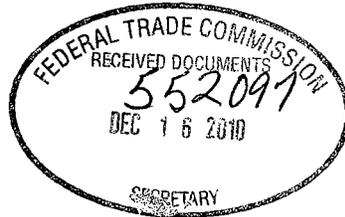




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December 15, 2010

Via UPS NEXT DAY AIR

Donald S. Clark, Esquire
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-135
Washington, DC 20580

**Re: Request for Rehearing by the Full Commission of the Denial of Church & Dwight Co., Inc.'s Petition to Quash, Limit, or Stay Subpoenas *Ad Testificandum* Directed to James Craigie, Adrian Huns, Paul Siracusa and Kelly Zhan
File No. 091-0037**

Dear Secretary Clark:

Pursuant to 16 C.F.R. § 27(f), Church & Dwight Co., Inc. ("Church & Dwight") hereby requests a rehearing by the full Federal Trade Commission of Church & Dwight's Petition to Quash, Limit, or Stay Subpoenas *Ad Testificandum* directed to James Craigie, Adrian Huns, Paul Siracusa, and Kelly Zhan ("Petition"), filed November 5, 2010. A copy of Church & Dwight's Petition appears as Appendix "A" hereto. Additionally, as set forth more fully below, Church & Dwight respectfully requests that the full Commission reverses Commissioner Julie Brill's decision or, in the alternative, issue a stay of compliance with the Subpoenas *Ad Testificandum*, as now set forth in the letter decision for January 13, 2011 and January 14, 2011, until the United States Court of Appeals for the District of Columbia Circuit has reached a final decision in an appeal concerning the same issues implicated by the instant subpoenas or, in the alternative, rule that the subpoenaed parties may only be asked condom-related questions until resolution by the D.C. Circuit.

The Petition regarding the Subpoenas *Ad Testificandum*, issued on October 15, 2010, was denied by Commissioner Brill, by letter dated December 8, 2010, which was received by counsel for Church & Dwight by express mail on December 15, 2010. The letter denying the Petition is attached as Appendix "B" hereto. Church & Dwight respectfully disagrees with the ruling of Commissioner Brill, and accordingly requests that the entire Commission review the Petition for the following reasons:



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As stated in the Petition, the issues implicated by the instant Subpoenas *Ad Testificandum* mirror those in a currently ongoing dispute between the parties arising from the Commission's Subpoena *Duces Tecum* and Civil Investigative Demand ("CID"), issued on June 29, 2009 ("2009 Subpoena"). The parties attempted to negotiate a compromise regarding the 2009 Subpoena, but were unsuccessful. The Commission ultimately filed an enforcement action on February 26, 2010 in the United States District Court for the District of Columbia ("Enforcement Action"). See *FTC v. Church & Dwight Co., Inc.*, No.: 1:10-mc-00149-EGS, Dkt. No. 1. On October 29, 2010, Magistrate Judge John M. Facciola ordered the parties to engage in discussions concerning the least costly method of producing documents concerning the Canadian market for condoms. *Id.*, Dkt. No. 23 at 8. Judge Facciola also ruled that condom related documents containing non-condom related information are "plausibly" relevant to the 2009 Subpoena. *Id.* at 9. However, the Court found it did not have the power to determine through a requested *in camera* review whether such non-condom information contained in the condom related documents has actual reasonable relevance to the Commission's Resolution. *Id.*, Dkt No. 23 at 11-12. Church & Dwight appealed this ruling directly to the Circuit Court on November 2, 2010. *Id.*, Dkt. No. 25.

Regarding the Canada issue, pursuant to the Court's order, Church & Dwight already has engaged in several productive communications with the FTC staff attorneys and has commenced collecting documents responsive to the Commission's requests. Thus, Church & Dwight does not plan to pursue this issue on appeal. Accordingly, regarding the instant subpoenas, Church & Dwight has no objection to the Commission asking the subpoenaed parties *condom related* questions concerning the United States or Canada.

Regarding the non-condom issue, however, Church & Dwight maintains its position that such information is not reasonably relevant to the Commission's investigation as defined by the Commission's own Resolution, dated June 10, 2009. Accordingly, Church & Dwight is pursuing this issue on appeal to the D.C. Circuit. Thus, at the very least, a stay order by the full Commission is necessary to avoid sacrificing the integrity of Church & Dwight's appeal by forcing it to produce subpoenaed parties for questioning on non-condom related information.

Church & Dwight's position on the non-condom issue is discussed at length in its Memorandum in Support of its Motion to Stay Pending Appeal ("Memorandum") and its Reply to the Commission's Opposition to Church & Dwight's Motion to Stay Pending Appeal ("Reply"). A copy of the Memorandum and Reply appears as Appendices "C" and "D" hereto. For the Commission's convenience, Church & Dwight summarizes its position below.



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An investigative subpoena is enforceable only "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is *reasonably relevant*." *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 431 U.S. 974 (1977) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (Jackson, J.)) (emphasis added). Generally, Church & Dwight submits that "the *Texaco* standard and/or its application in the district courts requires clarification by the D.C. Circuit, after thirty years, as how to the 'reasonably relevant' prong of the standard is to be employed – and how far it can be stretched by the government." Memorandum at 6.

Specifically, Magistrate Judge Facciola in the Enforcement Action "never articulated how information concerning non-condom related products – such as cat litter, detergent, and toothpaste – could be 'reasonably relevant' [as opposed to plausibly relevant] to the [Commission's] investigation [as defined by the Resolution] concerning the 'sale or distribution of condoms in the United States.'" Memorandum at 6. Rather, the court merely stated 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." *FTC v. Church & Dwight Co., Inc.*, No.: 1:10-mc-00149-EGS, Dkt. No. 23 at 9 (emphasis added).

The District Court deferred to the stated breadth of the Commission's powers without actually applying the *Texaco* standard. Review by the D.C. Circuit is very important because the *Texaco* standard operates as the only constitutional check on the Commission's broad investigatory powers.¹ Commentators have already noted that "[under Judge Facciola's] decision the FTC's future position will be that, so long as the agency *plausibly can speculate* that the information sought *might* prove useful to its investigation, it is allowed to reach *far and wide*." Michael Knight and Robert Jones, "Broader Standards in FTC Subpoena Enforcement" (emphasis added), a copy of which appears as Appendix "F" hereto. Accordingly, Church & Dwight seeks the D.C. Circuit's review of whether district courts must articulate how the information sought is reasonably relevant to the scope of the investigation as defined by the operative agency resolution, through *in camera* review or otherwise, and whether the *Texaco* standard requires clarification in this age of electronic discovery.

¹ See Earl J. Silbert & Brian S. Chilton, (*Giga*) *Bit by (Giga) Bit: Technology's Potential Erosion of the Fourth Amendment*, Criminal Justice at page 11 (Spring 2010) ("The idea that the executive branch can somehow serve as both the hunter of evidence and protector of privacy related to that evidence, is nonsensical. . . . [W]hoever is in the best position to protect the citizens' privacy interests, and however those are best protected, it is asking too much of our law enforcement personnel to wear simultaneously the hat of aggressive enforcer and champion of privacy."), a copy of which appears as Appendix "E" hereto.



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Church & Dwight reiterates that it has no objection to the FTC staff attorneys asking the four subpoenaed parties *condom related* questions concerning the United States or Canada, if an agreement is reached, without the waiver of any rights, that non-condom related questions will not be asked at this time. Further, Church & Dwight has proposed that if it is unsuccessful on appeal to the D.C. Circuit, it will produce the same witnesses again for questioning on non-condom related issues. Although the rules do not allow instructions not to answer, the rules do not prohibit the FTC staff from agreeing to limit the questioning of witnesses to certain agreed upon topics without waiver of rights. See 16 C.F.R. § 2.9(b)(2). To date, the FTC staff attorneys have rejected this compromise. Therefore, any claimed delay in the investigation while the D.C. Circuit decides the appeal is of the FTC staff's own making. See *also* Reply at 8. At the same time, Church & Dwight cannot sacrifice the integrity of its right to appeal in the Enforcement Action by producing subpoenaed parties for questioning on non-condom related information.

Church & Dwight stresses that it is not attempting to impede the Commission's investigation into the sale or distribution of condoms in the United States. To date, Church & Dwight has produced 2,697,174 pages of documents in response to the FTC staff's demands and provided detailed responses to a lengthy CID and a myriad of other related questions raised by the FTC staff. Accordingly, Church & Dwight seeks the full Commission (1) to reverse Commissioner Brill's decision or, in the alternative, (2) to stay questioning of the subpoenaed parties until resolution by the D.C. Circuit or, in the alternative, (3) to rule that the subpoenaed parties can be asked only condom related questions concerning the United States and Canada with questions concerning non-condom related information to be reserved until after the D.C. Circuit's resolution of that issue.

Respectfully submitted,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read 'Carl W. Hittinger', written over a horizontal line.

Carl W. Hittinger

Enclosures

cc: Janice L. Charter, Esquire
Sylvia Kundig, Esquire
Linda Badger, Esquire
Mark S. Hegedus, Esquire

Tab A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

CHURCH & DWIGHT CO., INC.

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091-0037

**PETITION TO QUASH, LIMIT OR STAY SUBPOENAS AD TESTIFICANDUM DIRECTED
TO JAMES CRAIGIE, ADRIAN HUNS, PAUL SIRACUSA AND KELLY ZHAN**

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Attorneys for Petitioner
Church & Dwight Co., Inc.

Dated: November 4, 2010

Pursuant to 16 C.F.R. § 2.7(d), Church & Dwight Co., Inc. (“Church & Dwight”) hereby petitions to quash or limit the FTC’s subpoenas *ad testificandum* issued on October 15, 2010, as extended¹, and directed to: James Craigie, Adrian Huns, Paul Siracusa and Kelly Zhan. More specifically, Church & Dwight petitions to quash, limit or stay the subpoenas to the extent they seek testimony beyond the Commission’s Resolution Authorizing Use of Compulsory Process in a Non Public Investigation (“Resolution”), dated June 10, 2009, which expressly limits the investigation to the distribution and sales of condoms in the United States. At the very least, the investigational hearings should be stayed until a final decision is reached in the presently pending appeal to the Court of Appeals for the District of Columbia arising out of an enforcement action concerning the same parties and issues implicated by this petition.

I. BACKGROUND

A. The Subpoenas *Ad Testificandum* And Church & Dwight’s Good Faith Efforts To Clarify Their Scope

On October 15, 2010, the FTC issued four subpoenas *ad testificandum* directed to: Mr. Craigie, Church & Dwight’s President, CEO, and Chairman; Mr. Huns, President of International Consumer Products; Mr. Siracusa, Executive Vice President, Global Research and Development; and Ms. Zhan, Director of Finance, Consumer International Division. Church & Dwight’s counsel received copies of the subpoenas on October 18, 2010. The subpoenas state that the “subject of investigation” is “Church & Dwight’s marketing practices through retail

¹ On October 29, 2010, the FTC agreed to extend the time for the investigational hearings of Mr. Adrian Huns and Ms. Kelly Zhan until January 13, 2011. *See* FTC Extension dated October 29, 2010, which is attached hereto as Exhibit A. In a final effort to avoid any unnecessary motion practice, counsel for Church & Dwight asked the Commission Staff if they would “agree to limit the questions at the presently scheduled January investigative hearings to only the marketing and distribution of condoms in the United States if [Church & Dwight] would file an appeal of Judge Facciola’s decision to the Court of Appeals for the District of Columbia.” *See* Electronic Correspondence dated November 1, 2010, which is attached hereto as Exhibit B. The Commission Staff responded that they “will not agree to limit the questions.” *Id.*

chains in the *United States of America.*” See Subpoenas, which are attached hereto as Exhibit C (*emphasis added*). The subpoenas further direct the reader to an attached copy of the Commission’s Resolution, which states, in pertinent part:

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.

(*emphasis added*).

Also on October 18, 2010, in a good faith effort to clarify the scope of the subpoenas and avoid any unnecessary motion practice, Church & Dwight’s counsel sent a letter to the FTC Commission Staff in San Francisco responsible for the investigation, attempting to confirm that the subpoenas, as stated, limited the subject matter of the investigational hearings to the United States only. See October 18 Correspondence from Church & Dwight’s Counsel, which is attached hereto as Exhibit D. The next day, and for further clarification, counsel sent another letter to the Commission Staff to confirm that the witnesses would not be questioned about products other than condoms. See October 19 Correspondence from Church & Dwight’s Counsel, which is attached hereto as Exhibit E. The letter further stated that “if witnesses are asked questions regarding any country other than the United States or any product other than condoms, counsel for Church & Dwight will object and instruct the witnesses not to answer those questions.” *Id.*

On October 19, 2010, the Commission Staff answered both of Church & Dwight's letters. See October 19 Correspondence from Commission Staff ("Staff Response"), which is attached hereto as Exhibit F. But rather than respond to Church & Dwight directly, and with substance or helpful guidance, the Commission Staff merely stated, in pertinent part, that "the scope of an investigational hearing is defined by the Commission's resolution authorizing process, which is attached to the Subpoena." *Id.* As the Commission Staff is now aware, the scope of an instant Resolution is an issue that is pending before the United States Court of Appeals for the District of Columbia Circuit arising out of a subpoena enforcement action filed by the FTC ("Enforcement Action").² Because the Commission Staff's response to Church & Dwight's letters failed to provide any of the clarification sought regarding the investigational hearing, the instant Petition is necessary.

B. The Enforcement Action Filed By The FTC And The Resulting Appeal

Among other related issues, the Enforcement Action is focused on whether the Resolution, on its face as drafted by the FTC, purports to cover a geographic scope beyond the United States and products other than condoms. By way of background, on June 29, 2009, the FTC issued a subpoena *duces tecum* and Civil Investigative Demand ("CID") to Church & Dwight. The subpoena *duces tecum* and CID were issued in accordance with the exact same Resolution that establishes the scope of the instant subpoenas *ad testificandum*.

During Church & Dwight's review and production of now 2,575,994 pages of documents responsive to the FTC's subpoena *duces tecum*, the Commission Staff asserted that it was also entitled to documents concerning Church & Dwight's sales and marketing practices of condoms in Canada, including documents located in Canada from Church & Dwight's Canadian

² See *FTC v. Church & Dwight Co., Inc.*, No. 1:10-mc-00149-EGS.

subsidiary. According to the FTC's economist, Canadian documents were needed to support an alleged "natural experiment" comparing the United States and Canadian condom markets. The Commission Staff also maintained that it was entitled to obtain documents in un-redacted form, which contained Church & Dwight's confidential and business sensitive information on products other than condoms. Based on a straightforward reading of the Resolution, Church & Dwight disagreed that the Commission Staff was entitled to Canadian based documents and non-condom product information. Although the parties attempted to resolve their differences in good faith, they could not reach a compromise on these issues. Following motion practice before the FTC, on February 26, 2010, the FTC filed an Enforcement Action Petition against Church & Dwight to compel production of Canadian documents and information on non-condom products. On April 22, 2010, District Court Judge Emmet G. Sullivan transferred the case to Magistrate Judge John M. Facciola "for resolution with any appeal from his judgment to be taken directly to the [D.C. Circuit]." See Minute Order, which is attached hereto as Exhibit G.

In that judicial proceeding, the FTC argued that the subpoena and CID are lawful, seek relevant information, and are not unduly burdensome. See Memorandum in Support of Petition of the Federal Trade Commission For an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand ("FTC Petition") at 10, which is attached hereto as Exhibit H. In doing so, the FTC touted its broad investigatory powers while offering this empty analysis of the issues:

The FTC here seeks to determine whether [Church & Dwight] has attempted to acquire, acquired, or maintained a monopoly *in the sale or distribution of condoms in the U.S.* through potentially exclusionary practices. By refusing to produce information and documents regarding *non-condom products and sales in Canada*, [Church & Dwight] seeks to force the Commission to investigate these issues in a vacuum. But it is clear that a target of a Commission investigation cannot shape the course of that investigation.

Id. at 13 (*emphasis added*). Although the FTC made no real attempt to demonstrate the link between “the sale or distribution of condoms in the U.S.” and “non-condom products and sales in Canada,” it nevertheless contended that information regarding the latter is reasonably relevant to the investigation. *Id.*

Regarding Canada, the FTC simply speculated that a comparison between the Canada and U.S. condom markets “can be useful to determine whether the U.S. practices reflect an abuse of monopoly power.” *Id.* Regarding other non-condom products, the FTC conceded that the “[r]elevant product’ is ‘condoms,’” yet stated outright that “[t]he . . . Resolution [c]overs [n]on-[c]ondom [p]roduct [i]nformation.” See Reply of Petitioner Federal Trade Commission (“FTC Reply”) at 17, 15, which is attached hereto as Exhibit I. However, as with Canada, the FTC failed to articulate how information concerning other products could be reasonably relevant to the “sale or distribution of condoms in the U.S.” FTC Petition at 13.

In response to the FTC’s Petition, Church & Dwight contested the FTC’s assertions that information concerning Canada and non-condom products is reasonably relevant to the investigation. Regarding Canada, Church & Dwight argued that documents from its Canadian subsidiary are irrelevant to the FTC’s investigation because the plain language of the Resolution restricts the scope of inquiry to the United States. See Church & Dwight’s Opposition to the FTC’s Enforcement Action Petition (“Opposition”), which is attached hereto as Exhibit J. Moreover, Church & Dwight explained precisely why the FTC’s so-called natural experiment is flawed on its face and would not survive scrutiny under *Daubert* and its progeny. Regarding non-condom products, Church & Dwight argued that products other than condoms are irrelevant to the FTC’s investigation because the plain language of the Resolution restricts the scope of

inquiry to “the distribution or sale of *condoms* in the United States.” *See* Resolution (*emphasis added*).

On October 29, 2010, Magistrate Judge Facciola issued a Memorandum Opinion and Order granting the FTC’s petition and leaving the interpretation of the Resolution still very much at issue. *See* Memorandum Opinion and Order (“Opinion”), which is attached hereto as Exhibit K. The Opinion essentially defers to the FTC’s empty analysis as to the relevancy of Canadian condom and United States non-condom products to the instant investigation. The Court’s opinion is based on an overly broad and not literal reading of the operative Resolution issued by the Commission. It is, therefore, contrary to applicable law from the District of Columbia Court of Appeals, as discussed herein. Pursuant to the District Court’s Minute Order, Church & Dwight has appealed this ruling directly to the District of Columbia Circuit Court of Appeals. *See* Minute Order, Exhibit G.

II. ARGUMENT

The phrasing of the instant subpoenas *ad testificandum* and the Commission Staff’s response to Church & Dwight’s letters trigger the very same issues now pending before the D.C. Circuit: namely, whether information concerning non-U.S. and non-condom products is reasonably relevant to the instant investigation. In both instances, the Commission Staff is attempting to broaden the scope of the Commission’s Resolution by ignoring its plain language. Indeed, the response to Church & Dwight’s good faith inquiries regarding the subpoenas demonstrates that the Commission Staff is seeking access to the same information that Church & Dwight contends is not covered by the Resolution while these same important issues are being litigated in the present appeal arising out of the Enforcement Action. This should not be allowed. Any attempt by the Commission Staff to question the witnesses beyond the scope of

the Commission's Resolution should be quashed or limited while the appeal to the D.C. Circuit is pending. At the very least, the investigational hearings should be stayed until a final decision is reached by the federal appellate courts.³

A. Information Concerning Countries Other Than The United States Is Not Reasonably Relevant To The FTC's Investigation.

An investigative subpoena is enforceable only "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (Bazelon, C.J.), *cert. denied*, 431 U.S. 974 (1997) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (Jackson, J.)). "The 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.*" *Texaco*, 555 F.2d at 874 (*emphasis added*). The FTC's own response to Church & Dwight's recent letters points to the Resolution as defining the scope of the investigation. *See Staff Response*. However, "when a conflict exists in the parties' understanding of the purpose of an agency's investigation," as exists here, "the language of the agency's resolution, rather than subsequent representations of Commission staff, controls." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (Silberman, J.) (internal citations omitted), *cert. denied*, 507 U.S. 910 (1993).

Here, the Resolution's plain language narrows the FTC's inquiry to the "distribution or sale of condoms *in the United States*, or in any part of *that* commerce[.]" (*emphasis added*). The "or in any part of that commerce" language preserves the FTC's inquiry into alleged unfair

³ Because the appeal of the Enforcement Action and the instant Petition involve the same legal issues, Church & Dwight hereby incorporates by reference, as if set forth fully herein, all of the arguments stated in its Opposition to the FTC's Enforcement Action Petition and any brief or memorandum in the appeal regarding the geographic scope of the Resolution and its inapplicability to non-condom products for purposes of the instant Petition and/or any and all subsequent appeals or enforcement action proceedings related to the investigational hearing subpoenas. *See generally* Exhibit J.

competition occurring in smaller geographic markets *within* the United States. *See* Opposition at 11 (stating the same). The Resolution’s plain language does not refer to any geographic area outside of the United States, explicitly or implicitly. Even the Commission Staff’s subpoenas state – on their face – that the “subject of investigation” is “Church & Dwight’s marketing practices through retail chains in the *United States of America.*” Thus, based on a straightforward and plain language reading of the Resolution, testimony by the witnesses regarding any country other than the United States cannot be reasonably relevant to the scope and purpose of the FTC’s investigation. *See* Opposition at 11 (“the *Resolution unequivocally states* that the FTC’s purpose is *only* to investigate Church & Dwight’s sales, marketing and distribution practices with regard to male condoms within the United States, and not Canada.”) (*emphasis added*).

The Commission Staff has refused to confirm that the witnesses will only be questioned with respect to Church & Dwight’s business practices in the United States. *See* Electronic Correspondence dated November 1, 2010 (stating that the Staff “will not agree to limit the questions.”). In fact, based on its legal positions in the pending Enforcement Action, the Commission undoubtedly believes that the Resolution has an unstated extra-territorial reach that extends beyond its plain language and would permit the Commission Staff to question the witnesses without regard for geographic boundaries. *See* FTC Petition at 13 (claiming that “a comparison of [Church & Dwight’s] U.S. and Canadian marketing practices can be useful to determine whether the U.S. practices reflect an abuse of monopoly power.”).

For instance, Church & Dwight expects the Commission Staff will query the witnesses for information on the company’s business practices outside of the United States simply because of their positions with the company, *i.e.*, Mr. Craigie, President, CEO, and Chairman; Mr. Huns,

President of *International* Consumer Products; Mr. Siracusa, Executive Vice President, *Global* Research and Development; and Ms. Zhan, Director of Finance, Consumer *International* Division. Church & Dwight also expects the Staff will question the witnesses in an effort to obtain information concerning the Canadian condom market to support its so-called natural experiment. However, Church & Dwight has already sufficiently and repeatedly established why such an effort is invalid on its face.⁴ Moreover, the Commission Staff cannot use the witnesses' testimony as an attempt to fill the evidentiary holes in its theory. Without a federal court order, now on appeal, compelling the production of Canadian documents, the Commission Staff will be unable to lay the necessary foundation for the witnesses' testimony on any issues related to the Canadian condom market or place their testimony into the proper context. Accordingly, any such effort would simply be a waste of time for all parties involved.

Moreover, and as already noted above, the parties' differing interpretations of the Resolution's geographic scope is an issue that lies at the very heart of the Enforcement Action and the pending appeal to the D. C. Circuit. *Compare* FTC Petition at 13 ("Canada documents . . . are reasonably relevant to the FTC's investigation.") *with* Opposition at 10 ("*[c]*ontrary to the express terms of its own controlling Resolution, the FTC Staff claims that Church & Dwight is required to produce all documents related to the distribution and sale of condoms in Canada") (*emphasis added*). The Commission Staff should not be permitted to circumvent the proceedings it initiated, while on appeal, by questioning the witnesses without limitation. Neither the Resolution nor the subpoenas provide any support for the Staff's efforts to conduct an international fishing expedition. For these reasons, Church & Dwight respectfully requests that

⁴ For example, the Commission Staff has not adduced any independent support that the Canadian market is analogous to the United States market, that Church & Dwight does not use planogram rebates in Canada, or that Church & Dwight's percentage of market growth has been substantially lower in Canada than in the United States.

the subpoenas *ad testificandum* be quashed, limited or stayed while the issues are being decided by the D.C. Circuit to the extent they seek information beyond “the distribution or sale of condoms *in the United States.*” See Resolution (*emphasis added*).

B. Non-Condom Products Are Entirely Irrelevant To The FTC’s Investigation Into The Distribution Or Sale Of Condoms.

As with the issue of geographic scope, information sought concerning Church & Dwight products must be “reasonably relevant,” to the “scope and purpose of the FTC’s investigation, as set forth in the Commission’s resolution.” *Texaco*, 555 F.2d at 872, 874 (*emphasis added*). Here, the Resolution’s plain language establishes the relevant product to be condoms only: “Nature and Scope of Investigation . . . To determine whether Church & Dwight . . . has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of *condoms* in the United States[.]” (*emphasis added*).

Approximately forty (40) words after the general purpose of the investigation is established as “distribution or sale of condoms in the United States,” the Resolution refers to “Trojan brand condoms and other products distributed or sold by Church & Dwight.” *Id.* However, properly read on its face, the “other products” language does not include irrelevant non-condom products such as toothpaste, cat litter, baking soda and detergents.⁵ See Opposition at 19. Rather, that language is clearly intended to only address other *non-Trojan* brand *condom* products made by Church & Dwight since 1999, such as Naturalamb and Elexa, not other non-condom products. This is particularly so in light of the Resolution’s opening and crystal clear articulation of the nature and scope of the investigation, “To determine whether Church &

⁵ 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, OxiClean, Close-Up, Aim and Pepsodent toothpastes, Brillo, and Orange Glo. Church & Dwight also sells various specialty chemicals.

Dwight Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States. . .” *Id.* at 19-20.

Instead, the Commission Staff has, during the parties’ disputes over the scope of the Resolution, improperly seized on the “other products” language out of context to alter the plain meaning of the Resolution as issued by the Commission. *See* FTC Reply 16 (claiming that “[t]he resolution’s operative language for purposes of obtaining non-condom product information is the phrase ‘Trojan brand condoms *and other products* distributed or sold by Church & Dwight.’”).

The Circuit Court of Appeals for the District of Columbia sitting *en banc* rejected a similar attempt to alter the plain meaning of an FTC resolution in *Texaco* – a case relied upon heavily by the FTC in the Enforcement Action. 555 F.2d at 874. There, the resolution stated, in pertinent part:

The purpose of the authorized investigation is to develop facts relating to the acts and practices of . . . (certain named corporations) to determine whether said corporations, and other persons and corporations, individually or in concert, are engaged in conduct *in the reporting of natural gas reserves for Southern Louisiana* which violates Section 5 of the Federal Trade Commission Act, *or* are engaged in conduct or activities relating to the *exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels* in violation of Section 5 of the Federal Trade Commission Act.

Id. at 868 (*emphasis added*). The *Texaco* resolution contained two distinct areas of inquiry: (1) reporting of natural gas reserves; and (2) exploration, development, production, marketing of natural gas, petroleum, and fossil fuels. Regarding the former, the gas producer respondents, unlike Church & Dwight here, attempted to unilaterally limit the FTC’s inquiry to “possible underreporting of *proved* [gas] reserves to the [American Gas Association (“AGA”)].” *Id.* at 874 (*emphasis added*). Not surprisingly, the D.C. Circuit rejected this attempt because the “FTC’s

resolution [did] not even mention either the *AGA* or *proved* reserves.” *Id.*⁶ Following the logic of *Texaco*, the Commission Staff here should not be permitted to rewrite the Commission’s Resolution *ex post facto* whenever doing so would meet its alleged investigatory needs.⁷ Only the Commission has the power to issue Resolutions.

