ORAL ARGUMENT SCHEDULED FOR OCTOBER 11, 2011

Nos. 10-5383 and 11-5008
(consolidated)

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

FEDERAL TRADE COMMISSION,
Appellee,

v.

CHURCH & DWIGHT CO., INC.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the "Certificate as to Parties, Rulings, and Related Cases" included in Appellant Church & Dwight Co., Inc.'s brief filed on June 1, 2011 (Doc. 1310785).

B. Rulings Under Review

References to the rulings at issue are listed in the "Certificate as to Parties, Rulings, and Related Cases" included in Appellant Church & Dwight Co., Inc.'s brief filed on June 1, 2011 (Doc. 1310785).

C. Related Cases

There are no related cases, as stated in the "Certificate as to Parties, Rulings, and Related Cases" included in Appellant Church & Dwight Co., Inc.'s brief filed on June 1, 2011 (Doc. 1310785)

Respectfully submitted,

/s/ Mark S. Hegedus

MARK S. HEGEDUS

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GLOSSARY OF TERMS

C&D	Church & Dwight Co., Inc.
C&D Br.	Church & Dwight Co., Inc. Opening Brief filed June 1, 2011
CID	Civil Investigative Demand
Commission	Federal Trade Commission
December 23 Order	December 23, 2010, Order, *FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81 (D.D.C. 2010)
FTC	Federal Trade Commission
FTC Act	Federal Trade Commission Act
JA	Joint Appendix
October 29 Order	October 29, 2010, Order, *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3 (D.D.C. 2010)
Resolution	Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (FTC File No. 091-0037) (Jun. 10, 2009).
Subpoena	FTC Subpoena *Duces Tecum* issued to Church & Dwight Co., Inc. (Jun. 29, 2009)

JURISDICTIONAL STATEMENT

The Federal Trade Commission ("FTC" or "Commission") initiated this action in the United States District Court for the District of Columbia to enforce a subpoena *duces tecum* ("subpoena") and a civil investigation demand ("CID") that issued in the course of a law enforcement investigation. The district court's jurisdiction came from Sections 9 and 20 of the FTC Act. 15 U.S.C. §§ 49, 57b-1(e).

On October 29, 2010, the district court issued an order enforcing the subpoena and CID ("October 29 Order").[1] That order was final, *see FTC v. Texaco, Inc.*, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977) (*en banc*), and this Court has jurisdiction to review it under 28 U.S.C. § 1291. Appellant C&D timely filed its notice of appeal of that order on November 2, 2010, pursuant to Fed. R. App. P. 4(a)(1)(B).[2]

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[1] Pursuant to 28 U.S.C. § 636(c), the parties consented to the district court's referral of the case to Magistrate Judge John M. Facciola for all purposes. JA–189-95, 407. The October 29 Order is reported at *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3 (D.D.C. 2010).

[2] Although C&D also filed a notice of appeal of the district court's December 23, 2010, order denying C&D's request for a stay of the October 29 Order and granting the FTC's motion for an order requiring C&D's compliance with the same, JA–440-41, C&D's opening brief raised no challenges to the later order, which is reported at *FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81 (D.D.C. 2010).

ISSUES PRESENTED

1. Whether the district court properly concluded that non-condom product information was reasonably relevant to the FTC's investigation of potential exclusionary conduct related to the marketing of condoms and non-condom products.

2. Whether the district court applied the correct legal standard in concluding that non-condom product information was reasonably relevant to the FTC's investigation and therefore could not be redacted from responsive documents.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

The October 29 Order enforced the subpoena and CID issued by the FTC on June 29, 2009, in the course of a law enforcement investigation into possible violations of Section 5 of the FTC Act, 15 U.S.C. § 45. Specifically, the investigation seeks to determine whether C&D may be unlawfully monopolizing the market for condoms through exclusionary conduct related, but not limited, to its marketing of condoms and other products. As the Commission's Resolution made clear, the investigation concerns the possibility that C&D is engaging in

exclusionary conduct that involves, among other things, condoms and non-condom products. In addition to unauthorized delays in responding to the FTC's process, C&D insisted on redacting non-condom product information in producing responsive materials to the FTC, contending that such information was not reasonably relevant to the FTC's investigation.

Pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1(e), the FTC petitioned the district court for an order to enforce the subpoena and CID. On October 29, 2010, the district court granted the FTC's petition. C&D filed an appeal of the October 29 Order, while at the same time refusing to comply with it. The FTC sought and obtained an order from the district court setting a deadline of January 11, 2011, for C&D's compliance. C&D then sought a stay of the October 29 Order from this Court, which denied the stay on January 27, 2011. Thereafter, C&D produced the disputed documents without the claimed redactions, but it continues to pursue this appeal.

