



Office of the Secretary

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

June 27, 2011

VIA E-MAIL AND COURIER DELIVERY

Mark W. Nelson, Esq.
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006

RE: *Request to the Full Federal Trade Commission to Review the Ruling Denying the Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011 Directed to W. L. Gore & Associates, Inc., File No. 101-0207*

Dear Mr. Nelson:

This letter advises you of the Commission's disposition of W.L. Gore & Associates, Inc.'s ("Gore") request that the full Commission review the denial of Gore's petition to limit or quash a subpoena *duces tecum* directed to Gore. The Commission issued the subpoena on March 10, 2011; Gore petitioned to limit or quash it on April 19, 2011; and Commissioner Brill, acting as the Commission's delegate, *see* 16 C.F.R. § 2.7(d)(2), directed the issuance of a letter ruling denying the petition to limit or quash on May 23, 2011. For the reasons set forth below and more fully in Commissioner Brill's letter ruling, the Commission affirms that ruling.

The Commission issued the subpoena in connection with its investigation of whether Gore has engaged in unfair methods of competition "by contracts, exclusionary practices, or other conduct relating to waterproof or waterproof and breathable membranes or technologies and related products."¹ In its petition to limit or quash, Gore requested relief from the subpoena on the grounds that the subpoena is overly broad and that complying with the subpoena would be unduly burdensome. Gore argued that complying with the subpoena would require searching the computer files and offices of 1,500 employees or more, encompassing 1.3 terabytes of data or more, and would require potentially hundreds of thousands of hours of personnel time and cost many millions of dollars. Gore also argued that the subpoena's call for documents dating back to January 1, 2001 is unduly burdensome and overly broad because it requires Gore to

¹ Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, File No. 101-0207 (Feb. 16, 2011).

investigate archived storage and dated electronic records, including files of long-departed employees. Finally, Gore argued that the subpoena is unduly burdensome because it seeks numerous privileged documents and requires a log to be submitted on or before the return date of the subpoena as to any documents withheld. Gore argued that the cost of preparing the privilege log would be significant, and many of the documents sought would be tangential to the investigation.

In its request for full Commission review, Gore essentially repeats these same arguments and does not supply any additional facts or legal arguments in support of its petition to limit or quash. Though Commissioner Brill's May 23, 2011 ruling offered guidance to Gore on the information necessary to establish a claim of burden, Gore has not supplemented its claim by providing, for instance, information regarding the use of advanced analytical technologies to aid search, review and production of electronic information, or any discussion as to why the subpoena presents an undue burden from the standpoint of Gore's normal operating resources and costs.

Instead of supporting its claim of burden, Gore describes in detail ongoing negotiations with the Commission staff. The Commission welcomes such discussions between subpoena recipients and the Commission staff because they enhance staff's ability to obtain the information it needs to carry out the Commission's law enforcement mission efficiently, while reducing the burden on recipients. In fact, the Commission's Rules of Practice anticipate and require such discussions between staff and subpoena recipients. *See, e.g.*, 16 C.F.R. § 2.7(d)(2). The fact that such discussions are ongoing does not provide a basis for quashing or limiting the subpoena.² To the contrary, such negotiations undercut Gore's arguments regarding the alleged undue burden of the subpoena. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882-83 (D.C. Cir.) (en banc) (noting that the alleged burdensomeness of the subpoena was "substantially mitigated" by extensive negotiations between FTC staff and Mobil Oil), *cert. denied*, 431 U.S. 974 (1977).

The Commission has reviewed the record created by Gore in support of its petition to limit or quash and its request for full Commission review. For the reasons explained in Commissioner Brill's May 23, 2011 letter ruling and in this ruling, Gore has failed to meet the proper standard demonstrating unreasonable breadth of a Commission subpoena and undue burden in complying with a Commission subpoena. Accordingly, Gore has not carried its burden of proof establishing its entitlement to relief from the subpoena. *See SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973) (holding that the petitioner has "the burden of showing that an agency subpoena is unreasonable . . . and, where, as here, the agency inquiry is authorized by law and the material sought are relevant to the inquiry, that burden is not easily met"), *cert. denied*, 415 U.S. 915 (1974). Because Gore did not request a stay pending

² Gore claims that Commission staff have departed from FTC procedures in their negotiations over Gore's compliance with the subpoena. But Gore has not shown that there are inconsistencies between Commission policy or practice and the ongoing negotiations with Gore regarding its compliance with the outstanding subpoena.

full Commission review as permitted by Commission Rule 2.7(f), the now-expired June 7, 2011 subpoena return date set by the Commission's May 23, 2011 letter ruling remains in effect.

For the reasons set forth in the Commission's letter ruling of March 23, 2011 denying Gore's petition to limit or quash, **IT IS ORDERED THAT** such ruling should be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

Donald S. Clark
Secretary