Here, the Commission Staff’s unreasonable refusal to clarify the scope of its subpoenas *ad testificandum* coupled with the FTC’s position in the Enforcement Action makes it a near certainty that the Commission Staff will attempt to query the witnesses about non-condom products, which is improper due to the pending appeal to the D.C. Circuit addressing that same issue. Like the actions taken by the *Texaco* gas producers, the Commission Staff’s attempt to do so violates the plain meaning of the Commission’s Resolution. Unlike the *Texaco* gas producers, Church & Dwight does not seek to alter the plain meaning scope of the Resolution. Rather, it is the Resolution’s plain language – promulgated by the FTC itself – that limits the scope of inquiry to condoms only.

Moreover, as with the geographic scope, the parties’ dispute concerning the products implicated by the Resolution lies at the very heart of the Enforcement Action and the pending appeal. *Compare* FTC Reply at 16 (“[t]he resolution’s operative language for purposes of obtaining non-condom product information is the phrase ‘Trojan brand condoms *and other*

⁶ Similarly, the Resolution does not mention countries other than the U.S., nor state that the FTC is investigating Church & Dwight’s business practices in any jurisdiction other than the U.S. *See* Section II(A), *supra*.

⁷ Notably, the FTC’s citation to *Texaco* to liken Church & Dwight to the gas producers misses the point. The FTC states “this case is just like *Texaco*, where the gas producers sought to read the ‘proved’ into the phrase ‘reporting of natural gas reserves.’” FTC Reply at 16 (citing *Texaco*, 555 F.2d at 874). However, this ignores the fact that the “reporting of natural gas reserves” language appears in the part of the resolution establishing the purpose of the investigation and is, therefore, more analogous to the “in the distribution or sale of condoms in the United States” language in the instant Resolution. Church & Dwight does not read any words into that phrase. Rather, the FTC stresses the later “other products” language out of context in an attempt to assert that as the purpose of the investigation. *See Id.* at 16 (“[t]he resolution’s operative language for purposes of obtaining non-condom product information is the phrase ‘Trojan brand condoms *and other products* distributed or sold by Church & Dwight.”). Thus, the FTC, in disturbing the plain meaning of the Resolution, is more like the gas producers than Church & Dwight.

products distributed or sold by Church & Dwight.”) *with* Opposition at 19 (“[p]roperly read, the FTC’s Resolution’s plain language concerning ‘Trojan brand condoms *and other products* distributed or sold by Church & Dwight’ does not include irrelevant non-condom products such as toothpaste, cat litter, baking soda and detergents.”). Accordingly, Church & Dwight respectfully requests that the subpoenas *ad testificandum* be quashed or limited to the extent they seek information on non-condom products.

C. Allowing The Investigational Hearings To Proceed At This Juncture Would Be A Waste Of Time And Resources For Both Parties.

Unless the Commission Staff agrees, or the Commission orders its Staff, to limit the scope of questioning, a meaningful investigational hearing cannot occur until any appeals of Judge Facciola’s ruling in the Enforcement Action are exhausted. *See* Electronic Correspondence dated November 1, 2010 (stating that the Staff “will not agree to limit questions.”). It bears repeating that the basic issues implicated by the instant subpoenas and Enforcement Action are identical. Therefore, any investigational hearings should be quashed, limited or continued until a final decision concerning the proper scope of the Resolution is reached.

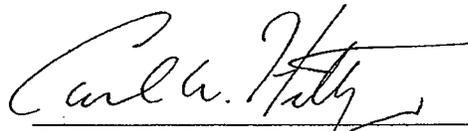
Moreover, requiring investigational hearings to move forward at this time will result in wasteful piecemeal proceedings. As explained in its October 19th correspondence to the Commission Staff, Church & Dwight will instruct the witnesses to not answer questions concerning Church & Dwight’s business practices in any country other than the United States or products other than condoms. Importantly, Church & Dwight’s counsel will not take such actions for the improper purpose of impeding the investigation. Rather, counsel must act in a matter that will preserve the integrity of its client’s position in the pending appeal arising out of

the Enforcement Action. Thus, if Church & Dwight instructs the witnesses not to answer, and the Circuit Court subsequently rules in its favor, the Commission Staff will likely claim that additional questioning of the witnesses is required. Under those circumstances, the Staff will undoubtedly attempt to compel the witnesses' presence for a second hearing. This should not be permitted. The hearings should not occur in a wasteful piecemeal fashion or until the appellate court(s) resolve the parties' dispute over the proper reach of the Resolution.

III. CONCLUSION

For all of the above reasons, the four subpoenas *ad testificandum*, issued on October 15, 2010, in connection with the FTC's non-public investigation, should be quashed or limited to the extent they seek information concerning any country other than the United States and any Church & Dwight products other than condoms. At the very least, the investigational hearings should be stayed until any appeals of Judge Facciola's ruling in the Enforcement Action are exhausted, with the federal appellate courts.

Respectfully submitted,



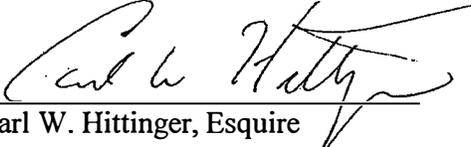
Carl W. Hittinger, Esquire
Lesli C. Esposito, Esquire
Matthew A. Goldberg, Esquire
Patrick Castañeda, Esquire
DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, PA 19103
T.: (215) 656-2449
F.: (215) 656-2149

Attorneys for Petitioner
Church & Dwight Co., Inc.

Dated: November 4, 2010

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, Limit or Stay Subpoenas *Ad Testificandum* directed to: James Craigie, Adrian Huns, Paul Siracusa and Kelly Zhan dated November 4, 2010. However, these efforts have proven unsuccessful and have necessitated the filing of the instant Petition.


Carl W. Hittinger, Esquire

Dated: November 4, 2010

EXHIBIT A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103

October 29, 2010

Carl Hittinger, Esq.
Lesli Esposito, Esq.
Matthew Goldberg, 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 Mr. Hittinger, Ms. Esposito, and Mr. Goldberg:

Please be advised that we agree to extend the time for the investigational hearings of Adrian Huns and Kelly Zhan until January 13, 2011.

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 Sylvia Kundig at 415.848.5188.

Sincerely,

Dean Graybill, Esq.
Assistant Regional Director
Western-Region-San Francisco

EXHIBIT B

From: Kundig, Sylvia [mailto:SKUNDIG@ftc.gov]
Sent: Monday, November 01, 2010 04:04 PM
To: Hittinger, Carl; Esposito, Lesli; Goldberg, Matthew A.
Cc: Ortiz, Kelly <kortiz@ftc.gov>; Charter, Janice L. <JCHARTER@ftc.gov>; Hegedus, Mark S. <mhegedus@ftc.gov>
Subject: RE: Extension

Carl. We will not agree to limit the questions. Sylvia

From: Hittinger, Carl [mailto:Carl.Hittinger@dlapiper.com]
Sent: Monday, November 01, 2010 11:38 AM
To: Kundig, Sylvia; Esposito, Lesli; Goldberg, Matthew A.
Cc: Ortiz, Kelly; Charter, Janice L.; Hegedus, Mark S.
Subject: RE: Extension

Sylvia: Understood. Next question, returning to our recent phone call, will you agree to limit the questions at the presently scheduled January investigative hearings to only the marketing and distribution of condoms in the United States if we would file an appeal of Judge Facciola's decision to the Court of Appeals for the District of Columbia? Thanks, Carl

EXHIBIT C



SUBPOENA AD TESTIFICANDUM

1. TO

James Craige
c/o Lesli Esposito, Esq.
DLA Piper US LLP
One Liberty Place
1650 Market Street - Suite 4900
Philadelphia, Pennsylvania 19103

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 below (Item 6).

3. LOCATION OF HEARING

DLA Piper US LLP
One Liberty Place
1650 Market Street - Suite 4900
Philadelphia, Pennsylvania 19103

4. YOUR APPEARANCE WILL BE BEFORE

Janice Charter and Sylvia Kundig

5. DATE AND TIME OF HEARING OR DEPOSITION

January 14, 2011, 9:00 a.m.

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 CUSTODIAN/DEPUTY RECORDS CUSTODIAN

8. COMMISSION COUNSEL

Janice Charter, Esq. (415) 848-5115
Sylvia Kundig, Esq. (415) 848-5188

DATE ISSUED

10/15/10

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 8.

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)

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

COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
I. 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



SUBPOENA AD TESTIFICANDUM

<p>1. TO</p> <p>Paul Siracusa c/o Lesli Esposito, Esq. DLA Piper US LLP One Liberty Place 1650 Market Street - Suite 4900 Philadelphia, Pennsylvania 19103</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
--	---

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 below (Item 6).

<p>3. LOCATION OF HEARING</p> <p>DLA Piper US LLP One Liberty Place 1650 Market Street - Suite 4900 Philadelphia, Pennsylvania 19103</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Janice Charter and Sylvia Kundig</p> <hr/> <p>5. DATE AND TIME OF HEARING OR DEPOSITION</p> <p>January 14, 2011 4:00 p.m.</p>
--	---

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.

<p>7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN</p>	<p>8. COMMISSION COUNSEL</p> <p>Janice Charter, Esq. (415) 848-5115 Sylvia Kundig, Esq. (415) 848-5188</p>
--	--

<p>DATE ISSUED</p> <p>10/15/10</p>	<p>COMMISSIONER'S SIGNATURE</p> <p><i>J. Thomas Ross</i></p>
------------------------------------	--

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 8.

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)

**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:

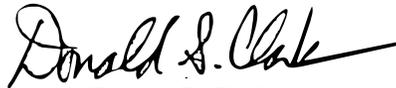
To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or 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



SUBPOENA AD TESTIFICANDUM

<p>1. TO</p> <p>Adrian Huns c/o Lesli Esposito, Esq. DLA Piper US LLP One Liberty Place 1650 Market Street - Suite 4900 Philadelphia, Pennsylvania 19103</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
--	---

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 below (Item 6).

<p>3. LOCATION OF HEARING</p> <p>DLA Piper US LLP One Liberty Place 1650 Market Street - Suite 4900 Philadelphia, Pennsylvania 19103</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Janice Charter and Sylvia Kundig</p> <hr/> <p>5. DATE AND TIME OF HEARING OR DEPOSITION</p> <p>November 5, 2010, 9:00 a.m.</p>
--	--

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.

<p>7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN</p>	<p>8. COMMISSION COUNSEL</p> <p>Janice Charter, Esq. (415) 848-5115 Sylvia Kundig, Esq. (415) 848-5188</p>
--	--

<p>DATE ISSUED</p> <p>10/15/10</p>	<p>COMMISSIONER'S SIGNATURE</p> <p><i>J. Tim Roc</i></p>
------------------------------------	--

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 8.

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)

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



SUBPOENA AD TESTIFICANDUM

<p>1. TO</p> <p>Kelly Zhan c/o Lesli Esposito, Esq. DLA Piper US LLP One Liberty Place 1650 Market Street - Suite 4900 Philadelphia, Pennsylvania 19103</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
---	---

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 below (Item 6).

<p>3. LOCATION OF HEARING</p> <p>DLA Piper US LLP One Liberty Place 1650 Market Street - Suite 4900 Philadelphia, Pennsylvania 19103</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Janice Charter and Sylvia Kundig</p> <p>5. DATE AND TIME OF HEARING OR DEPOSITION</p> <p>November 5, 2010, 5:00 p.m.</p>
--	--

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.

<p>7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN</p>	<p>8. COMMISSION COUNSEL</p> <p>Janice Charter, Esq. (415) 848-5115 Sylvia Kundig, Esq. (415) 848-5188</p>
--	--

<p>DATE ISSUED</p> <p>10/15/10</p>	<p>COMMISSIONER'S SIGNATURE</p> <p><i>A. Thurman Row</i></p>
------------------------------------	--

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

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TRAVEL EXPENSES

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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)

**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

EXHIBIT D



DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, Pennsylvania 19103-7300
www.dlapiper.com

Lesli Esposito
lesli.esposito@dlapiper.com
T 215.656.2432
F 215.656.3301

October 18, 2010

VIA E-MAIL & FIRST CLASS MAIL

Ms. Janice L. Charter
Ms. Sylvia Kundig
Federal Trade Commission
West Region - San Francisco
901 Market St., Suite 570
San Francisco, CA 94103

Re: Church & Dwight – FTC File No. 091-0037

Dear Jan and Sylvia:

We are in receipt of the Subpoenas Ad Testificandum for Kelly Zhan and Adrian Huns, as well as James Craigie and Paul Siracusa. The subpoenas describe the subject of the investigation as "Church & Dwight's marketing practices through retail chains in the United States of America." We understand this description to limit the subject matter of the investigational hearings to the United States of America; it is our understanding that the investigational hearings will not address Canada. Given that Canada is not the subject of the hearings, we will no longer move to quash the subpoenas of Kelly Zhan and Adrian Huns. However, if the witnesses are asked any questions that relate to Canada, as opposed to the United States, we will object during the hearings.

We are in the process of determining the availability of Adrian Huns and Kelly Zhan for investigational hearings. We will be in touch as soon as possible regarding specific dates.

As always, should you have any questions, please do not hesitate to contact me.

Sincerely,

DLA Piper LLP (US)



Lesli Esposito

Enclosure

cc: Carl W. Hittinger, Esquire
Matthew A. Goldberg, Esquire

EXHIBIT E



DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, Pennsylvania 19103-7300
www.dlapiper.com

Lesli Esposito
lesli.esposito@dlapiper.com
T 215.656.2432
F 215.656.3301

October 19, 2010

VIA E-MAIL & FIRST CLASS MAIL

Ms. Janice L. Charter
Ms. Sylvia Kundig
Federal Trade Commission
West Region - San Francisco
901 Market St., Suite 570
San Francisco, CA 94103

Re: Church & Dwight – FTC File No. 091-0037

Dear Jan and Sylvia:

This letter serves to clarify my letter of October 18, 2010. During the investigational hearings, if witnesses are asked questions regarding any country other than the United States or any product other than condoms, counsel for Church & Dwight will object and instruct the witnesses not to answer those questions.

Please let us know if you agree to these limitations.

Sincerely,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read 'Lesli Esposito', written over a horizontal line.

Lesli Esposito

cc: Carl W. Hittinger, Esquire
Matthew A. Goldberg, Esquire

EXHIBIT F



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 19, 2010

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

VIA Email and US Mail

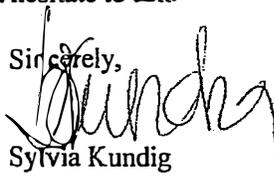
Re: Church & Dwight
FTC File 091-0037

Dear Lesli:

We are in receipt of your October 18, 2010 and October 19, 2010 letters regarding the scope of the Subpoenas Ad Testificandum for Kelly Zhan and Adrian Huns. As Church & Dwight is aware, the scope of an investigational hearing is defined by the Commission's resolution authorizing process, which is attached to the Subpoena. The investigational hearing will be conducted under the Commission's Rules, including 16 C.F.R. § 2.9, which addresses objections based upon scope. Under the Rules, a witness may not refuse to answer on grounds that the testimony sought is claimed to be beyond the scope of the investigation.

Should you have any questions, please do not hesitate to ask.

Sincerely,



Sylvia Kundig

EXHIBIT G

From: DCD_ECFNotice@dcd.uscourts.gov <DCD_ECFNotice@dcd.uscourts.gov>
To: DCD_ECFNotice@dcd.uscourts.gov <DCD_ECFNotice@dcd.uscourts.gov>
Sent: Thu Apr 22 10:21:55 2010
Subject: Activity in Case 1:10-mc-00149-EGS FEDERAL TRADE COMMISSION v. CHURCH & DWIGHT CO., INC. Order

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 4/22/2010 at 10:21 AM and filed on 4/22/2010

Case Name: FEDERAL TRADE COMMISSION v. CHURCH & DWIGHT CO., INC.

Case Number: 1:10-mc-00149-EGS

Filer:

Document Number: No document attached

Docket Text:

MINUTE ORDER. In view of the parties' responses indicating that they have no objection to the Court's referral of this case to the Honorable John M. Facciola for all purposes, the Court hereby transfers this case to Magistrate Judge Facciola for resolution with any appeal from his judgment to be taken directly to the United States Court of Appeals for the District of Columbia Circuit. Signed by Judge Emmet G. Sullivan on April 22, 2010. (lcegs1)

1:10-mc-00149-EGS Notice has been electronically mailed to:

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EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
Petitioner,)	
)	
v.)	Misc. No. _____
)	
CHURCH & DWIGHT CO., INC.,)	
)	
Respondent.)	
)	

**MEMORANDUM IN SUPPORT OF PETITION OF THE
FEDERAL TRADE COMMISSION
FOR AN ORDER ENFORCING A SUBPOENA *DUCES TECUM*
AND CIVIL INVESTIGATIVE DEMAND**

Petitioner, the Federal Trade Commission (“FTC” or “Commission”), by its designated attorneys and pursuant to Sections 9, 16 and 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 49, 56, 57b-1, petitions this Court for an Order requiring Respondent, Church & Dwight Co., Inc. (C&D), to comply with the subpoena *duces tecum* and the civil investigative demand (CID) issued to it by the FTC on June 29, 2009. The subpoena and CID seek documents and information relevant to an ongoing Commission law enforcement investigation. The Commission issued the subpoena and CID in aid of its non-public investigation seeking to determine whether Respondent C&D has engaged or is engaging in unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, with respect to the distribution or sale of condoms in the United States. In particular, the Commission seeks to determine whether C&D has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States 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 C&D.

C&D is impeding the Commission's investigation by (1) redacting non-privileged information about non-condom products contained in otherwise responsive documents, (2) refusing to produce information and documents located in or related to Canada, and (3) failing otherwise to comply with the subpoena and CID by compliance deadlines set by the Commission, which have been extended multiple times. While the Commission has rejected C&D's untimely petitions to quash the subpoena and CID and has instructed C&D to comply, C&D maintains that it will not comply with the subpoena and CID unless ordered to do so by this Court.

Because the subpoena and CID were lawfully issued, the information and documents sought are relevant to the Commission's investigation, and responding to the subpoena and CID would not unduly burden C&D, the Court should (1) order C&D to show cause why it should not fully comply, and (2) thereafter enforce the subpoena and CID. *See, e.g., FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. MacArthur*, 532 F.2d 1135, 1141-42 (7th Cir. 1976); *see also* Fed. R. Civ. P. 26(a)(1)(B)(v); 81(a)(5). Absent such an order from this Court, C&D will continue to impede the Commission's lawful investigation and delay antitrust enforcement that may be needed to protect consumers from possible anticompetitive conduct.

JURISDICTION

Section 9 of the FTC Act authorizes the Commission to issue subpoenas to require the production of documentary evidence relating to any matter under investigation. 15 U.S.C. § 49. If the recipient of the subpoena fails to comply, the Commission may petition the appropriate district court for an order requiring compliance. *Id.* The statute confers jurisdiction and venue on the district court of the United States in the district where the investigation is being conducted. *Id.*

Pursuant to Section 9, the Commission issued the subpoena *duces tecum* to C&D on June 29, 2009. Pet. Exh. 1 (Declaration of Sylvia Kundig of February 25, 2010), ¶ 9;¹ Pet Exh. 3. The FTC served the subpoena on C&D's counsel, and service is not in dispute here. Pet. Exh. 1, ¶ 10. The Commission's investigation is taking place in Washington, D.C. and San Francisco, CA. Pet. Exh. 1, ¶ 8. Because C&D has failed to comply with the subpoena, Section 9 of the FTC Act empowers this Court to issue its process (*e.g.*, a show cause order) to C&D in this proceeding. *See, e.g., FTC v. Browning*, 435 F.2d 96, 100-01 (D.C. Cir. 1970); *FEC v. Committee to Elect Lyndon LaRouche*, 613 F.2d 849, 854-58 (D.C. Cir. 1979).

Likewise, the Commission is empowered by Section 20(c) of the FTC Act, 15 U.S.C. § 57b-1(c), to require by CID the production of documents or other information relating to any Commission law enforcement investigation. Pursuant to Section 20(c), the Commission issued the CID to C&D on June 29, 2009. Pet Exh. 1 ¶ 9; Pet. Exh. 4. The FTC served the CID on C&D's counsel, and service is not in dispute here. Pet. Exh. 1 ¶ 11. Because C&D has failed to comply with the CID, Section 20(e) of the FTC Act authorizes the Commission to petition for its enforcement in any judicial district in which the respondent resides, is found, or transacts business, and authorizes service of process in any district. 15 U.S.C. § 57b-1(e). Section 20(h) gives district courts jurisdiction to hear and determine petitions for enforcement and to order compliance with the Commission's CIDs. 15 U.S.C. § 57b-1(h). In this case, venue and personal jurisdiction are proper under Section 20(e) because C&D transacts business in this district. Pet. Exh. 1, ¶ 3.

¹ Exhibits to the Commission's Petition are referred to as "Pet. Exh."

STATEMENT OF FACTS

The Parties

The Commission is an administrative agency of the United States government, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41, *et seq.* The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prevent the use of unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Section 3 of the FTC Act empowers the Commission to prosecute any inquiry necessary to its duties in any part of the United States. 15 U.S.C. § 43. Section 6 of the Act empowers the Commission “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,” with certain exceptions not relevant here. 15 U.S.C. § 46. As noted above, Section 9 of the Act empowers the Commission to demand, by subpoena, the production of all such documentary evidence relating to any matter under investigation, 15 U.S.C. § 49, and Section 20 empowers the Commission to require by CID the production of documents or other information relating to any Commission law enforcement investigation. 15 U.S.C. § 57b-1(e).

Respondent C&D is a publicly held company. C&D develops, manufactures and markets a broad range of household, personal care, and specialty products under well-recognized brand names, including Trojan brand condoms. It is incorporated in the State of Delaware, with its principal place of business at 469 North Harrison Street, Princeton, N.J. C&D transacts business throughout the United States, including Washington, D.C. Pet. Exh. 1, ¶ 3. C&D is engaged in, and its business affects, “commerce,” as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

Background – Condom Market

Condoms are sold or distributed to consumers through a variety of channels, including food stores, drug stores, and mass merchandisers, such as Wal-Mart and Target. C&D controls at least 70% of the latex condom market in the U.S. Pet. Exh. 1, ¶ 4. Because there is minimal television and print advertising for condoms, the principal way that consumers learn about the different brands and styles of condoms available at retail is at the store. Accordingly, a significant animating factor for condom sales is that the product be present on retail shelves and be placed in an advantageous position, *i.e.*, at eye level, on those shelves. Pet. Exh. 1, ¶ 5.

C&D has a marketing program designed to take advantage of consumers' buying behavior. Under this program, C&D offers a rebate on a retailer's net purchases if it agrees to dedicate a certain percentage of its shelf space to Trojan brand condoms. For example, retailers dedicating 70% of their shelf space to Trojan brand condoms receive a 7.5% rebate. The rebate is not contingent on the volume of Trojan brand condoms purchased by the retailer or sold by the retailer to consumers. Pet. Exh. 1, ¶ 6. One issue in this investigation is whether C&D, through these shelf-share agreements, unlawfully enhanced or maintained its monopoly power. Pet. Exh. 1, ¶ 7.

The Commission's Investigation and the Subpoena and CID

On June 10, 2009, the Commission opened a formal investigation and issued a Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (FTC File No. 091-0037). Pet. Exh. 1, ¶ 8; Pet. Exh. 2. The Resolution authorized the use of all compulsory process in connection with the 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.” Pet. Exh. 2.

On June 29, 2009, the Commission issued a subpoena *duces tecum* and a CID to C&D requiring the Company to produce documents and data relating to the investigation. Pet. Exh. 1, ¶ 9; Pet. Exh. 3; Pet. Exh. 4. The subpoena contains 23 specifications, while the CID contains 21. *Id.* Both the subpoena and CID seek documents and information regarding C&D’s practices in “(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.” Pet. Exh. 3, Definition K; Pet Exh. 4, Definition H.

The subpoena seeks, *inter alia*, documents related to the marketing practices that C&D has employed over time. Documents to be produced include 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 (Specifications 15-19). Pet. Exh. 1, ¶ 10; Pet. Exh. 3. The CID seeks, *inter alia*, detailed data relating to the sale of condoms, including pricing and 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 C&D’s marketing programs (Specifications 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). Pet. Exh. 1, ¶ 11; Pet. Exh. 4.

The subpoena and CID also contain a number of instructions governing the timing, format, and manner of submission of responsive documents. Both the subpoena and CID require “a

complete search of “the Company” which is defined as “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.” Pet. Exhs. 3, 4. The subpoena states that “Document” means, *inter alia*, “all computer files and written, recorded and graphic materials of every kind in the possession, custody or control of the Company.” Pet. Exh. 3. Instruction R of the subpoena provides in relevant part: “All Documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form [...] shall be produced in complete form, unredacted unless privileged, and in the order which they appear in the Company’s files and shall not be shuffled or otherwise rearranged.” *Id.* The subpoena and CID had response deadlines of July 30, 2009. Pet. Exh. 1, ¶ 9; Pet. Exh. 3; Pet. Exh. 4.

C&D’s Failure to Comply with the Subpoena and CID

Throughout the investigation, C&D has engaged in dilatory conduct that appears designed to frustrate the Commission’s legitimate law enforcement investigation. Pet. Exh. 1, ¶ 12. It neither sought a compliance extension nor complied in full with the subpoena and CID by the July 30, 2009 deadline. Pet. Exh. 1, ¶ 13. Subsequently, the Commission extended C&D’s compliance deadline to November 20, 2009, Pet. Exh. 5, but C&D again failed to comply in full. Pet. Exh. 1, ¶ 20. Finally, in conjunction with its denial of C&D’s two petitions to limit or quash, the Commission provided C&D with a final extension until January 26, 2010. Pet. Exh. 1, ¶ 23. C&D has yet to comply in full, Pet. Exh. 1, ¶ 27, and its failure to comply is not limited to those portions of the subpoena and CID to which it has specifically objected. C&D has ignored the Commission’s multiple deadlines for the vast majority of the documents C&D is required to produce. Pet. Exh. 1, ¶¶ 13, 20, 26.

In addition to its general failure to provide complete responses to the subpoena and CID, C&D has indicated that it will refuse to comply in two respects. First, C&D refuses to abide by the subpoena's and CID's defining "Relevant Area" to include Canada. Pet. Exh. 3, Definition K; Pet. Exh. 4, Definition H. C&D has searched the files of C&D employees located in the United States in C&D's International Division who work on behalf of C&D Canada, and has produced some of their responsive documents and information, but it has refused to search files located in Canada, despite repeated FTC staff requests that it do so. Pet. Exh. 1, ¶ 16. Second, C&D has also ignored the subpoena's Instruction R, which requires that documents be produced in unredacted form, unless privileged. Pet. Exh. 1, ¶ 18; Pet. Exh. 3. Instead, C&D has insisted on redacting non-privileged, non-condom information from otherwise responsive documents. Pet. Exh. 1, ¶ 19.

