by each.

DEFINITIONS AND INSTRUCTIONS

For the purposes of this Request, the following definitions and instructions apply:

- A. "Company" or "Church & Dwight" means Church & Dwight Co., Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms "subsidiary", "affiliate" and "joint venture" refer to any Person in which there is partial (25 percent or more) or total ownership or control between the Company and any other Person.
- B. "Documents" means all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of the Company. The term "Documents" includes, without limitation: electronic mail messages; electronic correspondence and drafts of Documents; metadata and other bibliographic or historical data describing or relating to Documents created, revised, or distributed on computer systems; copies of Documents that are not identical duplicates of the originals in that person's files; and copies of Documents the originals of which are not in the possession, custody or control of the Company.

(1) Unless otherwise specified, the term "Documents" excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; (b) architectural plans and engineering blueprints; and (c) Documents solely relating to environmental, tax, OSHA, or ERISA issues.

(2) The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce Documents that exist in machine-readable form, including Documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission's need for Documents and information, you are encouraged to discuss a possible modification to this instruction with the Commission representatives identified on the last page of this Request. The Commission representative will consider modifying this instruction to:

(a) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;

(b) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Commission representatives; or

(c) include other proposals consistent with Commission policy and the facts of the case.

(3) If the Company intends to utilize any De-duplication or Near-de-duplication software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this Request, or if the Company's computer systems contain or utilize such software, the Company must contact Commission representatives to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this Request.

- C. "Person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- D. "Relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
- E. "And" and "or" have both conjunctive and disjunctive meanings.
- F. "Plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
- G. "Sales" means net sales, i.e., total sales after deducting discounts, returns, allowances and excise taxes. "Sales" includes sales of the Relevant Product whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.
- H. "Channel" means (i) convenience stores; (ii) supermarkets and grocery stores; (iii) drug stores; (iv) club stores; (v) mass merchandisers; (vi) internet; (vii) public or nonprofit; (viii) adult market; (ix) distributors; and (x) all other outlets from which consumers purchase Relevant Products.
- I. "Relevant Product" means (1) male latex condoms; and (2) male non-latex condoms.
- J. "Planogram Program" means the program the Company offers to customers that is based on the percentage of facings or other types of display space the customer dedicates to Trojan brand condoms.
- K. "Relevant Area" means (a) the United States; (b) Canada; and (c) each area as to which the Company separately collects and maintains information and data within the United States, including, but not limited to, each Metropolitan Statistical Area ("MSA") or comparable metropolitan area designation.
- L. "Minimum viable scale" means the smallest amount of production at which average costs equal the price currently charged for the Relevant Product. It should be noted that minimum viable scale differs from the concept of minimum efficient scale, which is the

smallest scale at which average costs are minimized.

- M. "Sunk costs" means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the Relevant Product [provide the relevant service] that cannot be recovered through the redeployment of these assets for other uses.
- N. Unless otherwise specified, each specification calls for information and data to be provided separately for each Relevant Product, by Relevant Area, by Channel.
- O. All references to year refer to calendar year. Unless otherwise specified, each of the specifications calls for Documents and information for each of the years from January 1, 1999 to the present.
- P. This Request shall be deemed continuing in nature so as to require production of all Documents responsive to any specification included in this Request produced or obtained by the Company up to forty-five calendar days prior to the date of the Company's full compliance with this Request.
- Q. The Company shall discuss the form and method of production of responsive documents with the Commission representative identified on the last page of this subpoena. The Company shall be permitted to use any form and method of production of responsive documents that the Commission representative approves in writing. The Commission can support the following production forms and methods:
- (1) In lieu of original paper documents, the Company may submit either paper or electronic copies of original documents. If the documents are provided electronically as TIFF images, they must be accompanied by OCR.
 - (2) In lieu of original documents stored electronically, the Company may submit documents in the following form: electronically stored documents, except Microsoft Excel files and Access databases, may be produced as single-page TIFF images with a corresponding file containing the extracted text from the document, accompanied by an Opticon load file. Metadata and custodian information shall be provided in a delimited ASCII format. Microsoft Excel and Access files shall be provided natively.
 - (3) Electronic productions may be submitted in the following methods:
 - (a) Responsive documents may be submitted through an online repository maintained by an independent vendor; and
 - (b) Responsive documents may be submitted directly to the Commission on any combination of the listed media types; however, the Commission prefers IDE hard drives for productions over 10GB:

- CD-R CD-ROM formatted to ISO 9660 specifications;
- DVD-ROM for Windows-compatible personal computers;
- IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data; and
- USB 2.0 Flash Drives.