B. Facts and Proceedings Below

Background – Condom Market and the Commission's Investigation

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, a publicly held company that develops, manufactures and markets a broad range of household, personal care, and specialty products under well-recognized brand names, including Trojan brand condoms, controls at least 70% of the latex condom market in the U.S. JA–23. Because there is minimal television and print advertising for condoms, consumers principally learn about the available brands and styles of condoms at the retail store. Accordingly, a significant animating factor for condom sales is that the product be placed in an advantageous position on retail shelves. JA–23.

C&D's marketing program takes account of consumers' buying behavior. Retailers receive a rebate from C&D on their net purchases if they agree to dedicate a certain percentage of their available shelf space to Trojan brand condoms. For example, a retailer dedicating 70% of shelf space to Trojan brand condoms receives a 7.5% rebate. Receipt of the rebate is not contingent on the volume of Trojan brand condoms purchased by the retailer or sold by the retailer to consumers. JA–23.

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) ("the Resolution"). JA–24, 30. 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." JA–30.

On June 29, 2009, the Commission issued the subpoena and CID requiring C&D to produce materials relating to the investigation. JA–24, 32-62. The subpoena sought, *inter alia*, documents related to the marketing practices that C&D has employed over time. Documents to be produced included 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). JA–24, 34-37. The

CID sought, *inter alia*, detailed data relating to the sale of condoms, including pricing and discounts at wholesale and retail, as well as to quantities sold through various channels 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). JA–24, 49-57.

The subpoena and CID also included instructions governing the timing, format, and manner of submission of responsive documents. Notably, Instruction R of the subpoena provided 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." JA–41. The subpoena and CID had response deadlines of July 30, 2009. JA–32, 47.

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

Throughout the investigation, C&D has sought to delay and frustrate the Commission's legitimate law enforcement activities, ignoring the Commission's multiple deadlines for the vast majority of the documents that C&D was required

to produce, even as to materials that were not in dispute. JA–25, 26, 27. It neither sought a compliance extension nor complied in full with the subpoena and CID by the July 30, 2009, deadlines. JA–25. Subsequently, the Commission extended C&D's compliance deadlines to November 20, 2009, JA–64-65, but C&D again failed to comply in a timely or complete manner. JA–26.

In addition to its general failure to provide complete and timely responses to the subpoena and CID, C&D refused to comply with subpoena Instruction R, which required C&D to produce all documents, except those as to which C&D asserted a privilege, in unredacted form. JA–26, 41. On December 4, 2009, C&D filed an untimely petition to limit or quash the subpoena and CID, claiming that it should be permitted to redact non-privileged information relating to products other than condoms from the responsive documents. JA–26-27, 88-132.[3] Despite the untimely nature of C&D's petition, the Commission addressed the merits of C&D's claims and denied the petition on December 23, 2009. JA–27, 134-40.[4]

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[3] Contrary to C&D's representation, C&D Br. 6, the FTC never agreed to address the redaction issue on a document-by-document basis. JA–83, 131-32.

[4] C&D also refused to abide by the subpoena's and CID's defining "Relevant Area" to include Canada, and on November 12, 2009, it filed an untimely petition to limit or quash the subpoena and CID based on the inclusion of Canada in the Relevant Area definition. JA–26, 67-86. The Commission also denied that petition on December 23, 2009. JA–137-38.

Specifically, the Commission explained that the resolution "on its face authorized an investigation regarding the marketing of all of C&D's products," not just condoms. JA–139. The Commission noted that the "probative value of any given part of a document can be and is affected by its context." JA–139. Indeed, the Commission observed that context can be as important as text. JA–139. Another reason cited by the Commission for requiring unredacted documents is the need for witnesses to be able to identify and authenticate documents; "witnesses may need to see the entire document to be able to tell whether they are looking at a final document as opposed to earlier drafts or proposals." JA–139. Finally, the Commission explained that a comparative analysis of C&D's marketing strategies can have significant probative value, for instance, a comparison of marketing practices for products where C&D may have market power to marketing practices where it does not. JA–139. Based on these considerations, the Commission rejected C&D's claim that it must be allowed to redact information relating to C&D's non-condom products. JA–139.[5]

On December 28, 2009, C&D sought rehearing of the Commission's order denying C&D's petition, but it did not present any new evidence or identify any

[5] Pursuant to 16 C.F.R. § 2.7(d)(4), the Commission acted through authority delegated to Commissioner Pamela Jones Harbour. JA–135.

mistakes of fact or law in the initial ruling. JA–27, 142. In January 2010, C&D missed yet another extended due date for it to produce the responsive materials. JA–27, JA–140. The Commission denied C&D's rehearing request on February 16, 2010. JA–27, 145-46.