The Commission's rules and procedures afford subpoena and CID recipients the opportunity to petition the Commission to limit or quash any investigative subpoena or CID. *See* 16 C.F.R. § 2.7(d). C&D filed two untimely petitions to limit or quash: one on November 12, 2009, pertaining to the subpoena's and CID's inclusion of "Canada" as a "Relevant Area," Pet. Exh. 1, ¶ 21; Pet. Exh. 6; the second on December 4, 2009, seeking to quash non-privileged information regarding non-condom products included in documents that were otherwise responsive. Pet. Exh. 1, ¶ 22; Pet. Exh. 7. The Commission denied both petitions on December 23, 2009, and established a new January 26, 2010 compliance deadline. Pet. Exh. 1, ¶ 23; Pet. Exh. 8. Although C&D sought rehearing on December 28, 2009, it did not present any new evidence or identify any mistakes of fact or law in the initial ruling. Pet. Exh. 1, ¶ 24; Pet. Exh. 9. The Commission rejected C&D's rehearing request on February 16, 2010. Pet. Exh. 1, ¶ 27; Pet. Exh. 10. C&D continues to refuse to comply fully with the subpoena and CID. Pet. Exh. 1, ¶ 27.

LEGAL STANDARD FOR ENFORCEMENT

The standards for the judicial enforcement of administrative compulsory process have long been settled in this Circuit: “the court’s role in a proceeding to enforce an administrative subpoena is a strictly limited one.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (*en banc*) (citing *Endicott Johnson v. Perkins*, 317 U.S. 501, 509 (1943); *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950)). And “while the court’s function is ‘neither minor nor ministerial,’ the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity.” *Id.* (quoting *Oklahoma Press Publ’g*, 327 U.S. at 217 n.57); *accord*, *FTC v. Anderson*, 631 F.2d 741, 744-45 (D.C. Cir. 1979). A court must enforce an agency’s investigative subpoena “‘if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant,’” *Texaco*, 555 F.2d at 872 (quoting *Morton Salt*, 338 U.S. at 652).

Proceedings to enforce administrative investigative subpoenas and CIDs are entitled to summary disposition. They are properly instituted by a petition and order to show cause (rather than by complaint and summons). *See* Fed. R. Civ. P. 81(a)(5). And they are summary in nature: discovery or evidentiary hearings may be granted only upon a showing of “extraordinary circumstances” – which are not present here; otherwise, “discovery is improper in a summary subpoena enforcement proceeding.” *Carter*, 636 F.2d at 789 (quoting *United States v. Exxon Corp.*, 628 F.2d 70, 77 n.7 (D.C. Cir. 1980)); *see also*, e.g., Fed. R. Civ. P. 26(a)(1)(B)(v); *Appeal of FTC Line of Business Report Litig.*, 595 F.2d 685, 704-05 (D.C. Cir. 1978); *MacArthur*, 532 F.2d at 1141-42; *Browning*, 435 F.2d at 104.

ARGUMENT

I. THE SUBPOENA AND CID ARE LAWFUL, SEEK RELEVANT DOCUMENTS AND ARE NOT UNDULY BURDENSOME

Because the Commission lawfully issued the subpoena and CID to Respondent C&D, the information and documents being sought are relevant to the Commission's investigation, and the subpoena and CID do not impose an undue burden on C&D, the Court should order C&D to show cause why it should not fully comply.

A. The C&D Subpoena and CID Are Lawful

The Commission properly issued the subpoena and CID as part of an investigation concerning possible violations of Section 5 of the FTC Act, 15 U.S.C. § 45.² The Commission initiated the investigation by issuing its investigational Resolution on June 10, 2009. *See* Pet. Exh. 2.³ According to the Resolution, the Commission seeks to determine whether C&D has engaged in unfair methods of competition with respect to its Trojan brand condoms. The Commission also resolved that "all compulsory process available to it be used in connection with this investigation." *Id.*

² Section 5 provides, in relevant parts:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

³ Specifically, the Resolution listed as the Commission's authority to conduct the investigation Sections 6, 9, 10, and 20 of the FTC Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.*, and supplements thereto. Pet. Exh. 2.

As explained above, Sections 6, 9 and 20 of the FTC Act give the Commission ample authority to conduct this investigation and to issue subpoenas and CIDs in furtherance of such investigation. There is no question that the subpoena was properly authorized and duly issued. *See* 15 U.S.C. § 49; *see also* 16 C.F.R. § 2.7(a).⁴ The C&D subpoena seeks documents (described in detailed specifications) that are indisputably “relating to” the subject matter of the investigation, and, as required by 15 U.S.C. § 49, it was duly signed by a member of the Commission (Commissioner J. Thomas Rosch). Pet. Exh. 3. Similarly, the CID was properly authorized and duly issued. *See* 15 U.S.C. § 57b-1(c)(1). As required by Section 20(i), 15 U.S.C. § 57b-1(i), the CID was signed by a member of the Commission (Commissioner J. Thomas Rosch), Pet. Exh. 4, and was authorized by an investigational resolution approved by the Commission. Pet. Exh. 2. C&D received ample notice of the scope and purpose of the investigation. 16 C.F.R. § 2.7.

B. The Subpoena and CID Seek Documents and Information That Are Reasonably Relevant to the Commission’s Investigation

In petitions for enforcement by the Commission, “[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.” *Texaco*, 555 F.2d at 874. But, “the agency’s own appraisal of relevancy must be accepted so long as it is not ‘obviously wrong’.” *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (quoting *Carter*, 636 F.2d at 788; *Texaco*, 555 F.2d

⁴ Section 2.7(a) of the Commission’s Rules of Practice provides, in relevant part: “The Commission or any member thereof may, pursuant to a Commission resolution, issue a subpoena or a civil investigative demand directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence, or both, or, in the case of a civil investigative demand, to provide a written report or answers to questions relating to any matter under investigation by the Commission.”

at 877 n.32). It suffices that the information be “reasonably relevant” to the Commission’s inquiry. *Morton Salt*, 338 U.S. at 652; *Texaco*, 555 F.2d at 874 n.23, 876.

The judicial standard for ascertaining “relevance” in an investigatory proceeding is deferential to the administrative agency, and is more relaxed than in an adjudicatory proceeding. Indeed, “a court must respect the agency’s ‘power of inquisition’ and interpret relevance broadly.” *FTC v. Invention Submission Corp.*, Misc. No. 89-272-RCL, 1991 U.S. Dist. LEXIS 5523 at *5 (D. D.C. Feb. 14, 1991) (quoting *Morton Salt*, 338 U.S. at 642), *aff’d*, 965 F.2d 1086. In elucidating the relevance standard, the D.C. Circuit “recognize[d] that in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case,” and cautioned that a “court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.” *Texaco*, 555 F.2d at 874 & n.23. Thus, “an investigative subpoena of a federal agency will be enforced if the ‘evidence sought * * * [is] not plainly incompetent or irrelevant to any lawful purpose’ of the agency.” *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) (alteration original) (quoting *Endicott Johnson*, 317 U.S. at 509); *see also Invention Submission Corp.*, 965 F.2d at 1089; *Carter*, 636 F.2d at 788; *Texaco*, 555 F.2d at 871-73.

In an investigation such as the one here, the Commission does not seek the information necessary to prove any specific charges; it merely seeks to learn if the law is being violated and *whether* to file a complaint. “An agency can inquire ‘merely on suspicion that the law is being violated, or even just because it wants assurance that it is not’.” *Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523 at *5 (quoting *Morton Salt*, 338 U.S. at 642-43). Under such circumstances, “the law requires that courts give agencies leeway when considering relevance objections.” *Id.*; *see also Texaco*, 555 F.2d at 872. The requested documents, therefore, need only be relevant to the

investigation – the boundary of which may be defined quite broadly. *See Carter*, 636 F.2d at 787-88; *Texaco*, 555 F.2d at 874 & n. 26.

The FTC here seeks to determine whether C&D has attempted to acquire, acquired, or maintained a monopoly in the sale or distribution of condoms in the U.S. through potentially exclusionary practices. By refusing to produce information and documents regarding non-condom products and sales in Canada, C&D seeks to force the Commission to investigate these issues in a vacuum. But it is clear that a target of a Commission investigation cannot shape the course of that investigation.

For example, in *Texaco*, a case involving, *inter alia*, the gas reserves reporting practices of American Gas Association (AGA) members, the D.C. Circuit rejected gas producers' efforts to limit document production to only "proved gas reserves." The court held that the reasonably relevant standard required production of information regarding all kinds of reserves, regardless of the purposes for which the information was developed, to permit comparative investigation. *Texaco*, 555 F.2d at 875-76; *see also id.* at 877 ("Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance.").

C&D's Canadian documents, which are sought by the subpoena and CID, are reasonably relevant to the FTC's investigation. C&D may well lack monopoly power with respect to condom sales in Canada. Thus, a comparison of C&D's U.S. and Canadian marketing practices can be useful to determine whether the U.S. practices reflect an abuse of monopoly power. To the extent Canadian experiences do not translate to U.S. markets, the reasons therefor could also help to explain C&D's conduct in the U.S. market.

Similarly, C&D should not be permitted to control the course of the Commission's investigation by redacting non-privileged information from responsive documents. The context in which responsive material appears is significant. "Appropriate documents should be submitted in their entirety to ensure comprehensibility, rather than being edited by respondents." *FTC v. Carter*, 464 F.Supp. 633, 640 (D. D.C. 1979) (rejecting argument for withholding allegedly irrelevant advertising text), *aff'd*, 636 F.2d 781. Redaction of non-condom information could deprive a deponent, for example, of context needed to testify accurately about a document.

C. Compliance with the Subpoena and CID Would Not Be Unduly Burdensome

C&D has raised no burden claims regarding production of non-condom information.⁵ In fact, redacting documents to exclude what C&D contends is irrelevant information increases its production burden. Regarding Canadian documents, C&D has never claimed that the documents are not in its possession, custody or control.⁶ Instead, it has said that the documents and records are housed on a separate computer system and that production would cost thousands of dollars and staff-hours. Pet. Exh. 6 at 8. C&D, however, has submitted no substantiation for these burden claims, nor has it shown that those costs are in any way greater than the costs for review and production of documents located in the U.S. In any event, to prove that compliance with the subpoena and CID would be unduly burdensome, C&D would have to show that compliance would threaten to disrupt

⁵ Arguments not first raised before the Commission in a petition to quash are waived here. See, e.g., *Invention Submission Corp.*, 1991 U.S. Dist. LEXIS at *7 n.12; see also *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 168 (E.D. N.Y. 1993); *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1255 (E.D. Wis. 1996).

⁶ C&D can be required to produce foreign-located documents within its possession, custody or control. *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984); *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101 (S.D.N.Y. 1999); *Addamax Corp. v. Open Software Foundation, Inc.*, 148 F.R.D. 462 (D. Mass. 1993); *In re Rambus*, 2002 FTC LEXIS 90 at *12-*15 (Nov. 18, 2002).

its business unduly, or otherwise seriously hinder its business. *See, e.g., Texaco*, 555 F.2d at 882; *Invention Submission Corp.*, 965 F.2d at 1090; *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979). C&D has made no such showing.

II. BECAUSE RESPONDENT C&D HAS FAILED TO COMPLY WITH THE COMMISSION'S SUBPOENA AND CID, THE COURT SHOULD ORDER C&D TO COMPLY IMMEDIATELY, FULLY, AND WITHOUT UNAUTHORIZED REDACTIONS

The need for Court enforcement of the subpoena and CID is not limited to C&D's refusal to comply with the subpoena's and CID's requirements to produce Canadian and non-condom documents or information. With respect to C&D's production of documents to which it has raised no objections, C&D has ignored the three compliance deadlines set by the Commission – July 30, 2009, November 20, 2009 and January 26, 2010. Pet. Exh. 1, ¶¶ 13, 20, 26. Even though 8 months have passed since the Commission served process on C&D, the company seems in no hurry to comply fully. Pet. Exh. 1, ¶¶ 25, 27.

As discussed above, the information sought by the subpoena and CID is reasonably relevant to the Commission's investigation, and its production will not unduly burden C&D. C&D's insistence on redacting or withholding relevant, non-privileged documents and information, as well as its dilatory approach to responding to those portions of the subpoena and CID to which it has not objected, violates its obligations under the FTC Act. In so doing, it is impairing the Commission's legitimate law enforcement efforts, imposing unnecessary costs on itself and the Commission, and facilitating commercial conduct that may be harming consumers. Accordingly, the Court should direct C&D to search the files of its Canadian subsidiary and to produce responsive documents without redactions of non-privileged, non-condom information. The Court should also require C&D

to comply in full with the subpoena and CID no later than 10 days from the date of the order requested herein.

CONCLUSION

For the foregoing reasons, this Court should order C&D to (1) search and produce responsive documents from the files of its Canadian subsidiary, (2) cease redaction of non-privileged, non-condom information in otherwise responsive documents, and (3) comply fully with the Commission subpoena and CID within ten (10) days of the Court's Order.

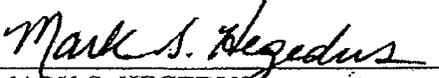
Respectfully submitted,

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EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)

Petitioner,)

v.)

CHURCH & DWIGHT CO., INC.,)

Respondent.)

Misc. No. 1:10-mc-00149-EGS/JMF

**REPLY OF PETITIONER FEDERAL TRADE COMMISSION TO
"CHURCH & DWIGHT CO., INC.'S OPPOSITION TO THE
PETITION OF THE FEDERAL TRADE COMMISSION FOR AN ORDER
ENFORCING SUBPOENA DUCES TECUM AND CIVIL INVESTIGATIVE DEMAND"**

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On February 26, 2010, the Federal Trade Commission (FTC or Commission) petitioned this Court, pursuant to Sections 9, 16 and 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 49, 56, 57b-1, for an order requiring Respondent, Church & Dwight Co., Inc. (C&D), to comply with the subpoena *duces tecum* and the civil investigative demand (CID) issued to it by the Commission on June 29, 2009.¹ On March 4, 2010, the Court issued an order directing C&D to show cause why the Court should not grant the Petition. C&D filed its response on May 21, 2010 (Response), but has failed to show why the Court should not enforce the subpoena and CID.

C&D does not challenge the lawfulness of the subpoena and CID. It does contend that the FTC’s request for documents and information possessed or controlled by C&D’s wholly owned, Canadian subsidiary are irrelevant to the purposes of the Commission’s investigation, as defined by the authorizing resolution (Pet. Exh. 2), and that production of such documents and

¹ The subpoena and CID are Petition Exhibits (Pet. Exhs.) 3 and 4, respectively.

information would be unduly burdensome. C&D, however, relies on a misreading of the resolution and an incorrect understanding of the Commission's power of original inquiry. Canadian documents and information are "reasonably relevant" to the Commission's investigation, properly understood, and C&D has made no showing that their production would be unduly burdensome.

C&D also maintains that it should be able to redact information about non-condom products that appears in otherwise responsive, non-privileged documents. Doing so, however, would seriously impede the Commission's lawful investigation, while C&D has demonstrated no basis for redacting the information. C&D's alternative proposal – subjecting documents to court review prior to their being produced to the FTC in unredacted form – would likewise interfere with the FTC's inquiry and would improperly transfer to the judiciary the FTC's role to address, in the first instance, confidentiality concerns in the context of an investigation.

Accordingly, the Court should reject C&D's challenge and issue an order requiring C&D to comply with the subpoena and CID not later than 10 days from the date of such order.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARDS COMPEL ENFORCEMENT IN THIS CASE

The issue before the Court is whether to enforce a subpoena and CID issued pursuant to the FTC Act in aid of the Commission's pre-complaint investigation. The Act provides that the Commission may invoke this Court's authority to enforce the subpoena and CID. 15 U.S.C. §§ 49, 57b-1(e). Contrary to C&D's suggestion,² the FTC's resort to the federal court for

² "By choosing to file the instant enforcement action, the FTC Staff has subjected itself to the authority of this Court, as well as the applicable case law and procedural rules in this Circuit, all of which strive to balance the burden on the producing party and the relevancy of the

enforcement does not somehow transform the proceeding into a dispute about the scope of discovery in an action defined by a complaint and governed by the Federal Rules of Civil Procedure. Rather, the standards applicable to pre-complaint subpoena enforcement continue to apply.

In *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977), where the FTC had likewise petitioned the federal court to aid in subpoena enforcement, the D.C. Circuit explained these standards:

“[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” [*U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).] In upholding the Commission’s order requiring certain corporations to file special reports demonstrating continuing compliance with a cease and desist order, the Court distinguished the judicial process, which does not involve itself in so-called “fishing expeditions” to determine if violations of law have occurred, from the administrative function of investigation:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. *Id.* at 642-43.

requested documents.” Response at 9.

“The FTC’s Petition, now pending in those same federal courts, ignores that it is accepted judicial policy that ‘redaction [is] appropriate where the information redacted [is] not relevant to the issues in the case.’” Response at 22 (citations omitted).

Thus, while the court's function is "neither minor nor ministerial," *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. [186,] 217 n.57 [(1946)], the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity.

Texaco, 555 F.2d at 872.³ These standards, not the narrower relevancy standards applied under the Federal Rules of Civil Procedure, govern the issues in this case.

The FTC's subpoena and CID are lawful, seek reasonably relevant information and are not unduly burdensome. C&D's Response, while long on hyperbole, especially in its mischaracterizations of the FTC's Staff's actions in the investigation, fails to show that the Court should not enforce the subpoena and CID. C&D has not challenged the Commission's showing that the subpoena and CID are lawful (see Petition at 2-3). As demonstrated below, C&D's claims regarding Canadian information and documents, as well as non-condom product information, lack factual and legal support. Because the subpoena and CID seek reasonably relevant information and documents, the production of which will not unduly burden C&D,⁴ the Court should issue an enforcement order.

³ Although C&D attempts to fault the FTC for being unable to articulate "exigent circumstances" necessitating expedition of these enforcement proceedings, C&D Response at 12 n.7, the imperative comes from the statutory and regulatory scheme itself, as the D.C. Circuit observed in *Texaco*.

⁴ C&D does not claim that is burdensome to produce documents containing non-condom information. Instead, it seeks to increase its burden by undertaking an improper content review and redaction of otherwise responsive documents.

II. C&D HAS FAILED TO SHOW THAT CANADIAN DOCUMENTS AND INFORMATION ARE NOT REASONABLY RELEVANT OR THAT THEY ARE UNDULY BURDENSOME TO PRODUCE

A. Canadian Documents and Information Will Aid the FTC's Investigation

In petitions for enforcement by the Commission, “[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.” *Texaco*, 555 F.2d at 874. Here, the Commission’s resolution states:

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.

Pet. Ex. 2. Although the Commission is investigating whether C&D’s conduct has harmed consumers located in the United States, the location of those consumers does not render Canadian documents and information from C&D’s wholly owned Canadian subsidiary irrelevant to the investigation. C&D’s claim otherwise (Response at 10-11) is wrong.

C&D does not deny that it sells condoms and other products in both the United States and Canada. C&D’s share of the condom market in Canada, however, is considerably smaller than in the United States, and the FTC’s request for materials from Canada will assist in determining the factors that affect C&D’s market share in these adjacent markets. For example, C&D uses Planograms in the United States, and the FTC seeks to understand to what extent the Planogram program, or some other sales and marketing practices, explains C&D’s dominant share in the United States condom market. That explanation will be assisted by examining C&D’s sales and

marketing practices in Canada, where it appears C&D does not use, or does not use to the same extent as in the United States, the Planogram program. Among other issues, the FTC seeks to determine whether the absence of Planograms, or other factors, explains C&D's smaller Canadian market share.

Even under the Federal Rules of Civil Procedure's narrower scope of discovery, *see FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) ("standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one"), C&D's Canadian documents and information would be deemed relevant. Those rules provide that relevant information need not be admissible so long as it is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Federal courts in the context of antitrust cases alleging harm to United States markets routinely reject relevancy objections and order discovery of foreign documents because, among other reasons, such materials "may help plaintiffs to discover the identity and location of potential witnesses." *In re Plastics Additives Antitrust Litigation*, No. 03-2038, 2004 U.S. Dist. LEXIS 23989, at *45 (E.D. Pa. Nov. 30, 2004); *see also In re Urethane Antitrust Litigation*, 261 F.R.D. 570, 574 (D. Kan. 2009); *In re Vitamins Antitrust Litigation*, No. 99-197, 2001 U.S. Dist. LEXIS 8904, at *64 (D.D.C. Jun. 20, 2001). C&D has made no showing that the Canadian materials sought by the FTC are not "reasonably calculated to lead to the discovery of admissible evidence," including the identity and location of potential witnesses. The relevance of Canadian materials to understanding C&D's condom sales and marketing practices in the United States is illustrated as well by

C&D's own documents, which indicate that C&D considers its Canadian experiences when assessing its United States activities. *See* Response at 17 n.10.⁵

Contrary to C&D's claim (Response at 12), the FTC does not have to demonstrate that the United States and Canadian markets are similar to justify its request for Canadian materials, particularly at the investigation stage. Given that C&D sells many of the same products in the two geographic markets, an aim of the investigation is to understand and compare both the similarities and differences between the two markets. The relevance of documents or information for comparison purposes is well-established. In *Texaco*, the Commission was investigating the practices of members of the American Gas Association (AGA), a trade association of natural gas producers. The court concluded that Superior Oil Co., which was not a member of AGA, was required to respond to the FTC's subpoena seeking information about gas reserves, because Superior made reserves estimates for its fields in South Louisiana, just like the members of the AGA. *Texaco*, 555 F.2d at 877. Concluding that Superior's information "could well be relevant to the FTC's inquiry," the court observed that "comparison of Superior's estimating process with that of a producer who does report to the AGA could be a useful analysis." *Id.* In light of the court's conclusion in *Texaco* and because C&D sells the same products both in the United States and Canada, the FTC's determination that Canadian documents and information are "reasonably relevant" is not "obviously wrong," *FTC v. Carter*,

⁵ At C&D's request, the FTC identified for C&D a document showing that C&D compares its Canadian and United States sales and marketing experiences. Although C&D claims that this was just one document and that it did not mention Planograms, Response at 17 n.10, in fact the FTC's investigation comprises all anticompetitive practices, not just Planograms, and the FTC made no attempt to identify all documents demonstrating that C&D compares its Canadian and United States marketing experiences.

636 F.2d 781, 788 (D.C. Cir. 1980), and accordingly “must be accepted.” *Invention Submission Corp.*, 965 F.2d at 1089.

The Court should also reject C&D’s contention (Response at 13-14, 16-17) that, merely because C&D has produced some documents related to Canada that happen to have been located in the files of United States custodians, this somehow obviates the need for C&D to respond to the subpoena and CID by producing documents and information held by its Canadian subsidiary.⁶ The target of the FTC’s compulsory process, which is the party most interested in *not* complying, *see Morton Salt*, 338 U.S. at 642, cannot be permitted to determine what documents the FTC needs to conduct its investigation.⁷ Nor must the FTC agree to a stepwise investigation, the progression of which depends upon C&D’s production and the FTC’s review of a subset of relevant documents. *United States v. Exxon Corp.*, 628 F.2d 70, 77 (D.C. Cir. 1980) (“nothing in the statute or its legislative history suggests in any way that Congress intended this study to be conducted in stages”). Thus, to fulfill its law enforcement responsibilities, the FTC requires that C&D respond to the subpoena and CID by producing all responsive documents and information held by C&D’s wholly own Canadian subsidiary.

⁶ C&D also claims that the FTC Staff agreed to let C&D initially produce Canada-related documents in the files of C&D’s United States custodians and leave for later determination whether C&D should produce documents and information from its Canadian subsidiary. Response at 5-6. C&D continues by accusing the FTC Staff of ignoring that agreement. In fact, there never was an agreement for a phased production, as the FTC Staff’s October 30, 2009 letter indicates. Response Exh. C. The subpoena and CID instructions clearly state that any modifications must be in writing. Pet. Exh. 3, Introduction; Pet. Exh. 4, Introduction.

⁷ Indeed, if the FTC were to try to draw conclusions about C&D’s condom marketing practices in Canada based upon the relatively small number of Canadian documents produced from the files of United States custodians, C&D would likely be the first to question the conclusions as lacking evidentiary support and reflecting inadequate investigation.

B. Canadian Materials Sought by the FTC Need Not be Admissible at a Trial to Be Reasonably Relevant

C&D asserts that the Canadian documents and information sought by the FTC are not reasonably relevant because the documents would not satisfy evidentiary standards for admissibility. In particular, C&D contends that the FTC would be unable to use these documents *at trial*, either to show that Canada is a similar market for purposes of introducing a “natural experiment,” or to admit such evidence as expert evidence under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Response at 12-14. But C&D cites no support for the proposition that federal courts enforce an agency’s subpoenas only where the materials are shown to be admissible under the Federal Rules of Evidence. Such a high standard would require agencies to articulate, at the investigation stage, a theory of violation, which, as courts repeatedly hold, the agencies need not do. *Texaco*, 555 F.2d at 877; *Invention Submission Corp.*, 965 F.2d at 1090. Even if some of the material sought by the FTC “ultimately prove[s] useless or irrelevant,” that does not preclude enforcement. *FTC v. Invention Submission Corp.*, No. 89-272, 1991 U.S. Dist. LEXIS 5523, at *22 (D.D.C. Feb. 14, 1991). Because questions of evidentiary admissibility would become relevant only during any trial, it is premature to consider them now.

C&D also claims that a “jurisdictional cul-de-sac” would prevent the FTC from securing foreign testimony or third party documents from Canada that the FTC might need to support at trial any argument based upon a “natural experiment.” Response at 14.⁸ Again, this argument

⁸ C&D does not, nor could it, contend that a court or the FTC could not require C&D to produce documents and information under its possession, custody or control. *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984); *Hunter Douglas, Inc. v. Comfortex Corp.*, M8-85, 1999 U.S. Dist. LEXIS 101 (S.D.N.Y. Jan. 11, 1999); *Addamax Corp. v. Open Software Foundation, Inc.*, 148 F.R.D. 462 (D. Mass. 1993); *In re Rambus*, No.

incorrectly assumes that the only documents C&D can be compelled to provide are those that would be admissible at trial. In any event, even if the FTC did need testimony from foreign witnesses, or third-party documents located in Canada, Federal courts have the power to compel, in appropriate circumstances, such testimony and documents. *See, e.g.*, 28 U.S.C. § 1781 (letters rogatory). Similarly, the FTC has mechanisms to obtain such testimony and documents, including through statutory authorization, 15 U.S.C. § 57b-1(c)(7)(B) & (C), voluntary witnesses, and the cooperation of foreign counterpart agencies. Thus, not only is the “jurisdictional cul-de-sac” argument irrelevant, it is wrong.