- (4) Documents submitted in hard copy shall be submitted in sturdy cartons not larger than 1.5 cubic feet. Number each such box and mark each such box with corporate identification and the name(s) of the person(s) whose files are contained in the box.

R. All Documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form:

(1) shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files and shall not be shuffled or otherwise rearranged. For example:

(a) if in their original condition papers were stapled, clipped or otherwise fastened together or maintained in file folders, binders, covers or containers, they shall be produced in such form, and any Documents that must be removed from their original folders, binders, covers or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover or container from which such Documents came; and

(b) if in their original condition electronic Documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format;

(2) if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language Document;

(3) shall be produced in color where necessary to interpret the Document;

(4) shall be marked on each page with corporate identification and consecutive Document control numbers;

(5) shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct and complete copies of the original Documents;

(6) shall be accompanied by an index that identifies: (I) the name of each person from whom responsive Documents are submitted; and (ii) the corresponding consecutive Document control number(s) used to identify that person's Documents, and if submitted in paper form, the box number containing such Documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable

form (provided that Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.

- S. If any Documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes each Document's authors, addressees, date, a description of each Document, all recipients of the original and any copies. Attachments to a Document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each Document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable the Commission to assess the applicability of the privilege claimed. For each Document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the Document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all nonprivileged portions of any responsive Document (including nonprivileged or redactable attachments) for which a claim of privilege is asserted (except where the only nonprivileged information has already been produced in response to this instruction), noting where redactions in the Document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third-party, such as internal law firm memoranda, may be omitted from the log.
- T. If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.
- U. If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's Document retention policy as disclosed or described in response to Specification 16 of this Request, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify persons having knowledge of the content of such Documents.
- V. In order for the Company's response to this Request to be complete, the attached certification form must be executed by the official supervising compliance with this Request, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this Request or

suggestions for possible modifications thereto should be directed to Sylvia Kundig at 415.848.5188. The response to the Request shall be addressed to the attention of Sylvia Kundig and delivered between 8:30 a.m. and 5:00 p.m. on any business day to Federal Trade Commission. If you wish to submit your response by United States mail, please call staff listed above for mailing instructions.

CERTIFICATION

This response to the Subpoena Duces Tecum, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

TYPE OR PRINT NAME AND TITLE

(Signature)

Subscribed and sworn to before me at the City of _____, State of _____
, this _____ day of _____, 200_.

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

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

**RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS
IN A NONPUBLIC INVESTIGATION**

File No. 091-0037

Nature and Scope of Investigation:

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.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

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

By direction of the Commission.



Donald S. Clark
Secretary

Issued: June 10, 2009

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

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

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By direction of the Commission.



Donald S. Clark
Secretary

Issued: June 10, 2009



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

July 28, 2009

Carl W. Hittinger, Esq.
Lesli Esposito, Esq.
DLA Piper
One Liberty Place
1650 Market Street, Ste. 4900
Philadelphia, PA 19103

VIA Email

Re: Church & Dwight
FTC File 091-0037

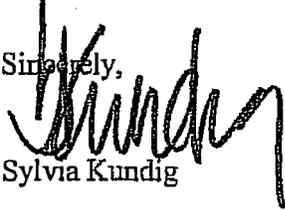
Dear Mr. Hittinger and Ms. Esposito:

Thank you for meeting with us on Monday to discuss your client's progress in complying with our requests for documents and information relevant to this matter.

During the meeting, we discussed responsive documents that had information redacted on the grounds that they contain irrelevant information, such as information on products other than the "Relevant Product." Please refer, however, to Paragraph R.(1) in the Definitions and Instructions that accompany the Subpoena Duces Tecum. It requires Church & Dwight to produce responsive documents "in complete form, unredacted unless privileged" Accordingly, please produce unredacted versions of all non-privileged, responsive documents.

We very much appreciate your cooperation in this matter and will make every effort to reduce any undue burden that you identify in our requests. Should you have any questions, please feel free to call me at 415.848.5188.