Enforcement Action

On February 26, 2010, the FTC filed a petition asking the district court to order C&D to comply with the subpoena and to produce responsive materials without the redaction of non-condom product information. JA–11-162. On October 29, 2010, the district court granted the FTC's petition, stating that, "[i]n light of the record before me, the FTC's petition will be granted." JA–303. Applying the standards in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *FTC v. Texaco*, 555 F.2d 862, and considering the Commission's Resolution and the record before the court, the district court concluded that non-condom product information was reasonably relevant to the investigation. JA–303, 311-12.[6] Explaining that relevance is judged by reference to the Commission's resolution, and not to possible charges in a future complaint, the court concluded

[6] The district court also directed C&D to produce responsive documents located in Canada, despite C&D's objection that such documents are not relevant to the Commission's investigation. C&D has since produced those documents and is not appealing that part of the October 29 Order.

that the Resolution specifically encompassed non-condom products sold or distributed by C&D. JA–312-13. It thus ordered C&D to produce responsive materials without redacting non-condom product information. JA–301, 314.

On November 2, 2010, C&D filed a notice of appeal of the October 29 Order, JA–318, but did not comply with the district court's order requiring the production of unredacted documents. JA–344. On November 22, 2010, the FTC filed an emergency motion asking the district court to require C&D to provide all the responsive materials, or show cause why it should not be held in contempt. JA–332-34. On the same day, C&D asked the district court for a stay pending appeal. JA–321.

On December 23, 2010, the district court granted the FTC's motion for a compliance date, stating: "I will require C&D's full and immediate compliance with my order of October 29, 2010, or, if it does not comply, I will require C&D to show cause why it should not be held in civil contempt." JA–438. The district court also denied C&D's motion for a stay of the October 29 Order. JA–438. The district court, however, temporarily stayed the December 23 Order to provide C&D the opportunity to seek a stay from this Court. JA–438, JA–444-45. On January 27, 2011, this Court denied C&D's stay request. Shortly thereafter, but more than 18 months after it had received the subpoena and CID, C&D began producing the

disputed documents without the redactions.

SUMMARY OF ARGUMENT

As the court below concluded, non-condom product information is reasonably relevant to the FTC's investigation of whether C&D has monopolized, or maintained a monopoly of, the condom market. Among other things, the information is relevant to determine whether C&D is engaging in exclusionary conduct, such as bundling or tying condom and non-condom products, to compare C&D's condom and non-condom sales and profits to assess C&D's incentives to engage in exclusionary conduct, and to provide context to documents used in the investigation. Applying the broad relevance standard required by this Court, giving the FTC's assessment of relevance the deference due, and considering the record before it, the district court correctly concluded that such information was reasonably relevant to the FTC's investigation. C&D has not met the difficult standard of demonstrating that the non-condom product information is irrelevant.

In reaching its conclusion, the district court correctly applied this Court's decision in *FTC v. Texaco, Inc.*, 555 F.2d 862, and committed no legal error. The Court should reject C&D's novel three-part framework for assessing relevancy, because it misstates the long-standing requirement 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." *See id.* at 874. C&D's re-interpretation and misapplication of the *Texaco* standard conflict with this Court's and the Supreme Court's decisions prescribing a limited judicial role in enforcing administrative agency process. This limited judicial role also supports the district court's rejection of C&D's position that it be permitted to redact information that C&D claims is irrelevant.

ARGUMENT

A court must enforce an administrative 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). C&D does not challenge the FTC's authority to undertake its investigation into C&D's marketing practices and their potential anticompetitive effects. Nor does C&D claim that the subpoena and CID are too indefinite. C&D also does not claim burden, nor could it given that it will produce (indeed, has produced) the documents in dispute in any event.[7] C&D, rather, limits its challenge to the reasonable relevance of non-condom product information contained in otherwise responsive documents that it must produce to the FTC. As

[7] In fact, C&D increases its burden by seeking to redact from those documents non-condom product information. *See* JA–432-33.

demonstrated below, C&D's arguments fail because such information is reasonably relevant to the Commission's investigation.