C. Substantive Antitrust Standards Do Not Justify C&D’s Decision to Withhold Reasonably Relevant Canadian Materials

C&D also claims that Canadian materials are not reasonably relevant to what it believes is the substantive law guiding the Commission’s investigation. Response at 15-16. C&D essentially asks that this Court evaluate the antitrust case C&D speculates the FTC may bring, and that it find that C&D’s United States pricing practices are lawful under *Pacific Bell Co. v. Linkline Communications, Inc.*, 129 S.Ct. 1109 (2009), and *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). According to C&D, if the United States pricing practices are lawful, the Canadian pricing practices can have no relevance to the FTC’s investigation. Courts, however, have consistently rejected claims that a party may resist investigative compulsory process merely because that party believed its conduct to be lawful. This Court should likewise reject C&D’s contention that the asserted lawfulness of its condom pricing practices means that the FTC cannot obtain reasonably relevant documents and

9302, 2002 FTC LEXIS 90 at *12-*15 (Nov. 18, 2002).

information about those practices. See *Morton Salt*, 338 U.S. at 643 (agency may investigate to assure itself that the law is not being violated).

The Court is required to permit legitimate inquiry without judging whether the investigated conduct is covered by the substantive law, as the D.C. Circuit explained in *Texaco*:

The Supreme Court has made it clear that the court's role in a proceeding to enforce an administrative subpoena is a strictly limited one. The seminal case is *Endicott Johnson v. Perkins*, 317 U.S. 501 (1943). The *Endicott* Court held that, on application for enforcement of a subpoena issued by the Secretary of Labor in administrative proceedings against the petitioner under the Welsh-Healy Public Contracts Act, the district court lacked authority to determine whether the corporation's activities were covered by the statute. Rather, the Court stated, since the evidence sought by the subpoena was not "plainly incompetent or irrelevant to any lawful purpose" of the Secretary, it was the district court's duty to order its production for the Secretary's consideration. *Id.* at 509. Shortly thereafter, in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Court applied the same principles to the enforcement of subpoenas issued pursuant to an investigation under the Fair Labor Standards Act. Rejecting any power in the district court to adjudicate coverage, the Court ruled that so long as the investigation was for a lawfully authorized purpose, the documents sought were relevant to the inquiry, and the demand was reasonable, the Administrator had a right to judicial enforcement of the subpoenas. See *id.* at 209. Emphasizing the importance of the administrative mandate to search out violations with a view to securing enforcement of the Act, the Court stated that while the Administrator may not act arbitrarily or in excess of his statutory authority, "this does not mean that the inquiry must be 'limited ... by forecasts of the probable result of the investigation' . . ." *Id.* at 216, quoting *Blair v. United States*, 250 U.S. 273, 282 (1919).

Texaco, 555 F.2d at 871-72 (citations and footnotes omitted). Because the FTC is exercising its power of original inquiry, it need not articulate any specific case theory to justify its request for Canadian materials (not to mention non-condom product information).

[I]n the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case. Accordingly the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. The court must not lose sight of the fact that the agency is

merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.

Id. at 874 (emphasis in original).

This Court in *Carter* rejected a contention, similar to C&D's here, that a subpoena could not be enforced because the respondents' advertising did not violate the FTC Act's prohibition of unfair or deceptive trade practices. *FTC v. Carter*, 464 F. Supp. 633, 640 (D.D.C. 1979). The Court referred to this argument as "meritless, since the Commission here is exercising its power of original inquiry into unfair trade practices." *Id.* Even under the Federal Rules of Civil Procedure, "[a] party does not have to prove a *prima facie* case to justify a request which appears reasonably calculated to lead to the discovery of admissible evidence." *In re Urethane*, 261 F.R.D. at 573 (quoting *Mackey v. IBP*, 167 F.R.D. 186, 193 (D. Kan. 1996)).

The D.C. Circuit in *Texaco* also stated that "[a]s a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding." 555 F.2d at 879. It explained that "[i]f parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed." *Id.*

C&D is asking this Court to pre-judge its conduct under the antitrust laws. As the foregoing cases make clear, the point of an investigation is to determine whether those laws have been violated. C&D's belief that it has not violated the laws cannot shield it from the Commission's investigative subpoena and CID. Accordingly, the Court should reject C&D's claim that "the only reasonably relevant documents under Section 2 of the Sherman Act at issue in the FTC's investigation are those discussing Church & Dwight's rebate programs in the

United States, along with those reflecting or discussing the pricing of condoms in the United States market in order to determine if any pricing is below cost and capable of recoupment.” Response at 16. Similarly, it should reject C&D’s position that documents “confined to the Canadian market” are irrelevant to United States issues “as a matter of law.” *Id.*

D. C&D Has Failed to Demonstrate that Producing Canadian Documents and Information Will Be Unduly Burdensome

C&D bears the burden to show that the FTC’s request is unreasonable, and the burden is not “easily met” where the agency inquiry is lawful and the “requested documents are relevant to that purpose.” *Texaco*, 555 F.2d at 882. It is not sufficient for C&D simply to complain about the request’s breadth, but instead it must show that compliance “threatens to unduly disrupt or seriously hinder normal operations of a business.” *Id.* C&D has not met its burden. Neither before the Commission nor in this Court has C&D submitted a sworn affidavit or credible evidence that specifies the burdens it claims. Response at 16-17. The only concrete fact asserted by C&D is that it has already produced 2 million pages of documents. *Id.*⁹ That fact, which relates to the past, says nothing regarding any future burden C&D may face, and certainly provides no indication that production of Canadian documents “threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco*, 555 F.2d at 882.

C&D also asserts that differences in how its Canadian subsidiary manages documents contributes to its compliance burden, Response at 17, but again C&D does not back up this claim with evidence. C&D does not show that the alleged differences translate into any more of a

⁹ Contrary to C&D’s claim that there was a “mutually agreed upon deadline of April 1, 2010” for C&D’s production of the documents required by the subpoena, Response at 5, the deadline was self-imposed by C&D. Moreover, it neither met the deadline nor provided a significant portion of the documents required by the subpoena.

burden for producing Canadian documents than for producing United States documents.¹⁰ C&D claims that the Canadian “document management system does not allow for key word searching to limit the review process,” Response at 17, but that claim, which, again, is not supported by any declarations or other evidence, is not probative of burden. Many businesses, including likely C&D’s United States operations, must load documents maintained in the business’s document management system into a database to make them searchable with litigation support technology.

C&D’s unsubstantiated burden claims must also be rejected in light of C&D’s dominance in the condom market and the public interest underlying the Commission’s investigation. *See Carter*, 464 F. Supp. at 641 (compliance not unduly burdensome in light of corporations’ financial position and public interest in investigation). Even if C&D had credibly identified its compliance costs, those costs should be compared to its revenues and its monopoly position in the United States condom market (which may be resulting in monopoly profits). C&D does not make this comparison. Further, condoms are an important product from a public health perspective given the role condoms play in preventing unwanted pregnancies and the spread of sexually transmitted diseases, including HIV/AIDS. C&D has made no showing that its compliance burden is excessive compared to the FTC’s interest in determining whether C&D seeks (or has sought) to acquire or maintain a monopoly through unfair trade practices in this all-important market. *Id.*

As it has throughout this investigation, the FTC will continue to respond to C&D proposals to lessen the compliance burden consistent with the investigation’s needs. In this

¹⁰ The mere fact that documents are located in Canada does not mean that they are burdensome to produce for an investigation in the United States. C&D’s Canadian headquarters are located in a suburb of Toronto, which is closer to C&D’s Princeton, NJ headquarters than many major American cities.

respect, the FTC notes that it has never “demanded” that C&D search the files of over 200 custodians, see Response at 4, nor insisted upon a search-term approach to document production. The number of custodians depends upon C&D’s own corporate structure, business practices and document management policies. The mere fact that C&D has structured its business and adopted policies that produce many documents does not justify circumscribing the FTC’s inquiry. *See Texaco*, 555 F.2d at 882 (refusing to modify subpoena on burden grounds where “the breadth complained of is in large part attributable to the magnitude of the producers’ business operations”). As for search terms, the proposal for their use came from C&D, and the parties had extensive discussions to develop an acceptable set of terms so that document production could proceed. In any event, the Commission remains willing to assist in structuring the search to minimize burden consistent with the investigation’s needs.¹¹

III. C&D IS NOT ENTITLED TO REDACT NON-CONDOM PRODUCT INFORMATION FROM OTHERWISE RESPONSIVE DOCUMENTS

A. The FTC Resolution Covers Non-Condom Product Information

The D.C. Circuit has repeatedly stated that “the Commission’s determination of relevance should be accepted if not ‘obviously wrong.’” *Carter*, 636 F.2d at 788 (quoting *Texaco*, 555 F.2d at 877 n.32); *see also Invention Submission Corp.*, 965 F.2d at 1089.

Consistent with antitrust law, which generally requires an antitrust plaintiff (including the FTC)

¹¹ The FTC is aware that lawyer-developed search terms can be problematic, producing both over-inclusive and under-inclusive results. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008); *United States v. O’Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008); *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. 2008). Therefore, when C&D undertakes search and production for its Canadian subsidiary, the FTC encourages it to make use of any search and retrieval technologies and forensic tools at its disposal to produce documents in a manner that is both responsive and cost-effective. The FTC stands ready to provide feedback, but the ultimate responsibility for the search is C&D’s.

to identify a relevant product market where the harm is alleged to occur, the FTC's resolution identifies the "distribution or sale of condoms in the United States" as the market where the FTC seeks to determine whether C&D "has attempted to acquire, acquired, or maintained a monopoly." Pet. Exh. 2. The resolution also authorizes investigation into the means used by C&D to create the antitrust harm in the condom market – "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." *Id.* That is, the FTC seeks to determine whether C&D has employed its marketing of "other products" to gain or maintain control of the condom market. Commissioner Harbour ruled below that "[t]he resolution on its face authorizes an investigation regarding the marketing of all of C&D's products." Pet. Exh. 8 at 6. The Commission's determination should be accepted.

C&D's claim (Response at 19-21) that the FTC resolution does not cover non-condom product information is obviously wrong. The resolution's operative language for purposes of obtaining non-condom product information is the phrase "Trojan brand condoms *and other products* distributed or sold by Church & Dwight." Pet. Exh. 2 (emphasis added). In this respect, this case is just like *Texaco*, where the gas producers sought to read the word "proved" into the phrase "reporting of natural gas reserves." 555 F.2d at 874. The D.C. Circuit rejected that effort, finding "no merit to the producers' contention that the FTC is only investigating possible underreporting of proved reserves to the AGA." *Id.* Similarly, because the FTC's investigation here is not limited to exclusionary practices involving condom products, the Court

should reject C&D's attempt to read the term "condom" into the phrase "other products."¹²

C&D contends that the FTC's identification of 15 condom-related search terms indicates that the FTC's inquiry is limited to condoms, Response at 20, but the FTC's actions during the investigation do not narrow the resolution's scope. Because the investigation seeks to examine monopolization in the condom market, the use of condom-related search terms is consistent with the FTC's investigation. Similarly, when C&D asked if it is the "FTC's position that the subpoena and CID also require the production of all requested categories of documents whether they relate to condoms or any other product manufactured by C and D even beyond the redacted documents raised in your petition," the FTC responded that the "Relevant Product" is "condoms" but that C&D should not redact non-condom information from condom-related documents. Response at 19 and Exh. E. As explained above, in investigating C&D's possible monopolization of the condom market, the FTC is trying to determine whether C&D's practices involving other products may contribute to harm in the condom market. By requiring that C&D provide non-condom information already found in condom-related, responsive documents, the FTC is not expanding the investigation beyond the scope of the resolution but rather is acting in precise accordance with its terms.

¹² The FTC resolution in *Texaco* also examined "conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and *other fossil fuels*." *Id.* at 868. The italicized language indicated that the FTC was interested in just fossil fuels, not all fuels. Similarly, had the FTC here wanted to limit its inquiry into C&D's marketing practices involving just "other condom products," it would have included the word "condom" in the phrase "other products."

B. Redaction of Non-Condom Information From Responsive Documents Interferes with the FTC's Investigation

Subpoena Instruction R states: "All Documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form ... 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." Pet. Exh. 1, ¶ 18; Pet. Exh. 3. In an attempt to trivialize the instruction, C&D refers to it as an "internal general procedure[]" (Response at 7), "boilerplate and standard FTC operating procedure[]" (Response at 7), "boilerplate instruction[]" (Response at 7), "unreasonable internal lock step polic[y] and antiquated procedure[]" (Response at 9), and "lockstep 'internal policy'" (Response at 22). The instruction is standard and for good reason, because it helps to preserve the integrity of the Commission's investigations. Setting it aside would seriously impede the Commission's work.

First, the instruction helps to preserve context. "Appropriate documents should be submitted in their entirety to ensure comprehensibility, rather than being edited by respondents." *Carter*, 464 F. Supp. at 640. C&D does not deny that context is important. Rather, it tries to claim that, while context matters for documents like cigarette advertising, it does not matter for C&D's condom documents when those documents include information about other products. Response at 23-24. Here, the FTC seeks to understand C&D's sales and marketing practices involving condoms *and* other products. Given the investigation's scope, redaction of the non-condom product information is no less harmful than the redaction of allegedly irrelevant text in the cigarette advertisements at issue in *Carter*. Indeed, redaction of non-condom product information may be more harmful than the redactions sought in *Carter*, because non-condom product information is reasonably relevant to the Commission's investigation.

Second, C&D tries to distinguish the single-page advertisements at issue in *Carter* from C&D documents that consist of multiple pages. Response at 24. (However, not all of the documents C&D seeks to redact are multi-page.) A rule that redactions are permissible for multi-page documents but prohibited for single-page documents is arbitrary and unreasonable, because it makes the redacted/unredacted determination depend on random factors such as font size, paper size and page breaks. As part of its investigation, it is not unreasonable for the FTC to see when C&D combines condom information with information about non-condom products, regardless of the document's length.

Third, C&D's redactions will frustrate the FTC's ability to examine whether C&D is monopolizing condom markets by using sales or marketing practices involving non-condom products. Such potentially exclusionary practices include bundling, *see, e.g., LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), and tying, *see, e.g., Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). The FTC's inquiry into these potentially unlawful practices necessarily requires information about products other than condoms that may be bundled or tied with condom products. Other reasonably relevant information includes data on sales and margins, which allows the Commission to compare C&D's conduct in the condom product market, where C&D may have neutralized significant competition, with its conduct in product markets where competition is more robust. Given the potential value of such data, redactions, such as those illustrated in Exhibit G to the Response, cannot be deemed benign. If C&D can redact non-condom product information, the inquiry the FTC is trying to undertake is impossible.

Fourth, applying the practice permitted by some federal courts of redacting allegedly irrelevant information, as C&D urges (Response at 22-23), is not appropriate for a pre-complaint

investigation. The Supreme Court and D.C. Circuit clearly distinguish between the power of original inquiry exercised by an investigative agency, such as the FTC, and judicial power. *Morton Salt*, 338 U.S. at 642-43; *Texaco*, 555 F.2d at 872. The mere fact that the FTC needs to rely on the federal courts to enforce its investigative subpoenas and CIDs does not eliminate that distinction, as *Texaco* illustrates. C&D's contention to the contrary (Response at 22) must be rejected.

Fifth, allowing C&D to redact information that it deems irrelevant could short-circuit legitimate lines of inquiry by the FTC. Because, in the context of an investigation, the FTC is not required to make a precise connection between the information it seeks and a particular theory of violation, *Invention Submission Corp.*, 965 F.2d at 1090, it would be impossible to develop redaction standards that protect the FTC's investigational latitude. Information that at first glance appears irrelevant may become relevant as the investigation progresses. See *Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523, at *22; *Invention Submission Corp.*, 965 F.2d at 1090. Yet, C&D's redaction of information it deems irrelevant could prevent the Commission from ever knowing what information it did not see. Worse, C&D could use its assessment of relevance to intentionally hide information and cut off an FTC line of inquiry, thus risking spoliation. The Court should not permit C&D to dictate the direction of the FTC's investigation.

C. C&D's Alternative Mechanisms Are Unacceptable

Although C&D states that it prefers that the Court deny the FTC's petition in its entirety, Response at 25, it offers two alternatives. The first would (1) allow C&D to continue to redact information from responsive documents, (2) require the FTC to timely object to specific redactions, (3) require C&D to reconsider the redaction in light of the FTC's objection, and (4) if

the parties were unable to resolve their differences, engage the Court to resolve the dispute. Response at 25-26. Under the second alternative, C&D would submit a random sample of documents in redacted and unredacted form to allow the Court to determine whether C&D's approach to redaction is acceptable. Response at 26. Either alternative presents serious concerns and should not be adopted.

First, neither alternative is acceptable because they both ignore that it is the FTC, not the target of an investigation, that determines whether responsive documents are relevant.

Unfortunately, the Court's *in camera* review will not address this problem. While the Court is certainly capable of ruling on relevancy, it will not have the information necessary to make an informed decision. *See Texaco*, 555 F.2d at 872. The situation would be different if the relevancy dispute arose in the context of litigation initiated and defined by a filed complaint. At the pre-complaint stage, when the agency is still investigating to determine if the law has been violated, the potential violations and the information relevant to the investigation cannot be as easily cabined for adjudication.

Second, C&D's approaches are contrary to this Court's and this Circuit's decisions holding that the FTC, not the courts, should have the opportunity to rule on confidentiality requests in the first instance. *Carter*, 464 F. Supp. at 642; *Texaco*, 555 F.2d at 884 (citing *FCC v. Schreiber*, 381 U.S. 279, 290-91, 295-96 (1965)). Giving the FTC the first opportunity to consider confidentiality questions allows the agency to consider its need for the information, based upon the results and direction of the investigation. It can also determine whether the FTC's existing, robust protections for confidential information suffice to respond to specific concerns raised by the respondent and to develop additional measures, if necessary. If, after that

point, the respondent believes additional measures are needed, judicial resolution may be appropriate. *See Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523, at *18.

Third, C&D's proposed alternatives will greatly slow the FTC's investigation. The "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate." *Texaco*, 555 F.2d at 872 (quoting *FMC v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975)). To expedite the investigation, the judicial role is limited. *Id.* Under C&D's proposals, however, the judiciary would assume the FTC's role of making confidentiality determinations even before the information had been produced to the FTC for use in the investigation. *See Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523, at *17 ("formulation of procedures for safeguarding confidentiality should be set by agencies, not by the courts"). That process will serve only to delay the investigation. *Cf. id.* (rejecting process requiring FTC's obtaining confidentiality agreement waivers during investigation because process would result in delay).

Finally, C&D has made no showing of need. C&D says that its redactions would "limit the risk of disclosing highly-sensitive information." Response at 21. C&D does not show that there is a risk that is not addressed by the Commission's existing confidentiality and non-disclosure protections. This Court has recognized that "the FTC Act itself expressly forbids public disclosure by the Commission of confidential information obtained by CIDs." *Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523, at *18. These prohibitions apply to CIDs and subpoenas alike, *see* 15 U.S.C. §§ 46(f), 57b-2(b)(3)(C), 57b-2(b)(6), and "are reinforced by the Commission's Rules." *Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523, at *18 n.33 (citing 16 C.F.R. § 4.10(a)(2)(6) & (9)). The statutory and regulatory protections do not leave C&D's confidential information "nakedly exposed." *Id.* at *18. In any event, "Congress, in

authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought." *Id.* at *15.

CONCLUSION

The FTC's subpoena and CID are lawful, seek "reasonably relevant" information and are not unduly burdensome. C&D has failed to show otherwise. The Court should enforce the subpoena and CID and issue an order requiring C&D's compliance within 10 days of such order.

Respectfully submitted,

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June 4, 2010

CERTIFICATE OF SERVICE

I certify that on June 4, 2010, a true and correct copy of the foregoing was served on Respondent via ECF.

/s/ Mark S. Hegedus

MARK S. HEGEDUS

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	:	
	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	NO.: 1:10-mc-00149-EGS
	:	
CHURCH & DWIGHT CO., INC.,	:	
	:	
	:	
Respondent.	:	

CHURCH & DWIGHT CO., INC.'S OPPOSITION TO THE PETITION OF
THE FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING
SUBPOENA *DUCES TECUM* AND CIVIL INVESTIGATIVE DEMAND

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I. INTRODUCTION

In response to an overly broad and burdensome Subpoena and Civil Investigative Demand (“CID”) issued by the Federal Trade Commission (“FTC”) in connection with its non-public investigation, Respondent Church & Dwight Co., Inc. (“Church & Dwight” or “the Company”) has dedicated significant resources, incurred millions of dollars in costs and endured substantial internal disruption in making a good faith production of approximately 2 million pages of documents related to the marketing, sale and distribution of condoms in the United States. Nevertheless, even before reviewing and analyzing the nearly 2 million pages from over 200 records custodians, the FTC Staff has requested substantially more documents. In fact, the FTC Staff is using this enforcement action to improperly expand the scope of its already broad Subpoena and CID beyond the parameters of the Resolution authorized by the FTC Commissioners, and to increase the enormous burden on Church & Dwight beyond the bounds of reason and the FTC’s jurisdiction.

Specifically, the operative document in this enforcement action approved by the FTC Commissioners – the FTC’s Resolution Authorizing Process – explicitly limits the scope of the FTC’s investigation to Church & Dwight’s business practices “*in the distribution or sale of condoms in the United States.*” (A copy of the operative Resolution is attached to the FTC’s Petition as Exhibit 2 (emphasis added).) Yet, under the guise of a so-called speculative “natural experiment,” the FTC first invites the Court to expand the Resolution’s unambiguous scope to include all documents on the distribution and sale of condoms in Canada from Church & Dwight’s Canadian-based subsidiary. Such an additional review and production process will cost Church & Dwight millions of more dollars above and beyond the production of documents from

204 previously identified custodians with condom related responsibilities in the United States. Such additional burden and disruption to Church & Dwight is undue and extreme. Similarly, the FTC contends that the Court should interpret the term “condom,” as used in the FTC Resolution, to include patently irrelevant *non-condom* products also sold by Church & Dwight such as toothpaste, cat litter, baking soda and detergents.¹ The FTC should not be permitted to undertake such an unchartered and costly fishing expedition and, therefore, its Petition should be denied in its entirety.

II. FACTUAL & PROCEDURAL BACKGROUND

A. Pertinent Background Information on Church & Dwight.

Church & Dwight is a Delaware corporation with its principal place of business in Princeton, New Jersey. (Decl. James Daniels ¶ 3, attached hereto as Exhibit “A.”)² In addition to manufacturing and distributing a wide variety of products worldwide, including, but not limited to, toothpaste, cat litter, baking soda, cleaning products and detergents (many under the Arm & Hammer label), Church & Dwight also manufactures and distributes latex and non-latex male condoms in the United States, primarily through its Trojan name brand.³ It also sells condoms under the name “Naturalamb” and used to sell some condoms under the Elexa name.

¹ Additional language in the Resolution, which comes well after the scope of the investigation defined as the “distribution or sale of condoms in the United States,” and which refers to “Trojan brand condoms and other products,” is clearly intended to address only other non-Trojan brand *condom* products (Naturalamb and Elexa) made by Church & Dwight, and not irrelevant non-condom products (cat litter, etc.). This issue is discussed in more detail in Section IV(B)(1), *infra*.

² The Declaration of James Daniels, Vice President of Sexual Health Care, which is attached hereto as Exhibit “A,” was originally submitted in a related matter pending before the Honorable Freda Wolfson of the United States District Court for the District of New Jersey, *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc.*, Civil Action No. 3:08-cv-05743-FLW-TJB. It is equally applicable to the instant petition.

³ For purposes of the instant proceedings, “condom” or “condoms” includes latex and non-latex male condoms, not female condoms.

Church & Dwight sells condoms directly and through distributors to various types of retailers, including drugstores and grocery stores. In drugstores and grocery stores, condoms are generally displayed on and sold from pegboards and shelves. (*Id.* ¶ 6.) Condoms rely on point of sale advertising (because they are minimally advertised on television and in print) and studies have shown that consumers spend, on average, less than ten seconds selecting a condom for purchase, due in large part to embarrassment factors. (*Id.* ¶ 7.) To aid customers in locating their condom of choice and elevating competitive choices, retailers generally display the same brand of condoms together and distributors typically minimize color and graphic changes to packages. (*Id.*)

Since acquiring the Trojan brand in 2001, Church & Dwight (like its predecessor Carter Wallace) has openly offered retailers incentive-based programs (“Planogram” or “Planogram rebates”). (Daniels Decl. ¶ 8.) The Planograms are voluntary and only encourage Trojan facings on the pegboards and shelves of retailers in exchange for a rebate. (*Id.* ¶¶ 8, 12.) The Planograms do not result in below cost pricing or require exclusivity. (*Id.* ¶ 13.) Church & Dwight does not punish retailers that decline to participate in the Planogram program. (*Id.* ¶ 10.) In fact, approximately half of Church & Dwight’s condom sales to customers are not made through a Planogram program, including sales to its largest customer Walmart. (*Id.*)

B. Church & Dwight’s Initial Responses to the Subpoena and CID.

In June of 2009, the FTC contacted Church & Dwight regarding a non-public investigation into its business practices in the market for condoms in the United States, particularly Church & Dwight’s Planogram program to determine, it said, whether those practices violate Section 2 of the Sherman Act and Section 5 of the FTC Act. On June 29, 2009, the FTC issued a Subpoena and CID to Church & Dwight. (Copies of the Subpoena and CID are attached

to the FTC's Petition as Exhibits 3 and 4, respectively.) The Subpoena and CID broadly encompass all documents related to Church & Dwight's condom business in the United States from over 200 custodians, as later identified by the FTC. The Subpoena and CID were accompanied by a Resolution, approved by Commissioner J. Thomas Rosch on behalf of the FTC, which states that the limited purpose of the investigation is 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.

(A copy of the operative Resolution is attached to the FTC's Petition as Exhibit 2 (emphasis added).) Church & Dwight produced its 18 page detailed written response to the CID on September 18, 2009.

The related document production required Church & Dwight to expend enormous time and resources, causing substantial disruption to the company's operations. This was driven largely by the FTC Staff's demand that documents be obtained from over 200 custodians. In light of the voluminous number of mostly electronic documents going back to 1999, which fell within the scope of the Subpoena and CID, Church & Dwight, in November 2009, proposed using search terms in a good faith effort to produce expediently documents that are most directly related to the purpose of the FTC's investigation. After extended negotiations, the FTC Staff finally agreed to the use of search terms in mid-December of 2009, which ultimately reduced somewhat the number of documents designated for review. Using a litigation staff from DLA Piper's offices across the United States, which consisted of over 50 document reviewers, Church

& Dwight was able to produce nearly 2 million pages of documents by the mutually agreed upon deadline of April 1, 2010. Meeting this deadline, however, required the over 50 DLA Piper reviewers to expend approximately 11,200 hours of billable time.

C. The FTC's Demands for the Production of Millions of Canadian Documents and Subsequent Negotiations.

While Church & Dwight continued its initial document production on a rolling basis, the FTC Staff claimed that its Subpoena and CID (not the operative FTC Resolution) defined the "Relevant Area" to include Canada and demanded the production of Canadian condom marketing and sales data from Church & Dwight's subsidiary in Canada. Church & Dwight objected by responding that "Relevant Area" should not include Canada because the FTC has no jurisdiction in Canada and the express terms of the FTC's own Resolution limit the investigation to the United States. Further, Church & Dwight objected to the FTC Staff's demand because documents relating to the Canadian company's condom sales practices in Canada are irrelevant to Church & Dwight's sales practices in the United States and would be unduly burdensome to review and produce.