Sincerely,


Sylvia Kundig



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

October 30, 2009

Lesli Esposito, Esq.
Carl Hittinger, Esq.
DLA Piper
One Liberty Place
1650 Market Street, Ste. 4900
Philadelphia, PA 19103

VIA Email and US Mail

Re: Church & Dwight
FTC File 091-0037

Dear Lesli and Carl:

We received Carl's email today which included a 2006 Church & Dwight document relating to Canada, which has vast swathes of information redacted. In the email, Carl refers to a nonexistent "tentative agreement" allegedly entered into between FTC staff and DLA Piper.

Our July 28, 2009 letter (attached), rejected your request to redact documents as you deemed appropriate. That letter refers you "to Paragraph R.(1) in the Definitions and Instructions that accompany the Subpoena Duces Tecum. It requires Church & Dwight to produce responsive documents 'in complete form, unredacted unless privileged'" At this time, I would also draw your attention to the preamble which states that "[a]ll modifications to this Request must be agreed to in writing"

In addition, while we appreciate the single document, I must again underscore that you must produce all responsive documents, whether they are located in the United States or Canada.

While we look forward to receiving your letter today, we have repeatedly made clear, orally and writing, that we will not modify process to exclude documents and data located in Canada. What we will entertain are requests to modify specific specifications, if the reason for the request is substantiated with specificity.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sylvia Kundig', written in a cursive style.

Sylvia Kundig

P&L Summary Household Products – Domestic

	Net Sales	Gross Profit	MPC	Orga Sales
A&H Liquid LD	\$			
XTRA Liquid LD				
Super Scoop				
Oxi Clean Powder				
Baking Soda				
Other Cleaners				
A&H Powder LD				
Other Oxi				
Kaboom				
Carpet Deod				
Other Household				
Total Household	\$			

Redacte

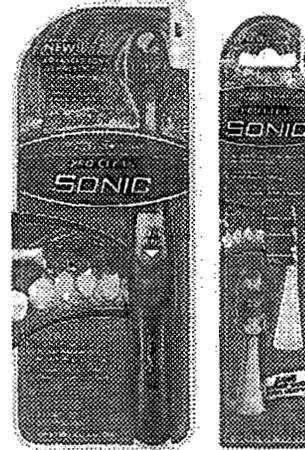
Excludes New Products, Licensing, and SAB

Redacted

Oral Care 2009

Redacted

P&L including Orajet	2009	2008	
Net Sales	Redact		
Gross Margin			
MPC			



With the Acquisition of Orange Glo, CHD now competes in the eight largest segments of the \$8.6B+ US Fabric Care Market

Redacted

Dollar Sales MM

YAG
Current
% Chg

Redacted

IRI Multi Outlet Household Panel Data
Calendar Year 2005 vs. Calendar Year 2004

27

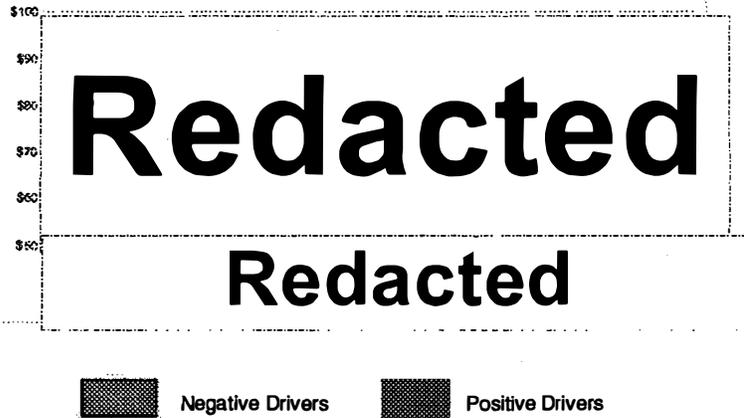
Liquid Laundry Price Tier Trends
Volume Share – Total U.S. FDKTS

Redacted

1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005

28

2006 - 2007 AH Powder Revenue Bridge



53

2006 - OxiClean Revenue Bridge (without Detergent Ball)



54

FTC:WATCH

Washington, D.C.

May 4, 2009

No. 741 - 20 pages

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Condom category captain case

The FTC is investigating possible restraint of trade in the retail sale of condoms manufactured by Church & Dwight Co. under the Trojan brand name, *FTC:WATCH* has learned. Specifically, the investigation is into retailers' use of so-called "category captains" to allocate their shelf space for certain products.

A category captain is a manufacturer or distributor chosen to decide which of several brands of a given product -- in this case, condoms -- the retailer should stock and how much and what kind of display each should receive. Retailers use category captains on the theory that they are experts in their fields.

FTC officials and staff reports have for years discussed the potential for "mischief" lurking in the category captain practice, especially the grocery business. In a February 2001 staff report, for example, identified "four ways in which category management -- particularly the use of category captains -- may lessen competition.

"The category captain might (1) learn confidential information about rivals' plans; (2) hinder the expansion of rivals; (3) promote collusion among retailers; or (4) facilitate collusion among manufacturers."

In 2005, then-Commissioner Thomas B. Leary told an ABA Sherman Act Section 2 committee meeting that the FTC might want to use its authority under Section 6(b) of the FTC Act to investigate how often retail store category captains offer advice about their competitors' products.

Section 6 authorizes the FTC to require "special reports" from businesses and are different from the subpoenas or Civil Investigative Demands that the agency issues in law enforcement investigations.

"You could have a market-wide investigation and try to develop information that way ... to just find out the extent to which category captains are offering advice on other people's products," he said. "Some people say

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that they never do it, and they advise their clients not to do it. Other people say they advise their clients to do it and don't see anything wrong with it, and so we would want to know how pervasive it really is." [FTC:WATCH No. 651, April 11, 2005]

It was at least the third time that Leary, a Republican, had expressed interest in the antitrust implications of category management.

In 2003, Leary spoke to an American Antitrust Institute program about the issue and subsequently reduced his oral remarks to a text.

"Both the customers, and the category captains who provide the service seem satisfied, Leary says. "Only the smaller producers who do not have a shot at captivity seem upset."

While some antitrust analysts "insist that category management should be analyzed as a vertical restraint, presumably because category managers are primarily suppliers to, not competitors of, the retail customers they advise, I believe the matter is more complex. In my view, the nature and context of the communication should control, not the formal relationship between the parties. In short, advice on the resale of the manufacturer's own product should be viewed as vertical; advice on the resale of a competitor's product should be viewed as horizontal."

"It is ... hard to imagine that a category captain really cares whether a retailer provides its competitors ... services ..., nor is the captain likely to be concerned about the overall effectiveness of a competitor's distribution system. Any advice that the captain gives to a customer about the appropriate ways to distribute a competitor's product is not likely to serve a legitimate vertical interest, but rather affects horizontal competition and serves a horizontal interest. It should be viewed as a horizontal communication. It is the nature of the interest, rather than the formal relationship, that should control."

Whether the operations of category captains are labeled horizontal or vertical, there "appears to be some tension between the claim that category captains merely give advice, which a retail customer is free to reject, and the claim that the practice is efficient because the captain knows so much more about the subject. Why would a relatively uninformed customer feel confident

enough to override the captain's advice? The advice is not purely gratuitous; a 'captain' does, after all, have some mutually recognized stature."

"The best strategy for a captain may be to recommend a plan that will preserve its already strong market position rather than blatantly enhance it — a plan that will also channel existing competition away from 'disruptive' initiatives and discourage maverick entry. A strategy of this kind may not be perceived as biased and may also be attractive to the retailer, particularly if the same captain or a like-minded counterpart gives similar advice to the retailer's own competitors."

The Sherman Act bars agreements "in restraint of trade." But when, Leary asked, does "advice" become "agreement"? In many cases, "we cannot draw much comfort from the factual distinction between advice and agreement."

In addition, while a category captain system may produce some efficiencies, "Short-term efficiencies may be associated with long-term harm. A category captain is likely to have an interest in a regime that not only preserves its leading position but also avoids competition that will be 'disruptive.' The captain would likely prefer to have its special product promotions separated in time and space from the promotions of its competitors, and to minimize the impact of an innovative new product. Retailers may also prefer to compete in the same orderly way with their own rivals. This kind of orderly competition within stores and across stores, may appear to be efficient in the short run because resources are not wasted on mutually cancelling efforts. (Short-run efficiencies may help to explain why category management is favored by many retailers, as well as by large suppliers.) On the other hand, orderly competition might stifle disruptive innovation that yields long-term benefits. In fact, I question whether arguments about the superiority of orderly competition are legally cognizable when horizontal restraints are involved.