More specifically, Church & Dwight informed the FTC Staff that while the Canadian company is a wholly-owned subsidiary of Church & Dwight, the Canadian company has different management, document retention policies and business practices in a different geographic product market. In light of Church & Dwight's objections, the FTC Staff initially agreed that Church & Dwight would produce documents relating to the sale and marketing of condoms in Canada only to the extent that those documents were in the possession of the over 200 custodians selected by the FTC in the United States. The parties further agreed to revisit the issue if the FTC Staff could articulate a reasonable basis for the production of documents from Church &

Dwight's Canadian subsidiary. Based on that agreement, Church & Dwight has produced, to date, approximately 18,000 documents related to Canada from the over 200 custodians located in the United States.

Instead, ignoring the parties' agreement, the FTC Staff persisted in requesting documents from Church & Dwight's Canadian subsidiary *without* reviewing the thousands of pages of Canadian documents already produced by Church & Dwight from the over 200 custodians in the United States. Church & Dwight again refused, based not only on its previous objections, but also because of the abovementioned agreement in place between the parties. In a good faith effort to resolve the impasse, Church & Dwight questioned the relevancy of the Canadian based documents to the United States investigation. The FTC Staff vaguely responded that Canadian documents will enable its internal economist to conduct a "natural experiment" involving the comparison of Church & Dwight's sales, marketing practices and market share for condoms in Canada with the separate United States condom market. On November 12, 2009, unsatisfied with this vague and overreaching response, Church & Dwight filed with the FTC a petition to limit or quash the Subpoena and CID to the extent they include Canada within the scope of the investigation and to the extent they seek the production of documents from the Canadian subsidiary, which are outside the scope of the FTC's own Resolution.

D. Proprietary & Confidential Information on Non-Relevant Products.

In a good faith effort to produce as many documents to the FTC as quickly as possible, Church & Dwight, with the agreement of the FTC Staff, produced documents it had previously produced in the related Mayer litigation pending before the United States District Court for the

District of New Jersey.⁴ *See supra* note 1. Aiming to disclose the documents promptly, Church & Dwight produced them in the same form as in the related Mayer litigation wherein proprietary and confidential information concerning irrelevant non-condom products was redacted. After receiving and reviewing the documents, the FTC Staff objected to the redactions by letter on July 28, 2009. (A true and correct copy of the FTC's letter is attached hereto as Exhibit "B").

After receiving the FTC's July 28, 2009 letter, Church & Dwight produced the documents without redactions, while stressing that it was not waiving its right to redact proprietary and confidential information on non-relevant products in the future. Although the FTC Staff posited that such redactions were prohibited – based solely on its own internal general procedures – the parties agreed to revisit the issue at a later date if Church & Dwight came across documents during its review that required the redaction of propriety and confidential information on irrelevant non-condom products. The FTC Staff explained that the non-redaction instruction is a boilerplate and standard FTC operating procedure, without exception. Due to the voluminous number of documents collected in response to the broad Subpoena and CID, Church & Dwight subsequently came across numerous documents that contained proprietary and confidential information on irrelevant non-condom products, which warranted redaction. To date, Church & Dwight has made a preliminary identification of numerous documents that require redaction.

As a result, Church & Dwight raised the redaction issue again with the FTC Staff. On November 17, 2009, Church & Dwight produced sensitive corporate strategic plans with proprietary and confidential information on non-relevant products redacted. Citing to the Subpoena's boilerplate instructions, the FTC Staff objected to the redactions and attempted to

⁴ In the Mayer litigation, it was uncovered that Mayer, a competitor of Church & Dwight, prompted the FTC to initiate an investigation against Church & Dwight by telling the FTC that Church & Dwight's planogram program required exclusivity, which was untrue.

abrogate the parties' good faith arrangement to address the redaction issue on a document-by-document basis, by letter on October 30, 2009. (A true and correct copy of the FTC's October 30, 2009 letter is attached hereto as Exhibit "C"). In response to this blanket rejection, Church & Dwight filed its petition to quash or limit the Subpoena on December 4, 2009.

E. The FTC's Decisions & Initiation of the Instant Enforcement Action.

On December 23, 2009, then FTC Commissioner Pamela Jones Harbour denied both of the abovementioned petitions to quash or modify the Subpoena and CID. On December 28, 2009, Church & Dwight filed a request for rehearing by all the FTC Commissioners. The request was denied on February 16, 2010. On February 26, 2010, the FTC filed the instant Petition to obtain an Order from this Court enforcing the Subpoena and CID.

III. LEGAL STANDARD

As Chief Judge Bazelon of the D. C. Circuit Court of Appeals previously ruled, a federal agency's investigative subpoena is subject to judicial review and is enforceable only "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (Bazelon, C. J.), *cert. denied*, 431 U.S. 974 (1977) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (Jackson, J.)). In turn, "[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.*" *Texaco*, 555 F.2d at 874 (emphasis added). As Circuit Judge Silberman further stated, "[w]hen 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." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (Silberman, J.) (internal citations omitted). An agency's appraisal

of relevancy should not be enforced if it is “obviously wrong.” *Id.* at 1089. Finally, in regard to the Commissioner’s prior denial of Church & Dwight’s petition to quash, “[i]n a subpoena enforcement . . . the District court can inquire into all relevant matters, unlimited by the scope of the agency’s own inquiry, if any.” *Id.* Indeed, “since the Court views an enforcement proceeding *de novo*,” the agency’s own determination of relevancy is not afforded deference beyond that described above. *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980) (MacKinnon, J.) (internal quotations omitted).

IV. ARGUMENT

The Canada and redaction issues are now before the Court because of, *inter alia*, the FTC Staff’s refusal during negotiations with Church & Dwight to articulate fully the reasonable relevance of the documents being sought, in favor of a strategy that hides behind agency-imposed secrecy, unreasonable internal lock step policies and antiquated procedures, all of which impose enormous burdens on third parties. However, the FTC cannot simply assert that such policies and regulations allow it to require the production of any documents—regardless of the undue burden associated with the production—without showing, like any litigant, that the documents demanded will lead to reasonably relevant and ultimately admissible evidence. By choosing to file the instant enforcement action, the FTC Staff has subjected itself to the authority of this Court, as well as the applicable case law and procedural rules in this Circuit, all of which strive to balance the burden on the producing party and the relevancy of the requested documents. As set forth herein, Church & Dwight respectfully submits that the plain language of the FTC’s own Resolution, fundamental principles of relevance and the avoidance of undue burden all warrant an Order from this Court denying the FTC’s Petition in its entirety.

A. Millions of Documents From Church & Dwight's Canadian Subsidiary are Irrelevant to the FTC's United States Investigation and Overly Burdensome to Review and Produce.

Contrary to the express terms of its own controlling Resolution, the FTC Staff claims that Church & Dwight is required to produce all documents related to the distribution and sale of condoms in Canada. As noted above, the Canadian subsidiary operates separately from Church & Dwight in the United States, and therefore, has its own policies and business practices, including those related to the marketing and sale of condoms. Further, the Canadian company's marketing and sale of condoms is limited to the separate condom market in Canada. Therefore, documents related to the distribution or sale of condoms in the separate Canadian market are wholly irrelevant to the FTC's investigation of Church & Dwight's business practices relating to the "distribution or sale of condoms *in the United States*," as defined in the FTC's own operative Resolution. (FTC's Pet. Ex. 2 (emphasis added).) Moreover, the millions of Canadian documents at issue would be overly burdensome to review and produce, particularly given their legal irrelevancy to the FTC's investigation.

1. *The plain language of the Commission's Resolution restricts the FTC Staff's scope of inquiry to the United States.*

The FTC's power of inquiry is limited by the scope and purpose of its investigation as stated in its own Resolution. *Texaco*, 555 F.2d at 874. As explained by Circuit Judge Silberman, "[w]hen a conflict exists in the parties' understanding of the purpose of an agency's investigations, *the language of the agency's resolution*, rather than subsequent representations of Commission staff, controls."⁵ *Invention Submission Corp.*, 965 F.2d at 1088 (emphasis added).

⁵ Notably, the FTC's non-binding rulings on Church & Dwight's Petitions to Quash and/or Limit do not have the effect of expanding the scope of the Resolution. Only a new resolution by the Commission can achieve that goal. As required by the applicable case law, the legal issues before this Court should be determined based upon the current Resolution's plain meaning and

Here, the Resolution's plain language irrefutably narrows the FTC staff's inquiry to the "distribution or sale of condoms *in the United States*, or in any part of that commerce[.]"⁶ (FTC's Pet. Ex. 2 (emphasis added)). The "or in any part of that commerce" language preserves the FTC's inquiry into alleged unfair competition occurring in smaller geographic markets *within* (not outside) the United States. *Id.* Thus, the Resolution unequivocally states that the FTC's purpose is *only* to investigate Church & Dwight's sales, marketing and distribution practices with regard to male condoms within the United States, and not Canada.

2. *The FTC's Staff's proposed "natural experiment" is unreliable on its face and does not establish that documents from Church & Dwight's Canadian subsidiary are reasonably relevant to its investigation.*

The FTC Staff does not claim that the production of documents from Church & Dwight's Canadian subsidiary is warranted because those documents contain information unavailable from another source that is directly relevant to the central issue in its investigation, *i.e.*, whether Church & Dwight "has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States." (FTC's Pet. Ex. 2.) Rather, the FTC Staff seeks information from Church & Dwight's Canadian subsidiary to indulge in a so-called and vaguely defined "natural experiment" comparing the separate United States and Canadian

terms and not on any hindsight embellishment thereof. Moreover, the language in the Resolution "Trojan brand condoms and other products" is clearly intended to address other condom products made by Church & Dwight since 1999, not just its Trojan brand. This would include its prior Elexa and Naturalamb brands not sold under the Trojan brand name. Elexa and Naturalamb documents have been produced in the investigation.

⁶ The FTC's own interpretations support this conclusion: "The Commission issued the subpoena and CID . . . to determine whether [Church & Dwight] has engaged or is engaging in unfair methods of competition in or affecting commerce . . . with respect to the distribution and sale of condoms in the United States," and "[t]he FTC here seeks to determine whether [Church & Dwight] has attempted to acquire, acquired, or maintained a monopoly in the sale or distribution of condoms in the U.S." (FTC's Pet. at 1, 13 (emphasis added).)

markets for male condoms. The problem is, the FTC Staff intends to take this leap without any proof of a relevant link between these different condom markets.

As stated by the FTC itself, “natural experiments” look to whether “the posited harm has occurred under *circumstances similar to the proposed transaction. . . .*” See *FTC v. Foster*, 2007 WL 1793441, at *38 (D.N.M. May 29, 2007) (Browning, J.) (emphasis added) (quoting “Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications”). Significantly, the FTC’s Staff has never made the requisite showing of market similarity, whether in weekly status calls with Church & Dwight, in its briefing before the FTC, in its Petition or during conferences before this Court. Instead, the FTC summarily alleges that Church & Dwight is attempting to force the FTC “to investigate . . . in a vacuum” and attempting to “shape the course of [this] investigation.” (FTC’s Pet. at 13.) This is not the case. Church & Dwight is simply exercising its right to protect itself from an unwarranted and unnecessarily intrusive fishing expedition by the FTC Staff to troll for any and all documents no matter how tangential and regardless of whether they fall within the plain text of the FTC’s own Resolution.⁷

Moreover, the complete lack of support for “similar circumstances” renders the FTC Staff’s natural experiment immediately susceptible to an attack under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (Blackmun, J.). Specifically, for purposes of discovery, the proposed natural experiment does not “fit” with the alleged Sherman and FTC Act

⁷ Contrary to the FTC Staff’s assertion that Church & Dwight’s conduct is somehow impeding the pace of its investigation, during the initial March 9, 2010 status hearing before Judge Sullivan, the FTC could not articulate any “exigent circumstances” that warranted an expedited resolution of the instant action. (Mar. 9, 2010 Tr. at 2:14-4:3, portions thereof attached as Exhibit “D”).

violations currently being investigated, which are based on Church & Dwight's distribution or sale of male condoms *in the United States* and that arise from the specific antitrust issue of single product rebates. *Id.* at 591-92 (explaining that Federal Rule of Evidence 702 requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility). As the Supreme Court explained, the concept of fit is not always obvious, "and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert*, 509 U.S. at 591. To illustrate, the Supreme Court used the following hypothetical:

The study of the phases of the moon, for example, may provide valid scientific 'knowledge' about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (*absent creditable grounds supporting such a link*), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Id. (emphasis added); *see also Meister v. Medical Engineering Corp.*, 267 F.3d 1123, 1131 (D.C. Cir. 2001) (Rogers, J.) (affirming exclusion of testimony from two expert medical witnesses: one who failed to establish a "causal nexus" between the plaintiff's disease and the alleged cause; and another who relied upon case studies that "creat[ed] an analytical gap between the data and his opinion that '[was] simply too great'" to countenance) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *In re Human Tissue Products Liability Litigation*, 582 F. Supp. 2d 644, 655-81 (D.N.J. 2008) (Martini, J.) (ordering partial exclusion of expert opinion where witness was unable to "adequately explain how her conclusions could be extrapolated from the results or conclusions of any of the [cited] studies," which rendered her opinions, at best, "nothing more than pure speculation.").

Similarly, in this case, even after receiving thousands of documents related to Canada from United States records custodians, the FTC Staff has not offered any indication or

independent support whatsoever of a “credible link” or “nexus” between the United States and Canadian markets for male condoms that would enable the present natural experiment to later survive *Daubert* scrutiny. Unable to establish this necessary link, the FTC’s Subpoena becomes unenforceable because the information sought cannot be “reasonably relevant” for purposes of investigative discovery. *Texaco*, 555 F.2d at 872 (quoting *Morton Salt Co.*, 338 U.S. at 652).

In addition, even if Church & Dwight were compelled to produce documents from its Canadian subsidiary, the FTC Staff would still be entering a jurisdictional cul-de-sac that would preclude its efforts to conduct a reliable natural experiment. In particular, the FTC’s jurisdictional inability to subpoena other related third-party documents (*e.g.*, from retailers and competitors) in Canada and take the necessary testimony in Canada to understand that market renders the entire proposed and extremely burdensome “natural experiment” doomed from its inception as being inherently unreliable and based entirely upon inadmissible evidence. *See Fed. R. Evid.* 803(6) (stating that the testimony of a custodian or other qualified witness is required to lay foundation for the admission of documents relating to a regularly conducted business activity); *see also In re Universal Serv. Fund Tel. Billing Practices Litig.*, 2008 U.S. Dist. LEXIS 745448, at **23-4 (D. Kan. Sept. 26, 2008) (Lungstrum, J.) (excluding expert’s damage calculations related to antitrust claim where calculations were based solely on inadmissible and unreliable documents completely lacking in foundation).

3. ***The substantive antitrust issues underlying the FTC's investigation establish that the Canadian documents are not reasonably relevant.***⁸

Even beyond the fundamental problems with the proposed vague “natural experiment,” documents related to the distribution and sale of condoms in Canada from Church & Dwight’s Canadian subsidiary are not reasonably relevant when considered in light of the substantive antitrust issues presented in the FTC’s investigation. Here, the thrust of the FTC’s non-public investigation is determining whether Church & Dwight’s Planogram rebate programs or price-cutting with regard to condoms distributed in the United States violate the federal antitrust laws. Such conduct directly implicates legal concepts that, as defined by the Supreme Court, actually encourage price-cutting through rebates and other methods. *See, e.g., Pacific Bell Co. v. Linkline Comm’s., Inc.*, 129 S. Ct. 1109, 1120 (2009) (Roberts, C.J.) (“Cutting prices in order to increase business often is the very essence of competition. . . In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” (quotations omitted)). As the Supreme Court similarly stated in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, “[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . *We have adhered to this principle regardless of the type of antitrust claim involved.*” 509 U.S. 209, 222-4 (1993) (Kennedy, J.) (emphasis added) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (Brennan, J.)).

Accordingly, as has been pronounced by the Supreme Court, as a matter of law, companies that cut prices for a single product, as Church & Dwight does with its condom

⁸ Church & Dwight hereby designates this subsection as “new” matter per the Court’s Minute Order of March 4, 2010.

products using rebates through voluntary planogram programs, fall within a safe-harbor when the price cuts are not below an appropriate measure of cost. *Linkline*, 129 S. Ct. at 1120; *Brooke Group*, 509 U.S. at 222-24. Furthermore, this safe-harbor shields a company against antitrust liability where there is no “dangerous probability” that the company will be able to recoup its investment in the below-cost pricing. *Id.* As the Supreme Court recently held, the policy behind this safe-harbor is to avoid the chilling of “aggressive price competition.” *Linkline*, 129 S. Ct. at 1120. Accordingly, the only reasonably relevant documents under Section 2 of the Sherman Act at issue in the FTC’s investigation are those discussing Church & Dwight’s rebate programs in the United States, along with those reflecting or discussing the pricing of condoms in the United States market in order to determine if any pricing is below cost and capable of recoupment. Accordingly, documents that are confined to the Canadian market for condoms are completely irrelevant to these United States based issues as a matter of law, and are beyond the FTC’s own stated area of inquiry.⁹

4. ***Production of the requested documents from Church & Dwight’s Canadian subsidiary would be overly burdensome.***

The FTC Staff’s efforts to indulge in an inadmissible “natural experiment” does not justify the enormous burden that will befall Church & Dwight’s Canadian subsidiary if the FTC is allowed to conduct an unrestrained foray into the depths of its documents and records. This is particularly true considering the irrelevant nature of the Canadian documents and because the approximately 2 million page document set that was already produced (at enormous cost) by Church & Dwight *includes* thousands of documents related to Canada. In fact, there is no

⁹ This argument applies with equal force and demonstrates why proprietary and confidential information on non-condom products, such as cat litter or toothpaste, are equally irrelevant to the FTC’s investigation of Church & Dwight’s rebate program and whether Church & Dwight prices condoms below cost.

indication that the FTC has actually reviewed the Canadian documents already in its possession, let alone the entire 2 million total pages of documents that it already possesses, and from there, attempted to explain why additional Canadian documents are necessary or somehow limit the universe of documents to specific, easily identifiable categories.¹⁰

Significantly, the FTC Staff's demands for documents from Church & Dwight's Canadian subsidiary turn a blind eye to the tremendous burdens associated with such requests.¹¹ For example, the Canadian subsidiary does not have the same document management and retention system as Church & Dwight in the United States. In addition, the documents from the Canadian subsidiary, which consist of documents in mostly electronic and also hard copy format in various Canadian provinces, date back to 1997. Even the FTC Staff's recent proposal to limit the review of documents from Canada through search terms does very little to ease the enormous and undue burden upon Church & Dwight. First, Church & Dwight Canada's document management system does not allow for key word searching to limit the review process, which will be extremely costly, as it was for the United State document review process. Thus, the review and production of all requested Canadian documents would all be overly burdensome on Church & Dwight, particularly balanced against any tenuous and unsubstantiated relevancy claimed by the FTC.

¹⁰ To date, the FTC has identified only one document it claims shows Canada's relevance to the issues presented in the United States investigation. However, that document, concerning checkout lane stocking practices, has no relationship to Church & Dwight's Planogram program nor does it establish a similarity between the United States and Canadian markets for male condoms that could be used to support a so-called natural experiment and justify the undue expense and burden associated with a Canadian document production.

¹¹ Per the Court's Minute Order of March 4, 2010, this paragraph contains "new" evidence insofar as the events occurred after the FTC filed its enforcement action Petition.

In sum, the FTC Staff's demands for documents from Church & Dwight's Canadian subsidiary should be denied because they are beyond the geographic scope established by the FTC's Resolution's plain language, seek information that is not reasonably relevant to the purpose of the FTC's investigation, as a matter of law, and would impose an undue burden on Church & Dwight's Canadian subsidiary.

B. Church & Dwight's Approach of Redacting Proprietary, Confidential and Wholly Irrelevant Information on Non-Condom Products is a Reasonable and Accepted Method of Limiting the Risk of Disclosure and Harmless to the FTC's Investigation.

The controlling FTC Resolution, Subpoena and CID seek information on male condoms only. As non-condom products are not within the nature and scope of the FTC's investigation based on its Resolution, such information is entirely irrelevant to the FTC's investigation of Church & Dwight's business practices with respect to condoms in the United States. Still, Church & Dwight only seeks to redact confidential and proprietary information on non-condom products, and redaction is a widely-accepted and reasonable method in the federal courts to ensure limits on the risks of disclosure of confidential and proprietary information, subject to judicial review. Moreover, Church & Dwight has only redacted documents in a way that still preserves the context and comprehensibility of the redacted information, thereby limiting any chance of impeding the FTC's investigation, and Church & Dwight will continue to redact only in this manner, subject to Court review.

1. ***Church & Dwight seeks to redact proprietary and confidential information on non-condom products that is entirely irrelevant to the FTC's investigation involving condoms.***

The FTC's assertion that products other than male condoms are relevant to its inquiry is "obviously wrong." *Invention Submission Corp.*, 965 F.2d at 1089. "The 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.*" *Texaco*, 555 F.2d at 874 (emphasis added). As established above and acknowledged by the FTC itself, "[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.*" (FTC's Pet. at 10 (emphasis added)) To date, the FTC has provided nothing to support the relevancy of non-condom products. When the FTC Staff was asked recently whether it sought all non-condom documents or only redacted documents containing "both condom and non-condom" products, it responded it only wanted the latter, thereby undercutting its position that non-condom products are relevant to the investigation. (See e-mail correspondence exchanged between Carl W. Hittinger and Mark S. Hegedus, dated April 12, 2010, a copy of which is attached hereto as Exhibit. "E").

Properly read, the FTC's Resolution's language concerning "Trojan brand condoms and other products distributed or sold by Church & Dwight" does not include irrelevant non-condom products such as toothpaste, cat litter, baking soda and detergents. (FTC's Pet. Ex. 2.) Rather, that language is clearly intended to only address other non-Trojan brand condom products made by Church & Dwight since 1999. Such products would include non-Trojan brand condoms as

Naturalamb as well as condoms formerly distributed and sold by Church & Dwight under (non-Trojan) brand names such as Elexa.¹²

Notably, the “other products” language comes well after the general purpose of the investigation is established as “distribution or sale of *condoms* in the United States.” (*Id.* (emphasis added).) Reading that language to include non-condom products perverts the plain meaning of the Resolution. Again, the FTC’s own interpretation supports this conclusion: “[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.*” (FTC’s Pet. at 10 (emphasis added)); *see supra* note 4. Moreover, the primary 15 search terms, which were suggested by the FTC Staff, directly relate only to male condoms and provide additional context for the Resolution’s primary purpose: Condom!, Trojan!, Naturalamb!, Ansel!, SSL!, Durex!, Kimono!, Sperm!, Latex and price, “Nonoxynol 9,” “Global Protection,” “Pleasure Plus,” Inspiral!, Intellx! or Intellex!, and Skyn! (A true and correct copy of the FTC’s February 2, 2010 letter is attached hereto as Exhibit “F”). Thus, the plain meaning of the Resolution limits the FTC’s scope of inquiry to male condoms in the United States.

Moreover, the FTC Staff fails to actually measure the relevance of the material sought against its Resolution, as required by the case law cited in its memorandum. For example, the FTC’s resolution in *Texaco*, a decision the FTC relies heavily upon, stated:

The purpose of the authorized investigation is to develop facts relating to the acts and practices of . . . (certain named corporations) to determine whether said corporations, and other persons and corporations, individually or in concert, are engaged in conduct *in the reporting of natural gas reserves for Southern Louisiana* which violates Section 5 of the Federal Trade Commission Act, *or* are engaged in conduct or activities relating to

¹² *See supra* footnote 9.

the *exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels* in violation of Section 5 of the Federal Trade Commission Act.

555 F.2d at 868 (emphasis added). The resolution in *Texaco* contained two distinct areas of inquiry: (1) reporting of natural gas reserves; and (2) exploration, development, production, marketing of natural gas, petroleum, and fossil fuels. Regarding the former, the gas producer respondents in *Texaco*, in contrast to Church & Dwight here, attempted to unilaterally limit FTC inquiry to “possible underreporting of *proved* [gas] reserves to the [American Gas Association (AGA)].” *Id.* at 874 (emphasis added). Not surprisingly, the D.C. Circuit rejected this argument because the “FTC’s resolution [did] not even mention either the AGA or proved reserves.” *Id.*

Unlike the *Texaco* gas producers, Church & Dwight does not seek to limit the plain language scope of the FTC’s Resolution. Rather, it is the FTC Staff that is ignoring the terms of the FTC’s own Resolution by attempting to expand an inquiry into the distribution or sale of condoms by needlessly insisting on the production of sensitive information relating to products that have nothing at all to do with condoms.¹³ Accordingly, giving *Texaco* its proper deference requires the denial of the FTC’s Petition because it requires focus on the plain language of the Resolution as the guidepost for making determinations of reasonable relevance.

2. *Church & Dwight should be able to redact irrelevant information from otherwise responsive documents.*

In order to limit the risk of disclosing highly-sensitive information, Church & Dwight only seeks to redact proprietary and confidential information concerning irrelevant non-condom products, including information on toothpaste, cat litter, and detergents. As established above,

¹³ 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, OxiClean, Close-Up, Aim and Pepsodent toothpastes, Brillo, and Orange Glo. Church & Dwight also sells various specialty chemicals.

information on non-condom products is wholly irrelevant to the FTC's investigation. Thus, the redaction of such information will greatly reduce the risk of harm to Church & Dwight without impeding the FTC's investigation in any manner.

Nevertheless, as part of a lockstep "internal policy," the FTC Staff unconditionally and unreasonably objects to the concept of redaction, despite it being a widely accepted method of excising irrelevant information from otherwise responsive documents in federal litigation nationwide. *See Spano v. Boeing Co.*, 2008 U.S. Dist. LEXIS 31306, at *7 (S.D. Ill. Apr. 16, 2008) (Wilkerson, J.). The FTC's Petition, now pending in those same federal courts, ignores that it is accepted judicial policy that "redaction [is] appropriate where the information redacted [is] not relevant to the issues in the case." *Id.*; *see also 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 plaintiff to produce redacted versions of discoverable documents to the extent they contained irrelevant personal information). Furthermore, where the information sought is irrelevant, and where Church & Dwight has offered to redact in a manner, subject to judicial review, that preserves the context and integrity of any non-condom product information, the FTC's policy argument that redactions place relevant information out of context is unavailing. *Abbott v. Lockheed Martin Corp.*, 2009 U.S. Dist. LEXIS 15329, at *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 example, 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 products other than the one at issue. There, the 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.

The FTC's only rebuttal to redaction cites to one sentence from *FTC v. Carter*, 464 F. Supp. 633, 640 (D.D.C. 1979) (Parker, J.), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980), which is unavailing upon further analysis. 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 Federal Trade Commission Act." *Carter*, 464 F. Supp. at 636. The FTC sought "information as to consumer 'attitudes and belief,' undissemated advertisements, the entire text of ads . . . and materials going back to 1964 and 1971." *Id.* at 640. Although the court stated that "[a]ppropriate documents should be submitted in their entirety to ensure comprehensibility, rather than being edited by respondents," that statement was made in response to respondents' assertion that only *part* of a cigarette advertisement was relevant. *Id.* However, an advertisement for one product is quite a different thing than a sales report including

products such as condoms, as well as cat litter. Of course, redacting part of a cigarette advertisement presents issues of comprehensibility, particularly when cigarette advertising is an explicit area of inquiry. Unlike the cigarette advertisements in *Carter*, the documents sought here contain irrelevant products and do not necessitate the full text to ensure comprehensibility.