"The fundamental premise of our antitrust laws is that consumers are ultimately best served by interbrand competition that is uncoordinated, unstable and unpredictable. If rival producers were to combine and rationalize their sales and promotion efforts, they would get indicted for it. I question whether it is any less harmful

when a designated 'captain' acts as a czar for the group — even, or particularly, if the captain makes some effort to accommodate the interests of its competitors. The market will simply be less dynamic in the long run, something that is difficult to measure but reasonable to predict." <http://www.ftc.gov/speeches/leary/040519categorymgmt.pdf> [FTC:WATCH No. 634, June 21, 2004]

In 2005, the FTC made a point of examining the anticompetitive potential of category management in reviewing Procter & Gamble's acquisition of the Gillette Co. As we reported at the time, it was the first time the Commission had ever acknowledged that category management practices were a potential concern in a merger. [FTC:WATCH No. 661, October 10, 2005]

According to the Commission's Public Analysis of the P&G/Gillette merger: "Staff investigated whether the combined entity would have an increased ability to exploit its position as a so-called 'category manager' or 'category captain,' in order to obtain premium retailer shelf space and potentially exclude or disadvantage competitors in various broad categories" The commissioners (with only two voting) decided that in this particular case, category management was unlikely to cause harm.

As this brief history indicates, the potential for anticompetitive harm inherent in retailers' employment of supplier category captains to allocate shelf space is not a new concern at the FTC. Or in Congress.

In July, 2001, Sen. Christopher Bond (R-Mo.), the ranking member on the Senate Small Business Committee, met with then-FTC Chairman Timothy J. Muris to complain that retail "slotting fees" and shelf space controlled by suppliers can result in small businesses' products being excluded from retail shelves. Muris told Bond that he would investigate. [FTC:WATCH No. 572, September 10, 2001]

Trojans are the largest-selling condom brand in the U.S. According to the Trojan Web page, Church & Dwight offers 42 different styles of condoms or related products, including battery-powered "Vibrating Rings." <http://www.trojancondoms.com/Product/ProductList.aspx>

The FTC investigation is being led by the FTC's Western Regional Office in San Francisco.

REFERENCE: Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry, February 2001

Quoting Adam Smith on vertical price-fixing: **Harbour testifies that RPM hurts consumers**

"Throughout antitrust law, the rule of reason tends to be a euphemism for the absence of liability."

- Commissioner Pamela Jones Harbour.

FTC Commissioner Pamela Jones Harbour has taken more than two years to hone her arguments as to why the Supreme Court was wrong when it issued the Leegin decision overturning a century-old precedent that made Retail Price Maintenance (RPM) per se illegal. But in her latest testimony, she invoked an unexpected witness.

Appearing before an April 28 House Judiciary Subcommittee hearing entitled "Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices," Harbour pointed to familiar arguments such as Europe's rules against RPM. Then, she called the ghost of Adam Smith to the witness table to support her argument. From Harbor's testimony:

"First, Smith noted that consumers are best off when they can purchase the goods they desire at the cheapest price. Indeed, he went so far as to observe that this proposition was so self-evident that it would never have been questioned, 'had not the interested sophistry of merchants and manufacturers confounded the common sense of mankind.' I would argue that the Leegin majority opinion reflects just such sophistry," said Harbour.

"Smith's second observation is equally at odds with the Leegin decision: 'Consumption is the sole end and purpose of all production; and the interests of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption,

FTC:WATCH

Washington, D.C.
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Aye, aye, Captain?

The FTC has now sent "broad" subpoenas to major retailers in its investigation of the use of "category captains" in the distribution and sale of condoms. [FTC:WATCH No. 741, May 4]

The primary focus of the investigation is on the dominant U.S. condom manufacturer, Church & Dwight Co., which distributes the Trojan brand.

As recounted in No. 741, antitrust enforcers have been studying the potential for anticompetitive conduct posed by retailers' use "category captains" for several years.

Retailers use product category captains to relieve themselves of the burden of deciding which products in a category to stock and how many of the selecte products.

According to a source familiar with the condom investigation, there are at least three category captain practices which, if proven, could violate either the Sherman Act or the FTC Act by distorting the free market.

First, a category captain could learn enough about its competitors to undermine them in the market-place.

Or, a captain could use its power to select its competitors to secure agreements to fix prices.

And, a sufficiently powerful captain could leverage its position across an industry to facilitate a horizontal price fix among retailers.

While the FTC's investigation is examining the practice in the condom market, a finding of an anti-

trust violation would ripple through the retail industry as a whole, everything from supermarkets to clothing stores. And the ensuing targets could be chain stores themselves, if it were shown that they had been using category captains to reduce or eliminazate competition among themselves in various merchandise categories.

The impact could even extend to merger analysis. In 2005, the FTC made a point of examining the anticompetitive potential of category management in reviewing Procter & Gamble's acquisition of the Gillette Co. As we reported at the time, it was the first time the Commission had ever acknowledged that category management practices were a potential concern in a merger. [FTC:WATCH No. 661, October 10, 2005]

The FTC investigation is being led by the agency's Western Regional Office in San Francisco.

A robust antitrust legislative agenda

Support is growing in the U.S. Senate for legislation to overturn the Supreme Court's decision in *Leegin Creative Leather Prods. Inc. v. PSKS Inc.* (06-480, S.Ct.). [FTC:WATCH No. 733, January 12]

S.148, introduced by Sen. Herb Kohl (D-Wisc.), chairman of the Senate Antitrust, Competition Policy, and Consumer Rights Subcommittee, is designed "(1) to correct the Supreme Court's mistaken interpretation of the Sherman Act in the *Leegin* decision; and (2) to restore the rule that agreements between manufacturers and retailers, distributors or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act." [FTC:WATCH No. 733, January 12]

That bill now has six Democratic co-sponsors on the Senate Judiciary Committee: Sens. Charles Schumer (N.Y.), Russell Feingold (Wisc.), Al Franken (Minn.), Ted Kaufman (Del.), Sheldon Whitehouse (R.I.) and Kohl.

A seventh co-sponsor, Ron Wyden (Ore.), is not a Judiciary Committee member.

The House of Representatives has already adopted a *Leegin* repeal.

A bill to strip members of the Organization of Petroleum Exporting Countries of their exemption from U.S. antitrust laws, pending for several sessions, is unlikely to see action this year. The bill is called, appropriately enough, NOPEC.

A limited repeal of the McCarran-Ferguson Act, which has effectively insulated the insurance business from antitrust liability since 1945, is likely to be included in some form of Senate healthcare reform legislation. The legislation originated not in the Senate Antitrust Committee, but in the office of Sen. Judiciary Committee Chairman Patrick Leahy (D-Vt.)

S. 146, The Railroad Antitrust Enforcement Act, is awaiting action not in the Senate Judiciary Committee, but in the Senate Commerce Committee, where Chairman John Davison "Jay" Rockefeller IV (D-W. Va.) plans to fold it into a broader transportation bill. As proposed by Sen. Kohl, the Act would "eliminate ... antitrust exemptions by allowing the federal government, state attorneys general and private parties to file suit to enjoin anti-competitive mergers and acquisitions"; "restore the review of these mergers to the agency where they belong - the Justice Department's Antitrust Division"; and "eliminate the antitrust exemption for railroad collective rate making." It appears to have strong bipartisan support.

No, really,

To speed generic prescription drugs to consumers, S. 369 would overturn the federal judiciary's conclusion that when a branded manufacturer appears to pay a generic manufacturer not to bring a product to market under the provisions of the Hatch-Waxman Act, there is no violation of either the FTC Act or the Sherman Act.

As originally introduced by Sen. Kohl, the bill would have made these agreements per se violations of the Sherman Act. But as modified and adopted by the Senate Judiciary Committee, that is no longer the case. Now, such agreements are presumed to be illegal subject to trial at the FTC or in federal court. When challenged, to rebut the presumption, the parties would have to present "clear and convincing evidence" that the agreement does not restrain competition. In practice, the difference between per se and the presumption standard will string out a trial on the merits and

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

From: Hittinger, Carl
To: 'SKUNDIG@ftc.gov' <SKUNDIG@ftc.gov>; Esposito, Lesli
Cc: 'kortiz@ftc.gov' <kortiz@ftc.gov>; 'dobrien@ftc.gov' <dobrien@ftc.gov>;
'LBADGER@ftc.gov' <LBADGER@ftc.gov>
Sent: Fri Oct 30 17:25:19 2009
Subject: Re: October 30, letter

Sylvia. We obviously disagree about this issue and the sequence of events. From your response it appears you are not agreeable to a modification of the subpoena. We will therefore need to petition the Commission for a modification on the issue of redaction of products that do not concern male condom products. . Thanks for the prompt response.
Carl

Carl W. Hittinger
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DLA Piper US LLP
One Liberty Place
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Philadelphia , PA 19103
215-656-2449 T
215-606-2149 F
Sent From My Blackberry