Moreover, unlike the situation in *Carter*, the documents being redacted here are not all single page documents wherein information on condom and irrelevant non-condom products exists side by side. A substantial number of documents that Church & Dwight seeks to redact are multipage documents consisting of numerous pages of sensitive information have nothing at all to do with condoms and only certain pages relate in whole or in part to condoms. (An illustration of Church & Dwight's method of redacting irrelevant non-condom information is attached as Exhibit "G".)¹⁴ It is simply wrong for the FTC Staff to demand that all pages comprising such documents should be produced in full because they are necessary to provide context. In such cases, the irrelevant information being redacted exists completely separate and apart from the admittedly relevant condom information being reported and does absolutely nothing to place the condom information into context. (See Exhibit "G").

In essence, the FTC staff is attempting, as part of the executive branch, to be the sole judge of relevancy. As *Texaco* and its progeny made clear, that job is one for the judicial branch alone. See *Texaco*, 555 F.2d at 872-74. See also Earl J. Silbert & Brian S. Chilton, *(Giga) Bit by (Giga) Bit: Technology's Potential Erosion of the Fourth Amendment*, Criminal Justice at page 11 (Spring 2010) ("The idea that the executive branch can somehow serve as both the hunter of evidence and protector of privacy related to that evidence, is nonsensical. . . . [W]hoever is in the

¹⁴ The third page of Exhibit "G" contains financial condom information that was produced to the FTC, but is not attached to this filing. If necessary, it can be provided to the Court for *in camera* review.

best position to protect the citizens' privacy interests, and however those are best protected, it is asking too much of our law enforcement personnel to wear simultaneously the hat of aggressive enforcer and champion of privacy.”), attached hereto as Exhibit “H.”

In sum, and consistent with *Fine, supra*, Church & Dwight should not be required by the FTC 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. Church & Dwight’s redactions have and will only delete what is necessary to protect Church & Dwight’s interest in the confidential information relating to the wide variety of products it manufactures and distributes. Additionally, the manner in which the redactions are and will be implemented, subject to judicial review, 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* to which product the redacted information relates. (*See* Exhibit “G” for an example of such redactions.) In other words, the redactions are done to preserve context and alleviate any concerns held by the FTC Staff regarding the redacted information.

3. *The FTC has continuously rejected Church & Dwight’s efforts to reach a good faith compromise on the redaction issue.*

The FTC Staff has consistently rejected Church & Dwight’s prior good faith efforts to resolve the issue of redacting irrelevant non-condom product information from otherwise responsive documents. While the Court is respectfully urged to deny the FTC’s Petition in its entirety, Church & Dwight proposes an alternative ruling on this issue that is consistent with its prior suggestions to the FTC and one that is often implemented in such complex litigations. Specifically, Church & Dwight respectfully suggests that the Court consider fashioning an Order that: (1) allows Church & Dwight to continue redacting confidential, proprietary and irrelevant

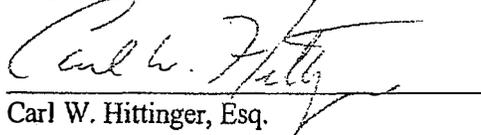
non-condom product information in a manner that preserves its context; (2) requires the FTC Staff to timely approach Church & Dwight's counsel with *specific* objections regarding a particular redaction; (3) requires Church & Dwight to reconsider its redaction; and (4) provides that if the parties cannot resolve a redaction issue after good faith efforts, the parties will submit the redacted document for the Court's *in camera* review and for a ruling on whether the redaction should stand (in whole or in part) or the document should be produced in its entirety.¹⁵ Finally, Church & Dwight again notes its previous offer to submit to the FTC and the Court, without any waiver, a random sampling of documents in redacted and un-redacted form (to be returned after review) to establish that only proprietary and confidential information on non-relevant products is, in fact, being redacted. Church & Dwight submits that either or both of these proposals would limit the risk of disclosing business sensitive irrelevant information without impeding the FTC's investigation.

¹⁵ Per the Court's Minute Order of March 4, 2010, this paragraph contains "new" evidence insofar as the events occurred after the FTC filed its enforcement action Petition.

V. CONCLUSION

For all of the reasons set forth above, Church & Dwight respectfully requests that the Court deny the FTC's Petition for an Order Enforcing the Subpoena and CID. Oral argument and a hearing on any facts at issue is respectfully requested.

Respectfully submitted,



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Church & Dwight Co., Inc.

May 24, 2010

CERTIFICATE OF SERVICE

I certify that on May 24, 2010, a true and correct copy of Respondent Church & Dwight's Response to the Federal Trade Commission's Petition for an Order Enforcing the Subpoena was served on the Petitioner via ECF upon the following:

Mark S. Hegedus
Willard K. Tom
David C. Shonka
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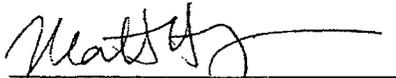

Matthew A. Goldberg, Esquire

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Petitioner,

v.

CHURCH & DWIGHT CO., INC.,

Respondent.

Misc. No. 10-149 (EGS/JMF)

MEMORANDUM OPINION

This case has been referred to me by Judge Sullivan for all purposes. Pending before me now is the Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation [#1] (“Pet.”). The Federal Trade Commission (“FTC”) seeks an order by this Court requiring that respondents Church & Dwight (“C&D”) fully comply with the subpoena *duces tecum* (“subpoena”) and civil investigative demand (“CID”) within ten days of this order. In light of the record before me, the FTC’s petition will be granted.

I. BACKGROUND

On June 10, 2009, the FTC issued a “Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation” (Pet. at 4) that defines the nature and scope of the investigation 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.

Pet., Exh. 2.

In conjunction with the investigation, the FTC issued a subpoena and CID seeking documents and data from C&D concerning its “Planogram” incentive programs for retailers of Trojan condoms. Pet., Exhs. 3 and 4. Both the subpoena and the CID bore hearing dates of July 30, 2009. *Id.* C&D did not comply with this deadline, did not seek an extension of the deadline, and neither attempted to limit the requests nor quash them at that time. Pet. at ¶14. Instead, C&D produced a “detailed written response” to the CID on September 18, 2009. See Church & Dwight Co., Inc.’s Opposition to the Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand [#15] (“Opp.”) at 4.

On October 28, 2009, the FTC contacted C&D concerning deficiencies in C&D’s response to the subpoena, and set a new compliance deadline of November 20, 2009, with which C&D did not comply. Pet. at ¶18. On November 12, 2009, C&D filed a petition asking the FTC to quash or limit the subpoena and CID to the extent that each defined the “Relevant Area” as including Canada, and each requested both documents and information from Canada. *Id.* at ¶19. On December 4, 2009, C&D filed a request to file out of time an additional petition to limit or quash the subpoena to the extent that it required production of “confidential information regarding non-condom products,” and further requested that it be allowed to redact discoverable documents to the extent they contained confidential and proprietary information concerning products other than condoms. *Id.* at ¶20. On December 23, 2009, the FTC denied the two petitions, and set a

new compliance deadline of January 26, 2010, with which C&D did not comply. *Id.* at ¶21-24. On February 26, 2010, the FTC filed this petition.

II. DISCUSSION

A. Relevancy of Documents Located with C&D's Canadian Subsidiary

In both the subpoena and the CID, the FTC defines "Relevant Area," as used in conjunction with the location of C&D's customers, as including both the United States and Canada. Pet., Exhs. 3 and 4. C&D objects to this definition on two grounds. First, C&D says that documents from their Canadian subsidiary are not relevant, based on the plain language of the resolution authorizing the investigation. Opp. at 10-11.

Furthermore, C&D says that, even if the documents could be relevant, the production of documents from their Canadian subsidiary would be overly burdensome. *Id.* at 16.

1. *The Canadian documents are sufficiently relevant to the investigation*

C&D argues that the language of the resolution limits the scope of inquiry to the United States, in that it seeks to determine whether C&D "attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States." *Id.* at 11. This is, however, a particularly narrow reading of the resolution. Of course the outcome of an ITC investigation will concern activities in commerce in the United States; the FTC does not, presumably, seek the documents in an effort to determine whether C&D attempted to acquire a monopoly on the male condom market in Canada. This does not mean, however, that the investigation must be restricted to economic activities in the United States, and to thereby conclude that it is impossible for activities of a Canadian subsidiary to have aided C&D in securing a monopoly in the United States, or for such activities to shed light on the investigation. That would mean that the Court would be

premising the quashing of the subpoena by assuming what the investigation is designed (at least in part) to determine—whether, in examining C&D’s lower market share in Canada versus that in the United States, C&D engaged or is engaging in activities in the United States that constitute unfair competition. It cannot be true that in a globalized economy a federal agency may never investigate the activities of 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.

Requiring the agency to, in effect, prove what it is investigating as a condition of the legitimacy of the investigation it is conducting is contradicted by the case in this Circuit most on point as to the breadth of FTC subpoenas and investigative demands. FTC v. Texaco, 555 F.2d 862 (D.C. Cir. 1977) (en banc). The court in that case evaluated subpoenas issued by the FTC to seven natural gas producers as part of an investigation into the procedures employed by various producers in reporting their gas reserves to the American Gas Association (AGA). Texaco, 555 F.2d at 866. The gas producers contended that the subpoenas should have been limited on the basis of relevance. Id. at 873. The court determined that the standard for limiting a subpoena issued by the FTC was one of “reasonable relevance.” Id. Furthermore, a district court could not “lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.” Id. at 874. Speculations made by the FTC as to the possible relevance of the disputed information were sufficient as long as they were not “obviously wrong.” Id. at 877 n.32.

One of the issues in Texaco concerned the FTC's subpoena of the Superior Oil Company ("Superior"), who was not a member of the AGA, and did not report reserve estimates to the AGA. Id. at 877. Superior argued that they could not be guilty of a conspiracy to underreport reserve estimates to the AGA, and the district judge denied enforcement of large portions of the subpoena. Id. In reversing the district court, the Court of Appeals noted that "the FTC's investigation is not restricted to this theory [of a conspiracy to underreport]," and that "comparison of Superior's estimating process with that of a producer who does report to the AGA could be a useful analysis." Id. Certainly it is plausible that methods for the sale and marketing of male condoms by C&D Canada may be similarly useful to an investigation and analysis of C&D's practices in the United States.

C&D further objects to the relevance of the Canadian documents on the basis of an alleged explanation from FTC staff "that Canadian documents will enable its internal economist to conduct a 'natural experiment' involving the comparison of Church & Dwight's sales, marketing practices and market share for condoms in Canada with the separate United States condom market." Opp. at 6. C&D cites a case concerning a preliminary injunction to prevent a merger for the FTC's definition of "natural experiment": "'Natural experiments,' i.e., evidence that the posited harm has occurred under circumstances similar to the proposed transaction, are relevant to merger analysis." FTC v. Foster, 2007 WL 1793441 at *38 (D.N.M. May 29, 2007). From this statement, C&D concludes that "the FTC's Staff has never made the requisite showing of market similarity." Opp. at 12. There is no such "requisite showing," however; a description in a very different circumstance of a general concept does not create a legal standard.

C&D goes on to challenge the FTC's "natural experiment" on the basis of Daubert v. Merrell Dow Pharma., Inc., 509 U.S. 579 (1993), noting that the FTC staff "has not offered any indication or independent support whatsoever of a 'credible link' or 'nexus' between the United States and Canadian markets for male condoms that would enable the present natural experiment to later survive Daubert scrutiny." Opp. at 13-14.

C&D is putting the cart well before the horse. In the first instance, the "natural experiment" comment by FTC staff is irrelevant. "[W]hen a conflict exists in the parties' understanding of the purpose of an agency's investigations, the language of the agency's resolution, rather than subsequent representations of Commission staff, controls." See FTC v. Invention Submission Corp. ("ISC"), 965 F.2d 1086, 1088 (D.C. Cir. 1992). Whatever FTC staff may have said in support of the relevancy of documents and information from C&D's Canadian subsidiary, there is no "natural experiment" language to be found in the resolution or the subsequent subpoena and CID.

Furthermore, C&D attempts to apply far higher standards of evidence to the FTC investigation than are applicable at this stage. In U.S. v. Morton Salt Co., 338 U.S. 632 (1950), the Supreme Court noted the difference between "the judicial function and the function the Commission is attempting to perform": "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so." Id. at 641-2. The Court compared the power to that of a Grand Jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Id. at 642-3.

It is not the place of the district court to speculate as to possible charges that might result from an investigation, and then to determine the relevance of the subpoena

requests in that light. See Texaco, 555 F.2d at 874. The “substantive antitrust issues” raised by C&D have no bearing at the investigative stage, when it may be that no complaint will ever issue. Opp. at 15.

Returning to the matter at hand, the FTC explains that materials from C&D’s Canadian subsidiary “will assist in determining the factors that affect C&D’s market shares in these adjacent markets,” as C&D has a far smaller share of the male condom market in Canada than in the United States. Reply of Petitioner Federal Trade Commission to the “Church & Dwight Co., Inc.’s Opposition to the Petition of the Federal Trade Commission for an Order Enforcing Subpoena Duces Tecum and Civil Investigative Demand” [#18] (“Reply”) at 5. Without speculating as to the outcome of the investigation, the explanation is sufficient to demonstrate that the Canadian documents are “reasonably relevant,” and not “obviously wrong.”

2. *C&D has not sufficiently shown that production of documents and information from their Canadian subsidiary is unduly burdensome*

C&D further objects to production of documents from their Canadian subsidiary on the basis that such production would be overly burdensome to C&D.

Under Texaco, the standard for showing that a request is unduly burdensome or unreasonably broad is a high one. See Texaco, 555 F.2d at 882. Some burden on the subpoenaed party is to be expected, and the burden of showing that the request is unreasonable is on the subpoenaed party. Id. If an agency inquiry is pursuant to a lawful purpose, and the requested documents are relevant to that purpose, that burden is not easily met, and courts have required a showing that compliance “threatens to unduly disrupt or seriously hinder normal operations of a business.” Id. There is no affidavit or other supporting proof that would permit that conclusion. Reply at 13. Moreover, as

indicated by the parties' agreements concerning search terms for searching documents in the United States, there may be electronic means of searching the data that the parties can mutually agree upon to keep the burden to the minimum. See generally THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY, 11 Sedona Conf. J. 289, 300-301 (2010). (Principle 6: Technologies to reduce cost and burden should be considered in the proportionality analysis).

C&D asserts that production of documents from C&D's Canadian subsidiary will be a tremendous burden, as the Canadian subsidiary has a different document management and retention system from C&D in the United States. Opp. at 17. While the FTC proposed that the review of documents in Canada could be limited through search terms, C&D objects, as C&D Canada's document management system does not allow for keyword searching to limit the review process. Id. Again, however, these claims are not supported by declarations or other evidence that are probative of the costs C&D would have to bear. Reply at 14.

Until a genuine effort is made by both parties to achieve the information demanded at the lowest possible cost fails, there are no clear grounds to consider C&D's claim of burdensomeness. It should be postponed until then.¹

B. C&D's Redactions of Information Pertaining to Products Other than Condoms

¹ C&D claims that the FTC staff initially agreed that C&D would first produce documents relating to the sale and marketing of condoms in Canada only to the extent that those documents were in the possession of the custodians selected by the FTC in the United States. Opp. at 5. However, while the FTC acknowledged in a November 4, 2009 letter to C&D that such an arrangement had been proposed by C&D, it was never agreed upon, and the FTC never agreed to forgo any Canada-held documents. Pet., Exh. 6 at Exh. C at 1.

1. *The redacted materials are sufficiently relevant in light of the resolution*

C&D asserts that it seeks to redact information from the documents it produces regarding “proprietary and confidential information on non-condom products that is entirely irrelevant to the FTC’s investigation involving condoms.” Opp. at 19. C&D quotes the FTC’s petition as stating that the investigation seeks to determine whether C&D has engaged in unfair competition “*with respect to its Trojan brand condoms.*” Id. (emphasis in Opp.). The FTC resolution itself states that the investigation will concern itself with “potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight.” Pet., Exh. 2. In response, C&D alleges that “other products” is “clearly intended” only to address other non-Trojan brand condom products made by C&D. Opp. at 19.

That intent, 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. ISC, 965 F.2d at 1088. In Texaco, that language 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.

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. ISC, 965 F.2d at 1090.

2. *The standard for relevancy in an FTC investigation is not the same as that for post-complaint litigation*

In response to the subpoena instruction requiring that produced documents be unredacted, C&D states that “the FTC cannot simply assert that such policies and regulations allow it to require the production of any documents . . . without showing, like any litigant, that the documents demanded will lead to reasonably relevant and ultimately admissible evidence.” Opp. at 9. This statement mischaracterizes the nature of an FTC investigation. No complaint has been filed—it may be no complaint will ever be filed. The FTC is not “like any other litigant,” because it is not engaged in litigation with C&D. As the Supreme Court noted in Morton Salt, “[b]ecause judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry.” Morton Salt, 338 U.S. at 642. At the pre-complaint stage, the court is not free to speculate as to possible charges in a future complaint, and then to determine the relevance of the subpoena requests on that basis. Texaco, 555 F.2d at 874.

C&D further claims that the FTC is “attempting . . . to be the sole judge of relevancy,” and that Texaco and later cases stand for the proposition that “that job is one for the judicial branch alone.” Opp. at 24. This interpretation of Texaco is off the mark. While it may be the place for the court to determine relevancy in a circumstance such as this, Texaco sets the bar for that relevancy very low, and limits its power to question the

judgment of the investigating administrative agency. Texaco, 555 F.2d at 872 (“[W]hile the court’s function is neither minor nor ministerial, the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity”) (internal citations omitted).

3. *C&D’s alternative proposal concerning in camera review of documents is untenable and inappropriate*

C&D proposes an “alternative ruling” that is “often implemented in such complex litigations.” Opp. at 25. C&D suggests that the Court (1) allow C&D to continue redacting information it judges to be confidential, proprietary, and irrelevant in a manner that preserves its context; (2) require the FTC to “timely approach” C&D’s counsel with specific objections regarding particular redactions; and (3) require C&D to consider the redaction. Then, if the parties cannot resolve a redaction issue after good faith efforts, the parties will submit the redacted document for the Court’s *in camera* review for a ruling on whether the redaction should stand, or whether the document should be produced in its entirety.

This ruling would be inappropriate on a number of levels. First, C&D attempts to improperly shift its burden of proving that the redacted information is irrelevant. See ISC, 965 F.2d at 1090 (“[I]n light of the broad deference we afford the investigating agency, it is essentially the respondent’s burden to show that the information is irrelevant”). Second, it places the court in an inappropriate position at this stage of the investigation. “The Supreme Court has made it clear that the court’s role in a proceeding to enforce an administrative subpoena is a strictly limited one.” Texaco, 555 F.2d at 871-72. For the court to review individual documents for their relevance at this pre-complaint

stage would invite speculation as to what possible charges might be included in a future complaint, and cause the Court to lose sight of the FTC's legitimate right to determine the facts. Id. at 874. Third, contrary to C&D's characterization, this is not a "complex litigation." To put such a scheme in place would elevate it to something well beyond what it should be—an administrative investigation, which is proper "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Morton Salt, 338 U.S. at 652.

III. CONCLUSION

For the reasons stated herein, the Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation will be granted. A separate Order accompanies this Memorandum Opinion.



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by John M.
Facciola
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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Petitioner,

v.

CHURCH & DWIGHT CO., INC.,

Respondent.

Misc. No. 10-149 (EGS/JMF)

ORDER

In accordance with the accompanying Memorandum Opinion, it is, hereby,

ORDERED that the Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation will be GRANTED.

SO ORDERED.



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John M. Facciola
Date: 2010.10.29
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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Tab B



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.
DLA Piper LLP (US)
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Philadelphia, PA 19103

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.

Tab C

BACKGROUND

On June 10, 2009, the FTC issued the following Resolution Authorizing Use of Compulsory Process in a Non Public Investigation (“Resolution”):

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.

(*emphasis added*). On June 29, 2009, the FTC issued a subpoena *duces tecum* and civil investigative demand (“CID”) to Church & Dwight pursuant to the above Resolution.

During Church & Dwight’s review and production of now 2,575,994 pages of documents responsive to the FTC’s subpoena *duces tecum*, the Commission Staff asserted that it was also entitled to documents concerning: (1) Church & Dwight’s sales and marketing practices of condoms in Canada, including documents located in Canada from Church & Dwight’s Canadian subsidiary; and (2) documents in un-redacted form, which contained Church & Dwight’s confidential and business sensitive information on non-condom related products. Based on a straightforward reading of the Resolution, Church & Dwight disagreed that the Commission Staff was entitled to Canadian based documents and non-condom product information. Although the parties attempted to resolve their differences in good faith they could not reach a compromise on these issues.

The FTC ultimately filed an Enforcement Action Petition in this Court against Church & Dwight to compel production of Canadian documents and information on non-condom products. (Dkt. No. 1). On April 22, 2010, District Court Judge Emmet G. Sullivan transferred the case to

Magistrate Judge John M. Facciola “for resolution with any appeal from his judgment to be taken directly to the [D.C. Circuit].” *See* Minute Order, dated April 14, 2010. Following extensive briefing in this Court (oral argument was requested, but not held), on October 29, 2010, this Court issued an Order and Memorandum Opinion granting the FTC’s petition. (Dkt. Nos. 22, 23). Pursuant to the District Court’s Minute Order dated April 14, 2010, Church & Dwight filed a notice of appeal on November 2, 2010, (Dkt. No. 25), appealing this Court’s ruling directly to the Court of Appeals for the District of Columbia Circuit. On November 10, 2010, this Court transmitted the notice of appeal, order appealed, and docket sheet to the D.C. Circuit. (Dkt. No. 26).

Since that time, the parties have agreed to commence negotiations regarding the production of Canadian information pursuant to this Court’s instruction that the parties engage in a “genuine effort . . . to achieve the information demanded at the lowest possible cost.” (Dkt. No. 23 at 8). For this reason, Church & Dwight, at the current time, is not pursuing the Canada issue on appeal. However, Church & Dwight reserves its right, implicit in this Court’s order, to challenge the FTC’s demands if they become unduly burdensome. *See Id.* (“Until a genuine effort is made by both parties to achieve the information demanded at the lowest possible cost fails, there are no clear grounds to consider C&D’s claim of burdensomeness. *It should be postponed until then.*”) (emphasis added).

Information regarding non-condom products is another story. Church & Dwight is pursuing an appeal of this issue and contends that the Court’s Order and Memorandum Opinion implicates serious legal questions regarding the interpretation of the scope of the FTC’s Resolution and the D.C. Circuit’s *en banc* decision in *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977) (Bazelon, C.J.), *cert. denied*, 431 U.S. 974 (1977). In that controlling case issued over

thirty years ago, the D.C. Circuit addressed the limits of the FTC's investigatory powers in subpoena enforcement actions, based particularly on the wording of the FTC's resolution at issue and the relationship between that operative document and the information sought by the FTC's staff. As such, Church & Dwight requests a stay in connection with these issues or the company will suffer irreparable damage if forced to produce documents containing irrelevant non-condom information before the issues are addressed by the D.C. Circuit on appeal. Conversely, the FTC will suffer no harm if a stay is granted because its investigation is continuing despite the appeal. Church & Dwight has already produced 2,575,994 pages of documents in response to the FTC's subpoena *duces tecum* and the parties have already initiated talks concerning the methodology for another production of documents regarding Canada. Finally, the public interest weighs in favor of granting a stay because the D.C. Circuit now has an opportunity to revisit *Texaco* in a new technological age where unbridled and intrusive government investigations are placing more and heavier burdens on U.S. companies than ever before. Thus, as set forth more fully below, Church & Dwight should not be compelled to produce tens of thousands of pages concerning non-condom products until its appeal is determined.

ARGUMENT

The substantiality of Church & Dwight's arguments on appeal, together with the balance of hardships, weigh in favor of granting a stay pending appellate review. Courts consider four factors when assessing a motion to stay pending appeal: (1) the movant's likelihood of success of prevailing on the merits of the appeal; (2) whether the movant will suffer irreparable damage absent a stay; (3) the harm that other parties will suffer if a stay is granted; and (4) the public interest. See *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (Rehnquist, J.); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (*Per Curiam*) (internal

citations omitted). Courts should not reduce these factors to a “set of rigid rules,” but rather render “individualized judgments in each case.” *Hilton*, 481 U.S. at 777.

Importantly, the court need not be convinced that the movant has “an absolute certainty of success” on appeal. *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (Mikva, J). Instead, the court properly grants a stay where the movant “has raised serious legal questions going to the merits, so serious, substantial, [and] difficult as to make them a fair ground of litigation. . . .” *Id.* (quoting *Wash. Metro Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (Leventhal, J.); see also *Peck v. Usphur Cnty. Bd. Of Educ.*, 941 F. Supp. 1478, 1481 (N.D. W. Va. 1996) (Keeley, J.) (“To find that plaintiffs have a strong likelihood of success on appeal, the Court need not harbor serious doubts concerning the correctness of its decision. Otherwise, relief under rule 62 (c) would rarely be granted. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.”). Church & Dwight respectfully submits that this standard is satisfied in the instant case.

I. CHURCH & DWIGHT’S APPEAL RAISES SERIOUS LEGAL QUESTIONS WARRANTING A STAY

Church & Dwight’s appeal raises serious legal questions concerning the interpretation and continuing validity of *Texaco*, a decision which was relied upon heavily by the FTC and cited frequently by this Court in its opinion. In 1977, the D.C. Circuit, sitting *en banc*, held that an investigative subpoena is enforceable only “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is *reasonably relevant*.” *FTC v. Texaco, Inc.*, 555 F.2d at 872, *cert. denied*, 431 U.S. 974 (1977) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (Jackson, J.)) (emphasis added). Further, the court held that

“the 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.*” *Texaco*, 555 F.2d at 874 (*emphasis added*).

Thus, the three prong *Texaco* standard in conjunction with the language of the controlling resolution is the only limit on the FTC’s broad investigatory powers in the subpoena enforcement context. However, as evidenced by this case, the *Texaco* standard and/or its application in the district courts requires clarification by the D.C. Circuit, after thirty years, as to how the “reasonably relevant” prong of the standard is to be employed – and how far it can be stretched by the Government. For example, the FTC and this Court never articulated how information concerning non-condom related products – such as cat litter, detergent, and toothpaste – could be “reasonably relevant” to the FTC’s investigation concerning the “sale or distribution of condoms in the United States.” *See* Resolution. Yet, the district court has ordered Church and Dwight to produce information of that very nature.

Instead of properly focusing on the plain language of the controlling Resolution, this Court reasoned that “[b]y 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.” (Dkt. No. 23 at 9) (*emphasis added*). However, “plausibility” is not the standard articulated by *Texaco* and its progeny. Indeed, the only identifiable basis for this Court’s granting of the FTC’s petition with respect to non-condom related products is the broadness of the applicable legal standards and limitless deferment to the stated breadth of the FTC’s powers. *Id.* As noted above, in the current technological age, with the added demands of e-discovery obligations, *Texaco* needs to be revisited as the burdens on corporations and prevalence of sweeping searches grow.

Accordingly, the serious legal issues presented by Church & Dwight's appeal weigh heavily in favor of a stay.