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

From: Kundig, Sylvia <SKUNDIG@ftc.gov>
To: Hittinger, Carl; Esposito, Lesli
Cc: Ortiz, Kelly <kortiz@ftc.gov>; O'Brien, Daniel <dobrien@ftc.gov>; Badger, Linda K.
<LBADGER@ftc.gov>
Sent: Fri Oct 30 17:06:56 2009
Subject: RE: October 30, letter

Carl: The July letter is unambiguous. There was never any discussion about redactions going forward. The issue of redaction is closed. Sylvia

From: Hittinger, Carl [mailto:Carl.Hittinger@dlapiper.com]
Sent: Friday, October 30, 2009 1:58 PM
To: Kundig, Sylvia; Esposito, Lesli
Cc: Ortiz, Kelly

Subject: RE: October 30, letter

Sylvia: Thank you for the letter. We recall the July letter as only relating to the issue of our then production of redacted documents from the Mayer case which we then agreed to produce in unredacted form without waiver of any rights. The letter then prompted other discussions about the redaction issue going forward. In any event, we can discuss this issue further on our call on November 9th and see if some resolution can be reached short of formally asking for a modification of the subpoena. Thanks, Carl

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Carl W. Hittinger
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From: Kundig, Sylvia [<mailto:SKUNDIG@ftc.gov>]
Sent: Friday, October 30, 2009 4:09 PM
To: Esposito, Lesli; Hittinger, Carl
Cc: Ortiz, Kelly
Subject: October 30, letter

ProcureSmart - October 26 to 30, 2009

In support of our Sustainability Initiative, our nearly 8,000 people globally are coming together this week to focus on efforts to purchase supplies and materials sustainably.

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FEDERAL TRADE COMMISSION
WESTERN REGION

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Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

July 28, 2009

Carl W. Hittinger, Esq.
Lesli Esposito, Esq.
DLA Piper
One Liberty Place
1650 Market Street, Ste. 4900
Philadelphia, PA 19103

VIA Email

Re: Church & Dwight
FTC File 091-0037

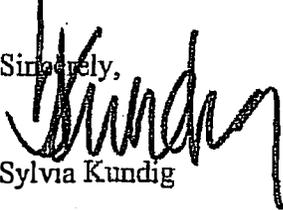
Dear Mr. Hittinger and Ms. Esposito:

Thank you for meeting with us on Monday to discuss your client's progress in complying with our requests for documents and information relevant to this matter.

During the meeting, we discussed responsive documents that had information redacted on the grounds that they contain irrelevant information, such as information on products other than the "Relevant Product." Please refer, however, to Paragraph R.(1) in the Definitions and Instructions that accompany the Subpoena Duces Tecum. It requires Church & Dwight to produce responsive documents "in complete form, unredacted unless privileged" Accordingly, please produce unredacted versions of all non-privileged, responsive documents.

We very much appreciate your cooperation in this matter and will make every effort to reduce any undue burden that you identify in our requests. Should you have any questions, please feel free to call me at 415.848.5188.

Sincerely,


Sylvia Kundig



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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Attorney

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October 30, 2009

Lesli Esposito, Esq.
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DLA Piper
One Liberty Place
1650 Market Street, Ste. 4900
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VIA Email and US Mail

Re: Church & Dwight
FTC File 091-0037

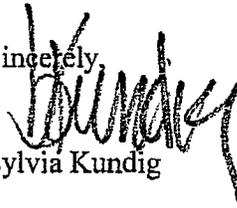
Dear Lesli and Carl:

We received Carl's email today which included a 2006 Church & Dwight document relating to Canada, which has vast swathes of information redacted. In the email, Carl refers to a nonexistent "tentative agreement" allegedly entered into between FTC staff and DLA Piper.

Our July 28, 2009 letter (attached), rejected your request to redact documents as you deemed appropriate. That letter refers you "to Paragraph R.(1) in the Definitions and Instructions that accompany the Subpoena Duces Tecum. It requires Church & Dwight to produce responsive documents 'in complete form, unredacted unless privileged'" At this time, I would also draw your attention to the preamble which states that "[a]ll modifications to this Request must be agreed to in writing"

In addition, while we appreciate the single document, I must again underscore that you must produce all responsive documents, whether they are located in the United States or Canada.

While we look forward to receiving your letter today, we have repeatedly made clear, orally and writing, that we will not modify process to exclude documents and data located in Canada. What we will entertain are requests to modify specific specifications, if the reason for the request is substantiated with specificity.

Sincerely,

Sylvia Kundig