II. CHURCH & DWIGHT WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

Absent a stay, Church & Dwight will suffer obvious irreparable injury if compelled to produce tens of thousands of pages of wholly irrelevant non-condom related information to the FTC during the pendency of its appeal. Once the FTC staff has and digests the *very information in dispute*, the rights Church & Dwight is attempting to protect will be irreversibly violated. Thus, forcing Church & Dwight to produce documents it will claim on appeal are wholly irrelevant simply makes no sense. *See FTC v. Whole Foods Market, Inc.*, Civ. No. 1:07-cv-01021-PLF, Plaintiff's Motion For Injunction Pending Appeal at 4 (where the FTC similarly argued that an injunction stay pending appeal was necessary to "allow meaningful appellate review" on the court's denial of the FTC's attempt to enjoin the merger of Whole Foods Market, Inc., and Wild Oats Markets, Inc.. Otherwise, the FTC "[would] lose any chance of securing effective relief against the acquisition . . .").

As noted above, Church & Dwight pursues its appeal and this stay to protect its confidential and business sensitive information concerning products that *bear no relation whatsoever* to condoms from overly broad and sweeping FTC demands. The FTC's investigation is bound by its own Resolution that defines the parameters of the investigation as the "distribution or sale of condoms in the United States." Yet, the FTC has not been held to the plain language of its own directive despite a continuing inability to articulate any reasonable connection between products such as cat litter and condoms. The same goes for detergent and condoms, toothpaste and condoms, and so on. For these reasons, a stay is needed to prevent

irreparable harm to Church & Dwight and allow meaningful appellate review on the important issues presented in this case.

III. THE FTC WILL NOT BE HARMED BY THE ISSUANCE OF A STAY

The FTC's now two year investigation will proceed unimpeded even if this Court issues a stay pending appeal. Currently, the FTC has in its possession 2,575,994 pages of documents that Church & Dwight produced pursuant to the FTC's subpoena *duces tecum*. This production concerns the "distribution or sale of condoms in the United States" and as such, is unquestionably relevant to the FTC's investigation. *See* Resolution. The FTC is reviewing these documents at this very moment. Moreover, pursuant to this Court's Order, Church & Dwight has agreed to work with the FTC to produce Canadian documents in the most cost effective way possible. Church & Dwight will not pursue this issue on appeal provided the FTC's demands do not rise to an unacceptable level of burdensomeness.

IV. THE PUBLIC INTEREST WILL BE SERVED BY A STAY

The public has an important interest in maintaining and redefining limits on the FTC's investigatory powers when necessitated by societal and technological advancements. While the FTC's powers are admittedly broad, they certainly are not limitless nor should they be. The D.C. Circuit made that clear in *Texaco*. FTC investigations are invasive, burdensome, and may (and have) require an investigative target such as Church & Dwight to spend millions of dollars to cope with such burdens and to defend legal conduct. Given the broad powers granted to the FTC, redefining their limits is of special importance to the public to ensure that these broad powers do not become overwhelming. Thus, the public interest favors granting a stay in this instance. *See* Earl J. Silbert & Brian S. Chilton, *(Giga) Bit by (Giga) Bit: Technology's Potential Erosion of the Fourth Amendment*, Criminal Justice at page 11 (Spring 2010) ("The idea that the

executive branch can somehow serve as both the hunter of evidence and protector of privacy related to that evidence, is nonsensical. . . . [W]hoever is in the best position to protect the citizens' privacy interests, and however those are best protected, it is asking too much of our law enforcement personnel to wear simultaneously the hat of aggressive enforcer and champion of privacy.”).

CONCLUSION

For all the foregoing reasons, Church & Dwight respectfully requests that the Court stay its enforcement order pending appeal. Additionally, Church & Dwight respectfully requests oral argument.

Respectfully submitted,

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Dated: November 22, 2010

Attorneys for Respondent
Church & Dwight Co., Inc.

Tab D

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

FEDERAL TRADE COMMISSION,	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	NO.: 1:10-mc-00149-EGS
	:	
CHURCH & DWIGHT CO., INC.,	:	
	:	
Respondent.	:	

**CHURCH & DWIGHT CO., INC.'S REPLY TO PETITIONER FEDERAL TRADE
COMMISSION'S OPPOSITION TO CHURCH & DWIGHT CO., INC.'S
MOTION TO STAY PENDING APPEAL**

The FTC's Opposition brief essentially asks this Court to find that appellate review of this Court's Opinion and Order is unnecessary and, therefore, Church & Dwight should simply produce the documents at issue and render the appeal effectively moot. In doing so, the FTC misconstrues and/or overlooks several significant reasons asserted by Church & Dwight as to why a stay is warranted here. First, the FTC misstates the legitimate nature of the legal questions raised by Church & Dwight on appeal. Second, in arguing that Church & Dwight somehow waived certain facets of its appeal, the FTC takes the illogical position that Church & Dwight was somehow required to raise issues related to this Court's application of the operative legal standard *before* this Court even rendered its decision. Third, the FTC minimizes the harm befalling Church & Dwight and overstates any alleged harm befalling the FTC. Fourth, the FTC fails to address the public interest concerning the proper application and clarification of a legal standard that will affect subpoena-related enforcement actions going forward. Accordingly,

Church & Dwight respectfully requests that this Court stay these proceedings during the pendency of Church & Dwight's appeal.

ARGUMENT

As explained more fully in Church & Dwight's initial memorandum of law, courts consider four factors when assessing a motion to stay pending appeal: (1) the movant's likelihood of success of prevailing on the merits of the appeal; (2) whether the movant will suffer irreparable damage absent a stay; (3) the harm that other parties will suffer if a stay is granted; and (4) the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (Rehnquist, J.); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (*per curiam*) (internal citations omitted). Courts should not reduce these factors to a "set of rigid rules," but rather render "individualized judgments in each case." *Hilton*, 481 U.S. at 777.

Importantly, the court need not be convinced that the movant has "an absolute certainty of success" on appeal. *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (Mikva, J). Rather, it is sufficient that the movant "has raised serious legal questions going to the merits, so serious, substantial, [and] difficult as to make them a fair ground of litigation. . . ." *Id.* (quoting *Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (Leventhal, J.); *see also Peck v. Upshur Cnty. Bd. Of Educ.*, 941 F. Supp. 1478, 1481 (N.D. W. Va. 1996) (Keeley, J.) ("To find that plaintiffs have a strong likelihood of success on appeal, the Court need not harbor serious doubts concerning the correctness of its decision. Otherwise, relief under rule 62 (c) would rarely be granted. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be

maintained.”), *aff’d in part and reversed in part on other grounds*, 155 F.3d 274 (4th Cir. W. Va. 1998). Church & Dwight respectfully submits that this standard is satisfied here.

I. CHURCH & DWIGHT HAS RAISED SERIOUS LEGAL QUESTIONS ON APPEAL WARRANTING A STAY

Regarding the first factor, the FTC misstates the heart of Church & Dwight’s arguments.

In its memorandum in support of its motion to stay, Church & Dwight stated that:

[A]s evidenced by this case, the *Texaco standard and/or its application* in the district courts requires *clarification* by the *D.C. Circuit, after thirty years*, as to how the “reasonably relevant” prong of the standard is to be employed – and how far it can be stretched by the Government. For example, the FTC *and this Court* never articulated how information concerning non-condom related products – such as cat litter, detergent, and toothpaste – could be ‘reasonably relevant’ to the FTC’s investigation concerning the ‘sale or distribution of condoms in the United States.’” *See Resolution*. Yet, the district court has ordered Church and Dwight to produce information of that very nature.

(Dkt. No. 27-1 at 6) (emphasis added). Thus, the serious legal issues triggered by Church & Dwight’s appeal involve this Court’s interpretation and application of the *Texaco* standard, not only the viability of *Texaco*, as the FTC suggests in its Opposition. (Dkt. No. 29 at 3).

Moreover, courts in this Circuit have granted a stay pending appeal when it is found that the appeal raised serious legal issues “including the proper application” of a “well-established” legal standard. *Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 83 (D.D.C. 2009) (concerning a long-standing evidentiary standard) (emphasis added). According to Judge Kessler, the appeal there “raise[d] serious and potentially far-reaching legal issues.” *Id.* at 84. Similarly, Church & Dwight’s appeal raises serious legal questions concerning the “proper application of the well-established [subpoena enforcement] standard[s]” in *Texaco*. *Al-Adahi*, 672 F. Supp. 2d at 83. Like *Al-Adahi*, answers to questions concerning the “*Texaco* standard and/or its application,” (Dkt. No. 27-1 at 6), will have a “far-reaching,” *Al-Adahi*, 672 F. Supp. 2d at 83, impact on future opponents of FTC enforcement action petitions and will provide important guidance to

companies served with investigative subpoenas – especially in instances where the Commission Staff, like here, has arguably stretched the plain meaning of the Resolution Authorizing Use of Compulsory Process beyond reasonable bounds and in pursuit of irrelevant information. (Dkt. No. 27-1 at 6); *see* Michael Knight and Robert Jones,¹ “Broader Standards in FTC Subpoena Enforcement” (“[u]nder this [Court’s] decision the FTC’s future position will be that, so long as the agency *plausibly* can *speculate* that the information sought *might* prove useful to its investigation, it is allowed to reach *far and wide*.”) (emphasis added). This is particularly important because a critical portion of United States subpoena enforcement law is addressed in the D.C. Circuit.

The FTC’s contention that Church & Dwight waived such arguments has no merit. Under the FTC’s reasoning, Church & Dwight would have needed a crystal ball to anticipate how this Court would apply the *Texaco* standard. Both *Adams v. Rice*, 531 F.3d 936, 944-45 (D.C. Cir. 2008) (Tatel, J.), and *Flynn v. Comm’r*, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001) (Edwards, J.), unlike here, involved scenarios where *plaintiffs* failed to allege an essential element of a cause of action or an entire cause of action in the district court. While waiver was reasonably implicated in those scenarios, it is not implicated here where the grounds for appeal, which resulted in serious legal questions, did not arise until this Court issued its Order and Memorandum Opinion. (Dkt. Nos. 22, 23). Nor does it make sense to argue, as the FTC does, that Church & Dwight should have asked the district court to revisit the Circuit Court’s *en banc* decision in *Texaco*, when considering that decision is binding precedent and can only be meaningfully “revisited” by the Court of Appeals itself.

The FTC’s Opposition brief also misconstrues the impact of technological advances as they relate to the “prevalence of sweeping searches” in the investigative subpoena context. (Dkt.

¹ Available at <http://www.law360.com/printarticle/211054?section=competition>.

No. 27 at 6). Technological advances are often double-edged swords. As this Court previously noted “although the electronic era has increased the number of documents potentially responsive to subpoenas, CIDs and discovery, it has also spawned the development of technologies that ease the cost and burden of searching and producing the documents. (Dkt. No. 23 at 8) (citing *The Sedona Conference, The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289, 300-301 (2010)). Missing from this acknowledgment, however, is that technology not only increases the number of potentially *responsive* documents, but also vastly increases the number of unresponsive and irrelevant documents accessible by the Government through an unmeasured interpretation of a Resolution that results in overbroad and sweeping demands for documents. The sweeping investigation at issue here exemplifies such a situation and requires judicial intervention. The *Texaco* standard set the limits for determining which “documents [are] potentially responsive to subpoenas” – which is an actual (not plausible) reasonable relevance in relationship to the Resolution at issue. It will be Church & Dwight’s position on appeal that this Court should have addressed that connection in this case, including through *in camera* review, which itself is a serious issue in light of the vast amount of information at issue when dealing with sweeping searches of electronic data.²

II. CHURCH & DWIGHT HAS DEMONSTRATED IRREPARABLE HARM

Contrary to the FTC’s assertions, Church & Dwight has identified the right it seeks to protect and demonstrated the irreparable injury sure to occur if a stay is not granted. Foremost, Church & Dwight has the right to appeal this Court’s October 29, 2010 Order. Church & Dwight has further identified its related right as follows:

² The FTC also accuses Church & Dwight of lacking candor with regard to its interpretation of the controlling Resolution. (Dkt. No. 29 at 4). Church & Dwight has already fully briefed its position on why the “other products” language in the Resolution that is seized upon by the FTC does not include non-condom products. (Dkt. No. 15 at 25-27).

Church & Dwight pursues its appeal and this stay to protect its confidential and business sensitive information concerning products that *bear no relation whatsoever* to condoms from *overly broad and sweeping FTC demands*.

(Dkt. No. 27-1 at 7) (second emphasis added). Said another way, Church & Dwight is protecting its right to be free from an abuse of government power, which, in this case, is asserted through a sweeping governmental request for *irrelevant* information. This right is necessarily implicit in *Texaco's* holding that an investigative subpoena is enforceable only "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is *reasonably relevant*." *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 431 U.S. 974 (1977) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (Jackson, J.)) (emphasis added). This standard is the only judicially imposed limit on the FTC's investigatory powers in the subpoena enforcement context.

Moreover, Church & Dwight has demonstrated irreparable injury to itself as follows:

Absent a stay, Church & Dwight will suffer obvious irreparable injury if compelled to produce tens of thousands of pages of *wholly irrelevant* non-condom related information to the FTC during the pendency of its appeal. Once the FTC staff has and digests the *very information in dispute*, the rights Church & Dwight is attempting to protect will be irreversibly violated.

(Dkt. No. 27-1 at 7) (first emphasis added). It follows naturally that the right to be free from an abuse of government power through sweeping requests for irrelevant information is irreparably violated once that information is produced.³ Such an invasion cannot be simply remedied later by the return of the documents as the FTC suggests. (Dkt. No. 29 at 7).

³ The FTC's claim that Church & Dwight's "supposition that its rights will be violated if staff 'digests' the information effectively concedes relevance" is dangerous and underscores the FTC's misunderstanding of the balance of powers at issue here. (Dkt. No. 29 at 7, n.4). As described above, the very right Church & Dwight seeks to protect is the right to be free of sweeping government requests for *irrelevant* information. Under the FTC's line of reasoning, anytime a party objects to the relevancy of the information sought, that party concedes relevance. If adopted, this absurd argument cripples all future respondents in subpoena enforcement actions who contest the relevancy of the information sought thereby making such actions mere rubber-stamping processes by the courts. This is contrary to *Texaco*.

Moreover, the case law cited by the FTC to support its suggestion is distinguishable. First, in *FTC v. Browning*, 435 F.2d 96, 102 (D.C. Cir. 1970) (Wilkey, J.), unlike here, the appellant did not even contest the elements of subpoena enforcement: “Appellant does not dispute that the information sought here was relevant to the proceedings” Thus, *Browning* is immediately inapposite. Second, *Gibson* and the other FTC case cited by Petitioner involved limited and pointed subpoenas. *FTC v. Gibson Prods. of San Antonio, Inc.*, 569 F.2d 900, 903, 906 (5th Cir. 1978) (Brown, J.) (the “limited . . . subpoenas” concerned “[s]pecifically, . . . (i) minutes of shareholder meetings, (ii) minutes of board of directors meeting, (iii) names and addresses of shareholders since the date of incorporation to present, and (iv) records on the transfer of shares since the date of incorporation to present.”); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (Silberman, J.) (the subpoenas sought “financial data - including balance sheets, income statements, records reflecting annual gross sales, and information concerning the financial status of each ISC regional office - and the names and addresses of clients, advertisers, and the companies listed in the corporation’s data bank.”), *cert denied*, 507 U.S. 910 (1993). By contrast, the FTC’s demands here implicate *any* non-condom related information, from cat litter to laundry detergents to bulk chemicals, *regardless of its relevancy* that just so happens to be found in a document also containing condom-related information.

Third, in *Gibson*, unlike here, the Fifth Circuit articulated how the information sought was actually relevant to the inquiry. *Gibson*, 569 F.2d at 906 (“[a] list of shareholders and officers, as well as minutes of board meetings, from the local stores would help resolve who actually controls wholesale buying.”). Here, the Court only

summarily stated that “[b]y 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.” (Dkt. No. 23 at 9) (emphasis added). Thus, unlike *Gibson*, Church Dwight contends that the Court here did not properly find the relevance of the information sought based on the Resolution at issue, which is now at issue before the Circuit Court.

III. THE FTC HAS NOT DEMONSTRATED SUFFICIENT HARM

The FTC’s “congressionally mandated duties of regulation” do not eviscerate the limits of subpoena enforcement as set forth by the Circuit Court in *Texaco*. On balance, the harm to Church & Dwight is greater than any harm allegedly befalling the FTC. Moreover, any harm befalling the FTC is partly due to the FTC’s own refusal to accept a fair and logical compromise.

Under *Texaco*, the FTC is not entitled to any and every document it seeks irrespective of the relevancy of the information contained therein. 555 F.2d at 872 (the specific information sought must be shown to be “reasonably relevant.”). Church & Dwight has repeatedly offered to produce the condom-related documents in question with appropriate redactions of wholly irrelevant information. The FTC has refused throughout the investigation to accept such redacted documents based on its “no redaction” policy. Church & Dwight has even offered to allow the FTC to ask for specific complete documents if it has any questions about the context providing it agrees to return the document after review. *See* letter dated November 24, 2010 from Carl W. Hittinger, Esquire to Sylvia Kundig, Esquire attached hereto as Exhibit A. Despite these reasonable suggestions that afford the FTC the opportunity to view *relevant* condom-related

information while protecting Church & Dwight's interests concerning wholly *irrelevant* non-condom information, the FTC has repeatedly rejected these attempts at compromise because of its "no redaction" policy. *See* letter dated July 28, 2009 from Sylvia Kundig, Esquire to Carl W. Hittinger, Esquire attached hereto as Exhibit B. Thus, it is inaccurate to say, as does the FTC, that Church & Dwight's "withholding of relevant information clearly impedes the FTC's investigation" when it is the FTC's own unyielding adherence to a lockstep "no redaction" policy that prevents it from viewing the relevant condom-related information that is expressly addressed by the Resolution at issue. (Dkt. No. 29 at 8).

The FTC has received approximately 2,697,174 pages of documents that are irrefutably responsive to the FTC's subpoena at the cost of millions of dollars to Church & Dwight. Yet, the FTC makes it seem as though Church & Dwight has not produced a single relevant document and is stonewalling the FTC's investigation. Moreover, the parties have already made substantial progress in talks concerning the production of documents regarding condom sales and marketing in Canada in the past two weeks, some of which will be produced shortly. The grave harm that the FTC alleges is overstated. If endorsed, it effectively renders *Texaco's* "reasonably relevant" requirement meaningless because every future respondent who on appeal challenges the relevancy of information sought is (to accept the FTC's argument) impeding the FTC's investigation – unless it succumbs to the FTC's every demand, even though the issues are properly on appeal in the courts.

IV. CHURCH & DWIGHT HAS DEMONSTRATED THAT THE PUBLIC INTEREST WARRANTS A STAY

Clarification of serious legal questions that have far-reaching consequences serves the public interest and Church & Dwight has demonstrated the same for purposes of a stay. Like here, *Al-Adahi* concerned serious legal issues “including the *proper application* of [a] *well-established*” legal standard. 672 F. Supp. 2d at 83 (emphasis added). The court there specifically noted that there was “significant benefit,” concerning the public interest, “in having the Court of Appeals *clarify*” the issues raised on appeal. *Id.* at 84 (emphasis added). Additionally, the court stated that “clarification of the legal landscape by the Court of Appeals would be particularly useful” due to the amount of “similarly situated petitioners before each judge in this District.” *Id.*

Here, like *Al-Adahi*, Church & Dwight’s appeal raises serious issues concerning the “proper application of the well-established [*Texaco*] standard[.]” *Al-Adahi*, 672 F. Supp. 2d at 83. Moreover, the public has an important interest “in having the Court of Appeals clarify . . . the legal landscape” regarding the standard and limits of the FTC’s investigatory powers as it relates to subpoena enforcement. *Id.* at 84. Although there are not “numerous similarly situated petitioners before each judge in this District,” here, clarification of the legal issues presented by Church & Dwight’s appeal will affect nearly all subpoena enforcement actions going forward and provide guidance to those in receipt of FTC subpoenas and other investigative demands.

The FTC folds its harm argument, rebutted above, into its public interest argument. It states that “the public interest is not served by a stay, because it is *impeding the FTC’s ability to complete its investigation* on behalf of U.S. consumers.” (Dkt. No. 29 at 8) (emphasis added). Church & Dwight has already rebutted this argument and

further notes that this harm pales in comparison to the irreparable harm sure to befall Church & Dwight if a stay is denied while the Circuit Court decides the important issues raised on appeal. The FTC also summarily states that Church & Dwight's "claim that the 'public has an important interest in maintaining and redefining the limits on the FTC's investigatory powers when necessitated by societal and technological advancements,' . . . is not served by a stay." (Dkt. No. 29 at 8) (citing Dkt. No. 27-1 at 8). However, the Constitutional balance of powers and the reasoning in *Al-Adahi* demonstrates that the opposite is true. See Earl J. Silbert & Brian S. Chilton, *(Giga) Bit by (Giga) Bit: Technology's Potential Erosion of the Fourth Amendment*, Criminal Justice at page 11 (Spring 2010) ("The idea that the executive branch can somehow serve as both the hunter of evidence and protector of privacy related to that evidence, is nonsensical. . . . [W]hoever is in the best position to protect the citizens' privacy interests, and however those are best protected, it is asking too much of our law enforcement personnel to wear simultaneously the hat of aggressive enforcer and champion of privacy."). Thus, the public interest favors granting a stay.

CONCLUSION

For all the foregoing reasons, the substantiality of Church & Dwight's arguments on appeal, together with the balance of hardships, weigh in favor of granting a stay pending appellate review. Accordingly, Church & Dwight respectfully requests that the Court stay its enforcement order pending appeal. Additionally, Church & Dwight respectfully requests oral argument.

Respectfully submitted,

/s/ Carl W. Hittinger

Carl W. Hittinger, Esquire; D.C. Bar No. 418376
Lesli C. Esposito, Esquire; D.C. Bar. No. 470298
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Attorneys for Respondent
Church & Dwight Co., Inc.

Dated: December 6, 2010

EXHIBIT A



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November 24, 2010

Via Email and First Class Mail

Ms. Sylvia Kundig
Federal Trade Commission
West Region - San Francisco
901 Market St., Suite 570
San Francisco, CA 94103

Re: Church & Dwight – FTC File No. 091-0037

Dear Sylvia:

This serves as a partial response to your letter of November 22 on the issue of the Board Minutes. In light of the present posture of the case with the pending motion to stay and related appeal to the D.C. Circuit and petition before the FTC, we must decline your proposal. However, as before, if there are certain redacted Board Minutes that you have received where you have questions concerning the context of the redaction, we will consider showing you the full unredacted pages at issue, provided you agree to return the unredacted pages to us after that review as well as agreeing that by doing so we have not waived any position we have taken as to the production of non-condom product information. We can discuss further on Wednesday if you would like. For your information, our office is closed on Friday.

Wishing you and your families a Happy Thanksgiving Holiday.

Very truly yours,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read 'Carl'.

Carl W. Hittinger

Enclosures

cc: Janice L. Charter, Esquire
Lesli C. Esposito, Esquire
Matthew A. Goldberg, Esquire

EXHIBIT B



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

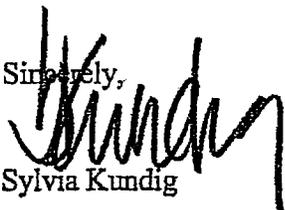
Dear Mr. Hittinger and Ms. Esposito:

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

CERTIFICATE OF SERVICE

I certify that on December 6, 2010, a true and correct copy of Respondent Church & Dwight Co., Inc.'s Reply to Petitioner Federal Trade Commission's Opposition to Church & Dwight's Motion to Stay Pending Appeal was served on the Petitioner via ECF upon the following:

Mark S. Hegedus
Willard K. Tom
David C. Shonka
John F. Daly
Lawrence DeMille-Wagman
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW
Washington, D.C. 20580
mhegedus@ftc.gov

/s/ Carl W. Hittinger

Carl W. Hittinger, Esquire

Tab E



(Giga) Bit by (Giga) Bit

Technology's Potential Erosion of the Fourth Amendment
BY EARL J. SILBERT AND BRIAN S. CHILTON

Near the end of the summer of 2009, while the nation was loudly debating national health insurance, the health care industry spawned another debate, though in the more muted and stately tones of Ninth Circuit judicial colleagues politely disagreeing with one another over an equally important question: When electronically stored records of innocent Americans are lawfully seized by the government to investigate the electronic records of targeted persons, and both targeted and untargeted persons' electronic files are commingled, how are the untargeted Americans' Fourth Amendment rights honored and preserved?

Seizure of Commingled Electronic Evidence in *United States v. Comprehensive Drug Testing, Inc.*

United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009) (en banc), arose out of the investigation of illegal steroid use by professional baseball players. The federal government began investigating the Bay Area Lab Cooperative (BALCO) in 2002 on suspicion of providing illegal steroids to professional baseball players. Major League Baseball and its players' union subsequently agreed that the players would participate in anonymous drug testing to determine if more than 5 percent of players tested positive. Comprehensive Drug Testing, Inc. (CDT) administered the program while Quest Diagnostics, Inc., performed the actual tests.

Although the procedural aspects reviewed in the case were far more complicated—including the appropriate extent of issue preclusion, the government's failure to timely appeal various rulings, and the scope of a district court's jurisdiction under Federal Rule of Criminal Procedure 41(g), this article focuses not on procedural issues but on the narrower issue of interplay between the Fourth Amendment and the evidence contained on electronic databases seized under the warrants—the pertinent facts can be adequately summarized for present purposes as follows: CDT maintained an electronic database of all the testing and results, while Quest kept the specimens. The federal government learned that 10

players had tested positive for steroids, and engaged in a series of steps to obtain that evidence, including (1) serving several grand jury subpoenas on CDT and Quest calling for all drug testing records and subpoenas, and (2) obtaining and executing search warrants calling for the records at various of CDT's and Quest's facilities relating to the 10 specific players for whom the government had established probable cause. The procedures relating to execution of the CDT warrant are the specific focus of this article.

In its search warrant affidavit submitted to the magistrate, the government represented that it was not feasible for the government to review CDT's databases onsite in order to cull out the evidence related to the 10 players and probable cause justifying seizure because of the nature of mass stored electronic evidence. The government asserted that electronic file names could be disguised, for example, or data could be hidden or erased, protected by passwords and encryption, accessible only with software not available onsite, or even designed with "booby traps" intended to destroy the information. The Ninth Circuit acknowledged that "[b]y reciting these hazards, the government made a strong case for off-site examination and segregation of the evidence seized," a striking conclusion given that CDT was neither a target of the investigation nor suspected of any actual or potential wrongdoing whatsoever. As described by the Ninth Circuit, the magistrate judge granted the warrant allowing "broad authority for seizure of data, including the right to remove pretty much any computer equipment found at CDT's Long Beach facility, along with any data storage devices, manuals, logs or related materials."

Because probable cause existed for 10 players only, this necessarily meant that the overwhelming amount of data seized contained information on hundreds, if not thousands, of persons for whom no probable cause showing had even been attempted, much less established. In an effort to protect the privacy rights of these other individuals, the magistrate ordered that the government personnel going through the seized data initially could not include the case agents, and instead would have to be restricted to "computer personnel" whose sole function would be to review the evidence and determine what data could be excluded onsite, or, for material that could not be excluded, culling out the evidence relating to the 10 probable cause persons. As it turned out, the government failed to adhere to the requirement of using a "taint team" not involved in the prosecution to make the initial pass through the evidence, instead allowing the case agent to go through the database with information on *all* professional baseball players, and then using that information to develop additional subpoenas and warrants.

EARL J. SILBERT is a partner and **BRIAN S. CHILTON** is of counsel with DLA Piper in Washington, D.C. Silbert concentrates on white collar crime investigations and trials, and representation of lawyers and law firms on ethical, malpractice, and partnership issues. Prior to entering private practice, he served for nearly 20 years as U.S. attorney for the District of Columbia in the tax division and in the deputy attorney general's office of the Department of Justice. He and two other assistant U.S. attorneys served as the first Watergate prosecutors. Chilton is a member of the white collar litigation group. His practice focuses heavily on the Foreign Corrupt Practices Act. He served as senior counsel in the office of the independent counsel (Whitewater/Lewinsky).

Some of the Ninth Circuit judges were clearly concerned about the case agent's failure to abide by the restriction against being involved in reviewing nonprobable cause sensitive medical record evidence of third persons. (*Comprehensive Drug Testing*, 579 F.3d at 997 & 999.) There is also a sense that some of the judges felt the government had not been completely candid in disclosing the procedures it had followed. (*Id.* at 994.) However, as detailed *infra*, the Ninth Circuit's en banc ruling ends up prescribing procedures to be followed going forward for *all* comparable computer database warrants and searches, without qualifying those procedures as applicable only in situations where concerns about the government's behavior exist. Indeed, the Fourth Amendment privacy issues addressed by the Ninth Circuit in this case, and the focus of this article, persist wholly apart from any government malfeasance. In other words, one can have high regard for the general professionalism and integrity of federal law enforcement and still believe that the Fourth Amendment privacy rights addressed by the Ninth Circuit and here are under serious threat.

But setting aside the government's failure to keep its case agent from reviewing the nonprobable cause data, the most interesting issue raised in the case is one that

Ninth Circuit reached back to one of its own 1982 cases, *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), for guidance. Even the court, though, acknowledged that reaching back that far—to a case that “just preceded the dawn of the information age, [where] all of the records . . . were on paper”—was potentially problematic. *Tamura* involved boxes of paper printouts, where the government had been granted authority to seize only information about transactions with those documents relating to the defendant-employee and his employer. When the government showed up to seize the evidence, employees refused to assist the government with the cumbersome task of segregating those transactions, causing the agents to seize all the records so they could cull out the responsive ones later. The Ninth Circuit had declined to suppress the properly seized material merely because material broader than allowed under the warrant had also been seized. The Ninth Circuit then said, way back in 1982, that for the future, “[i]n the comparatively rare instances where documents are so intermingled that they cannot feasibly be sorted on site, . . . the Government [should] seal [] and hold [] the documents pending approval by a magistrate of a further search. . . . If the need for transporting the documents is known to the of-

The Ninth Circuit's ruling ends up prescribing procedures for all comparable computer database searches and warrants.

will be increasingly encountered in today's electronic age, namely, when evidence is stored on databases such as those maintained by CDT—where probable cause evidence is inextricably mixed with nonprobable cause evidence—how does the government segregate the evidence it is entitled to without violating the Fourth Amendment interests of the persons associated with the evidence to which it is not entitled? The court reheard the case en banc to provide future guidance for Ninth Circuit district and magistrate judges “in the proper administration of search warrants and grand jury subpoenas for electronically stored information, so as to strike a proper balance between the government's legitimate interest in law enforcement and the people's right to privacy and property in their papers and effects, as guaranteed by the Fourth Amendment.”

The En Banc Majority's Opinion and “One Size Fits All” Prescription

Unsurprisingly for judges most comfortable with resolving matters of public policy by reference to precedent, the

ficers prior to the search . . . they may apply for specific authorization for large-scale removal of material, which should be granted by the magistrate issuing the warrant only where on-site sorting is infeasible and no other practical alternative exists.”

The en banc majority in *CDT* recognized that the technology of mass computer storage, databases, and networking had irrevocably transformed *Tamura's* “comparatively rare instance” of intermingled probable and nonprobable cause data to one that would become increasingly common, if not the norm, potentially allowing technology to eviscerate the Fourth Amendment:

At the time of *Tamura*, most individuals and enterprises kept records in their file cabinets or similar physical facilities. Today, the same kind of data is usually stored electronically, often far from the premises. . . . *Tamura* involved a few dozen boxes and was considered a broad seizure; but even inexpensive electronic storage media today can store the equivalent of millions of pages of information.

Wrongdoers and their collaborators have obvious incentives to make data difficult to find, but parties involved in lawful activities may also encrypt or compress data for entirely legitimate reasons: protection of privacy, preservation of privileged communications, warding off industrial espionage or preventing general mischief such as identity theft. Law enforcement today thus has a far more difficult, exacting and sensitive task in pursuing evidence of criminal activities than even in the relatively recent past. . . . The problem can be stated very simply: There is no way to be sure exactly what an electronic file contains without somehow examining its contents—either by opening it and looking, using specialized forensic software, keyword searching or some other such technique. But electronic files are generally found on media that also contain thousands or millions of other files among which the sought-after data may be stored or concealed. By necessity, government efforts to locate particular files will require examining a great many other files to exclude the possibility that the sought-after data are concealed there. Once a file is examined, however, the government may claim . . . that its contents are in plain view and, if incriminating, the government can keep it. Authorization to search *some* computer files therefore automatically becomes authorization to search all files in the same subdirectory, and all files in an enveloping directory, a neighboring hard drive, a nearby computer or nearby storage media. Where computers are not near each other, but are connected electronically, the original search might justify examining files in computers many miles away, on a theory that incriminating electronic data could have been shuttled and concealed there. . . . [P]eople now have personal data that are stored with that of innumerable strangers. Seizure of, for example, Google's email servers to look for a few incriminating messages could jeopardize the privacy of millions.

The *CDT* majority then issued very succinct directions to be followed by the Ninth Circuit's lower judges in the future:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases. . . .
2. Segregation and redaction must be either done by specialized personnel or an independent third party. . . . If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer per-

sonnel will not disclose to the investigators any information other than that which is the target of the warrant.

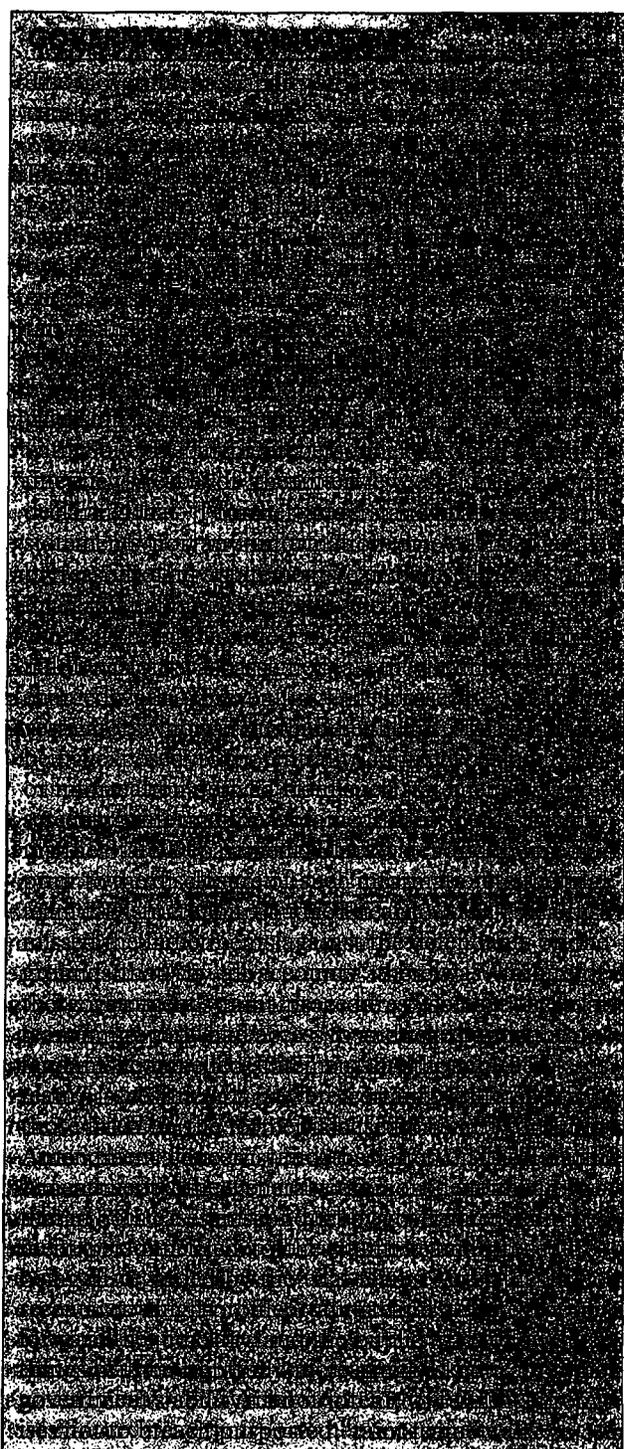
3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora. . . .
4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents. . . .
5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept. . . .

Criticisms of the En Banc Majority's Prescription

While the majority's attempts to reconcile the particularly thorny problem of balancing the government's legitimate law enforcement interests with the citizenry's Fourth Amendment interests were obviously motivated by an attempt to reach the best possible solution for the many competing interests implicated, those concurring or dissenting from the majority made several observations of where they thought the majority fell short.

One of the concurring judges offered the observation that, good intentions notwithstanding, the majority's "prophylactic approach" went beyond what was necessary to resolve the case before it, and amounted to "dicta . . . best viewed as a 'best practices' manual, rather than binding law." Another concurrence objected that the majority, by rushing to set out bright-line rules "in a rapidly developing area of law such as this one, as computer search capabilities improve exponentially by the month," was more akin to acting as a legislature rather than as a judicial body using "the common law method of reasoned decisionmaking, by which rules evolve from cases over time." One of the concurring opinions, disagreeing with the majority's prescribed rules, posited quite plausibly that where technology had created the conflict between legitimate law enforcement needs to search commingled data and the Fourth Amendment, so might technology just as quickly solve the problem: "[A] dotcom start-up company may well create software next week or next month that can accurately search through electronic storage media to report only the handful of files most likely responsive to a warrant."

Several concurrences argued that the more appropriate approach was to allow the "plain view" doctrine—which the majority held the government would be forced to waive—to be allowed to adapt to the new technological issues over a longer period of time, particularly



where the Supreme Court itself had not indicated that the doctrine could not be adapted to the issues raised by the technology so that it *must* be abandoned *ex ante*. Another concurrence questioned whether evidence like this—requiring manipulation by computer hardware

and software to become viewable at all—fell within the purview of the “plain view” doctrine at all.

Another concurrence also questioned the costs associated with the majority’s “protocol requiring the segregation of computer data by specialized personnel or an independent third party.” The concurrence pointed out that this raised significant cost issues entirely unaddressed by the majority, either because the government would now be required to employ in-house computer specialists routinely “walled-off” from investigations to be available for initial searches of commingled probable cause/nonprobable cause data, or because the government (whether prosecutors or the courts) would need to retain third-party specialists to perform that initial function.

Yet another concurrence raised an issue unaddressed by the majority while issuing its bright-line rule, namely that of “contraband” discovered by a third-party search specialist, which the law would not require to be returned to the owner even if it were not the target of the original search. As but one hypothetical stemming from the problem of all the potential data the reviewing might uncover, including some “contraband” data, the concurrence asked, “whether a ‘third-party’ computer technician . . . who comes across child pornography yet refuses to report it immediately, or returns it as part of data seized and searched, can himself be held liable for the possession of child pornography.”

Issues Facing Every Circuit in America

In summary, the Ninth Circuit judges are wrestling with serious questions that every federal circuit is, or soon will, face, and how those issues are resolved could potentially impact every American. Moreover, given that Americans’ electronic information is frequently stored in a circuit and state outside the location of their computers where they may have generated the information (for example, Google’s, Yahoo’s, and Microsoft’s public email servers used by Americans worldwide are located on the West Coast), it is particularly troubling to think that there would be different Fourth Amendment rights and procedures in the Ninth Circuit than in another. Clearly this is a national problem requiring a national solution.

The specific questions raised or implied by the majority and concurrences in *CDT* that should be considered are:

1. What is the precise technological nature of the intermingled probable cause/non-probable cause data problem? Very few judges and lawyers, smart as they are, have the technical expertise to address and resolve this problem. If technology

is the cause of the conflict, then society would be well served to get the views of individuals with the highest levels of expertise in that technology.

2. Is the intermingled data problem as severe and frequent as the government in *CDT* contended? The concurring opinions in *CDT* criticized the majority for jettisoning the plain view doctrine without taking *any* briefing on the question. Before it is accepted that the hindrance against law enforcement is as severe as the government contended in *CDT*, it would seem prudent to have additional state and federal prosecutors and agencies weigh in on their own experiences with the same issue.
3. How have other circuits addressed the intermingled data problem, if at all? The Ninth Circuit focused solely on its own case law, as was appropriate since it was deciding a Ninth Circuit case. But this is a national problem, and the review deserves a national perspective.
4. Is there a technological solution, or can one be created, to the intermingled data problem such that the Fourth Amendment concerns can be resolved technologically rather than legally? As the concurrence pointed out, it is wholly conceivable that what seems like an insurmountable problem today could be solved overnight by some enterprising computer genius.
5. If the concerns cannot be resolved technologically, then will allowing the "plain view" doctrine to be adapted over time in a common law case-by-case method adequately protect every American's Fourth Amendment interests, particularly where most Americans will never know, for example, that their e-mail accounts have been seized and reviewed by some government agent? There are few Americans, upon learning that government agents are combing through their e-mail, health, and financial records *now*, who will be satisfied that the courts will eventually settle on a standard.
6. If, as the majority suggests, initial reviews of intermingled data are to be conducted by a government agent not involved in the enforcement action, which branch of the federal government is best suited to provide such an agent in order to ensure that the Fourth Amendment protection against unreasonable intrusion into Americans' privacy is fully upheld? The possibilities are far broader than those proposed by the majority, which proposed either an isolated computer specialist within the executive branch or an inde-

pendent agent working under the supervision of the judicial branch. It may be that a permanent, independent agency under the supervision of Congress and the judiciary would be better than those two options.

7. Who will pay the costs of the independent reviewer and by what means? Given that the benefit is to all of American society, it would seem fair to spread those costs throughout society akin to the 911 user fee charged to every cell phone user. But whether that is the best answer is debatable. What is not debatable is that, of the three branches, the judiciary is the least equipped to determine how to address the funding issue and mechanisms.
8. What *will* the independent reviewer do if and when he or she searches the intermingled data, and inadvertently discovers potentially criminal evidence such as child pornography or terrorist plots? (See, e.g., *United States v. Farlow*, No. CR-09-38-B-W, 2009 WL 4728690 (D. Me. Dec. 3, 2009).) A government search of a computer unintentionally discovered evidence of child pornography. The defendant argued that the government could have used a more restrictive search method with no need to visually search the database. The government argued, and the court accepted, that a visual search was the only reliable means, and that the pornographic material discovered during the visual search was in plain view. The court considered but declined to adopt as inconsistent with First Circuit precedent the procedures outlined by the Ninth Circuit in *Comprehensive Drug Testing*.) Does society really want the reviewer to ignore such evidence? Again, the rights at stake here, and the potential impact on all of society, are such that the judiciary, on a case-by-case, circuit-by-circuit basis seems to be ill-suited to resolve this question.

Stay Tuned—There's More to Come

Indeed, the debate issuing from this case, while just beginning to rage nationally, may not even be over within the Ninth Circuit. In a procedure unusual to the Ninth Circuit, the opinion discussed in the text was the result of a "limited" en banc hearing before 11 judges. On November 4, 2009, Ninth Circuit Chief Judge Alex Kozinski ordered the parties to advise the court by November 25, 2009, whether or not the case should be reheard en banc by all 21 active judges on the Ninth Circuit. If that did occur, it would be the first time the Ninth Circuit has availed itself of that unusual procedure, even though the rule creating the procedure was adopted by the Ninth

Circuit in 1980. The United States' brief (*available at <http://volokh.com/wp/wp-content/uploads/2009/11/CDT-Full-En-Banc-Response.pdf>*) arguing in favor of such a hearing focuses on the same problems reviewed in this article and in the court's opinion. Although much of the brief focuses on the procedural issues not addressed in this article, it does have a few things to say about the government's view of how the rules adopted in the existing opinion have affected law enforcement in the Ninth Circuit. The government asserts numerous problems of the kind predicted by the concurring judges, including, but not limited to (a) "[i]n some districts, computer searches have ground to a complete halt, and, throughout the Circuit, investigations have been delayed or impeded. Magistrate judges are uniformly viewing compliance with the newly announced rules as mandatory, but they are implementing those rules in vastly different ways"; (b) "[m]any United States Attorney's Offices have been chilled from seeking any new warrants to search computers"; (c) "an FBI forensic examiner has advised that, to comply with the en banc decision's rules, he will need many months to learn a complex national secu-

ple, get to the heart of what may be the most important aspect of this case, namely, the balance that must be struck between society's interest in having the government enforce the law against dangerous defendants, and society's interest in protecting its privacy rights against unreasonable and intrusive searches. Striking that balance is an age-old project, but it is a balance that has largely remained in technological equipoise since the 1967 "wiretap" case when the Supreme Court decided *Katz v. United States*, 389 U.S. 347. The trove of evidence available in electronic format on computer servers and hard drives has finally overwhelmed the technological issues largely addressed and resolved in *Katz* and its progeny, bringing us to the current point. Even more pressing, though, is the fact that, as is apparent in *Comprehensive Drug Testing, Inc.*, the speed of change in technology is so much faster today than in 1967 that it is in society's interest to have this issue resolved as quickly as possible, or risk having seemingly settled legal standards and procedures constantly overwhelmed by subsequent changes in technology.

The other variable driving this debate is that as tech-

The trove of evidence available in electronic format has finally overwhelmed the issues addressed in Katz.

urity case before attempting to segregate responsive and non-responsive data on a seized computer"; and (d) that "the filter-team requirement is unworkable" because it is "grossly inefficient" and "will strain scarce government resources."

One other area addressed in the government's brief is its view that the "plain view" doctrine must be applied to computer data, and that it should not be compelled to waive reliance on that doctrine to obtain a search warrant for such data. In support of that view, the government offers some fairly emotionally compelling example that it asserts is "not hypothetical": "an agent examining a computer pursuant to a warrant to search for evidence of environmental crimes . . . discovered evidence that the defendant possessed large quantities of child pornography, had taken videos of his 13-year-old stepdaughter naked, and had file-sharing software on his computer that made his child pornography available to others." The government asserts that if it "had been required to waive reliance on the plain-view doctrine as a condition of obtaining the initial warrant, it might have been impossible to prosecute the defendant for that conduct."

This last assertion by the government, and its exam-

nology makes it easier and easier for criminals to conceal or destroy the evidence of their crimes, prosecutors become increasingly mistrustful of the ability of production via a subpoena to net the evidence necessary to obtain convictions. If a subpoena calls for production of millions of pages of documents, it is logistically difficult for a defendant to shred those pages without someone finding out—and even then, the physical evidence of the shredding will likely continue to exist. But if a subpoena calls for production of that same information that is stored electronically, a few seconds and a few key strokes are all that is necessary to destroy the evidence in a manner that leaves no trail. Little wonder, then, that prosecutors prefer warrants to subpoenas, particularly for electronic evidence.

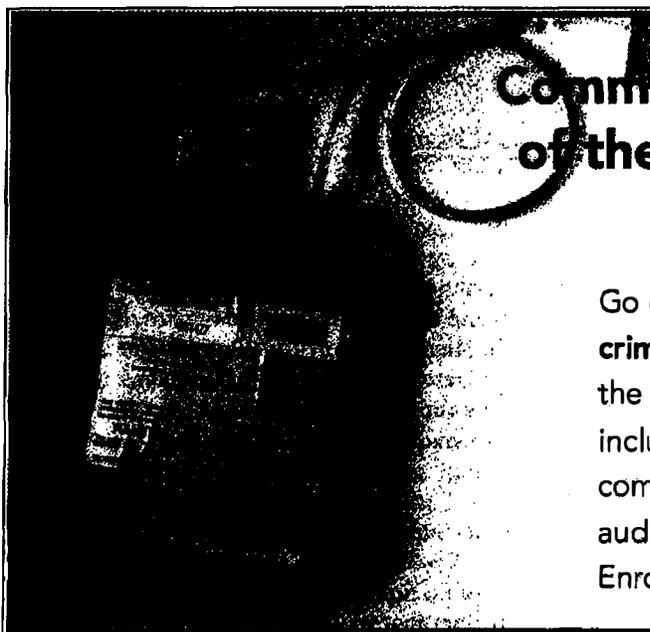
While the technological and privacy issues here are complex, and worthy of careful consideration, one issue is relatively simple: Whoever is in the best position to strike again the necessary balance here, it cannot be the executive branch. The Fourth Amendment has always contemplated that some other body will stand between society's privacy interests and the prosecutor, even if some of the prosecutors supposedly are given blinders under the name "taint

team." (See the sidebar, *Government "Taint Teams."*) The idea that the executive branch can somehow serve as both the hunter of evidence and protector of privacy related to that evidence, is nonsensical. Indeed, society's interest is in having its most zealous prosecutors charged with investigating and ferreting out dangerous criminals, so long as someone independent of them is charged with the separate duty of looking out for society's other interests. Neither of society's competing interests here are well served if prosecutors are given the impossible task of zealously doing both. While the technology issues raised in *Comprehensive Drug Testing, Inc.*, are indeed new and difficult, the concept that the executive branch cannot be asked to serve effectively in two competing capacities—protector against criminals, and protector of privacy—should be beyond dispute by this point in our history.

Conclusion

Americans' adoption of technology, and all the mass data storage and servers that go with it, has led to a situation where, on a daily basis, law enforcement will be seeking to seize and review electronic evidence not only of Americans for whom it has probable cause to believe a crime has occurred, but commingled electronic evidence relating to Americans for whom no probable cause exists. While the Ninth Circuit struggled nobly with a difficult issue, there are several aspects of its review that are troublesome. First, the stare decisis judicial process

seems particularly ill-suited for resolving this nationally important issue. From the perspective of the citizenry it is too slow to protect Americans whose rights are currently being violated, and from the perspective of law enforcement, lack of clear guidance and standards nationwide is having a detrimental effect on law enforcement's ability to obtain evidence for which it *has* satisfied the legal standards. Second, the prospect of having differing standards from magistrate to magistrate, much less circuit to circuit, where data are stored in states far removed from the data's citizen-owner—often without the owner's knowledge—means that in most cases the privacy interests of that owner will go largely unrecognized and unprotected in our adversarial process. Finally, whoever is in the best position to protect the citizens' privacy interests, and however those are best protected, it is asking too much of our law enforcement personnel to wear simultaneously the hat of aggressive enforcer and champion of privacy. In sum, the Ninth Circuit's case points to the need for development of a uniform, nationwide policy on (1) who outside of the executive branch will protect Americans' privacy interests in commingled electronically stored evidence, (2) according to what policies and procedures informed by a clear understanding of the technological issues, and (3) how the costs of doing the foregoing will be covered. In short, because of the nationwide impact of how these questions are resolved, this is an area where Congress should weigh in, and the sooner the better. ■



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Tab F



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Broader Standards In FTC Subpoena Enforcement

Law360, New York (November 22, 2010) -- In a rare court decision on the enforceability of agency subpoenas, the U.S. District Court for the District of Columbia has ruled that the Federal Trade Commission is entitled to receive documents from the Canadian subsidiary of Church & Dwight Co. ("C&D") relating to the sale and distribution of condoms and other products in Canada as part of the agency's investigation of the company's U.S. condom marketing practices. The court also held that C&D is not entitled to redact those portions of responsive documents that contain "proprietary and confidential information on non-condom products."

C&D has indicated it will appeal the ruling. If upheld, the court's decision provides significant support for the agency's authority to broadly collect documents and data that it believes could be of use in an investigation.

In Spring 2009, the FTC launched a nonpublic investigation of New Jersey-based C&D, manufacturer of Trojan brand condoms and many other products sold worldwide. According to the FTC, the investigation seeks to determine "whether C&D has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States ... through potentially exclusionary practices including ... 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 C&D, in violation of Section 5 of the Federal Trade Commission Act."

In aid of its investigation, the FTC issued a subpoena and civil investigative demand ("CID") seeking documents and data from C&D concerning its incentive programs for retailers of Trojan condoms. The subpoena and CID covered both the U.S. and Canada.

C&D requested that the commission quash or limit the staff's subpoena and CID, but the commissioners refused. When C&D failed to comply, in February 2010 the FTC filed a petition with the federal district court seeking to enforce it.

C&D raised three main objections. First, the company claimed that documents from its Canadian subsidiary were not relevant to the FTC's inquiry regarding possible monopolization in the United States. Second, it claimed that producing such documents would be unduly burdensome. Third, it argued that it should be able to redact from any responsive documents proprietary and confidential information on non-condom products, because such information also would be "entirely irrelevant to the FTC's investigation involving condoms." The U.S. magistrate judge rejected all three arguments and ordered C&D to fully comply with the CID and subpoena.

With respect to relevancy of the Canadian documents, the court ruled that an agency's request for information need only be "reasonably relevant" to its investigation, and that the agency's own speculation as to possible relevance is sufficient at the investigatory stage so long as it is not "obviously wrong," citing *FTC v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977).

The court further explained that the standard of relevance in agency investigations is far lower than that for evidence at trial, relying upon the Supreme Court's decision in *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950), to distinguish between "the judicial function and the function the Commission is attempting to perform," in which "the only power that is involved ... is the power to get information from those who best can give it and who are most interested in not doing so."

The court accepted the FTC's explanation that information from C&D's Canadian subsidiary would "assist in determining the factors that affect C&D's market share in these adjacent markets," finding it "sufficient to demonstrate that the Canadian documents are 'reasonably relevant,' and not 'obviously wrong.'"

On the issue of burden, the court held that the party claiming burden must show that compliance "threatens to unduly disrupt or seriously hinder the normal operations of a business." Because C&D had failed to produce evidence to this effect, its burden argument was rejected.

Finally, the court rejected C&D's argument that information on non-condom products contained in responsive documents was irrelevant to the FTC's investigation (and thus could be redacted from C&D's documents). "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."

If it stands, the decision will be important in future FTC investigations. As almost anyone who has received one can attest, FTC subpoenas and CIDs can be very broad in scope. Under the "not obviously wrong" standard employed by the court in this matter, it will be extremely difficult to object on relevancy grounds. Under this decision the FTC's future position will be that, so long as the agency plausibly can speculate that the information sought might prove useful to its investigation, it is allowed to reach far and wide.

In practice, most subpoenas and CIDs are narrowed by negotiation between the agency and the recipient. Actual enforcement actions are rare. Yet the district court opinion in this matter would provide the FTC with additional leverage in such negotiations, which could result in additional burden to subpoena recipients.

--By Michael H. Knight (pictured) and Robert C. Jones, Jones Day

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The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

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