I. THE DISTRICT COURT'S CONCLUSION THAT NON-CONDOM PRODUCT INFORMATION IS REASONABLY RELEVANT IS NOT CLEARLY ERRONEOUS

A. This Court Reviews the District Court's Decision for Clear Error and Abuse of Discretion

The Court applies a deferential standard of review to a district court decision enforcing an administrative agency subpoena or CID, and reviews the district court's decision for "arbitrariness or abuse of discretion," which will be found only if the decision "rests on a misapprehension of the relevant legal standard or is unsupported by the record." *FTC v. GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002) (internal quotations and citations omitted). "If the district court finds that the information sought by the agency is relevant, [this Court] will affirm unless that determination is 'clearly erroneous.'" *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (internal quotations and citations omitted). As shown in this Part, the district court's decision is fully supported by the record, and its conclusion that non-condom product information is reasonably relevant to the FTC's investigation is not clearly erroneous. Moreover, contrary to C&D's contention, C&D Br. 12, the district court applied the correct legal

standard. *See* Part II, *infra*.

B. Non-Condom Product Information is Reasonably Relevant to the Commission's Investigation

In petitions for enforcement of FTC subpoenas and CIDs, "[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. It suffices that the information be "reasonably relevant" to the Commission's investigation, *Morton Salt*, 338 U.S. at 652; *Texaco*, 555 F.2d at 874 n.23, 876, the boundary of which may be defined broadly. *See FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980); *Texaco*, 555 F.2d at 874 & n. 26. 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 in original) (quoting *Endicott Johnson v. Perkins*, 317 U.S. 501, 509 (1943)); *see also Invention Submission*, 965 F.2d at 1089; *Carter*, 636 F.2d at 788; *Texaco*, 555 F.2d at 871-73.

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.*, 1991 U.S. Dist. LEXIS 5523, at *5 (D.D.C. Feb. 13, 1991) (quoting *Morton Salt*, 338 U.S. at 642), *aff'd*, 965 F.2d 1086. In elucidating the need for a broad relevance standard, this Court has explained "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.

In an investigation such as the one here, the Commission seeks to learn if the law is being violated and *whether* to file a complaint; it does not necessarily seek information to prove any specific charges. "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*, 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. "[T]he agency's own appraisal of relevancy must be accepted so long as it is not 'obviously wrong.'" *Invention Submission*, 965 F.2d at 1089 (quoting *Carter*, 636 F.2d at 788 (quoting *Texaco*, 555 F.2d at 877 n.32)).

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 including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended." JA–30. The Commission ruled that the "[R]esolution on its face authorizes an investigation regarding the marketing of all of C&D's products." JA–139.[8] Non-condom product information is reasonably relevant to the investigation in at least three respects – identifying potential exclusionary practices, comparing C&D's marketing for products where it may or may not have market power, and providing context to responsive documents.

Among other things, the FTC is examining whether C&D may be engaging in exclusionary practices involving non-condom products as a means to monopolize sales of condoms. The FTC seeks to understand C&D's sales and marketing practices involving condoms *and* other products. Such potentially

[8] C&D suggests that the FTC staff could seek a new resolution from the Commission "if it believes that other products are specifically covered by an investigation into 'sale or distribution of condoms in the United States.'" C&D Br. 7, 39 n.8. Such a step is unnecessary, both because the Resolution is clear on its face and because the Commission has already ruled that it encompasses marketing of non-condom products.

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).[9] 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. JA–291, 294.

Non-condom product information may also be useful to compare, for example, how C&D markets its own products based upon the competition those products face. For example, C&D board presentations that address sales and profit margins associated with condom and non-condom products may provide probative information regarding C&D's incentives to maintain or enhance a dominant position in the condom market. The Commission may need to compare C&D's conduct in the condom market, where C&D may have neutralized significant competition, with its conduct in non-condom product markets, where competition is more robust. JA–139. More generally, C&D's decision to analyze or present information about condoms alongside non-condom product information may provide insight regarding competitive conditions in both kinds of markets.

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[9] These potential harm theories demonstrate the reasonable relevance of non-condom product information to the FTC's investigation, but the examples are not exhaustive of the potential wrongdoing and harm the FTC may investigate. As this Court has said, it is neither necessary nor appropriate for the FTC to articulate a particular theory of violation at the pre-complaint stage. *Texaco*, 555 F.2d at 877.

JA–293. This Court has specifically recognized the value of comparative information to an investigation. *Texaco*, 555 F.2d at 875, 876-77.

The context in which responsive materials appear is also important. "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), *aff'd*, 636 F.2d 781. Indeed, as the Commission concluded, "context can sometimes be as important as text," for example, for purposes of authentication where "witnesses may need to see the entire document to be able to tell whether they are looking at a final document as opposed to earlier drafts or proposals." JA–139; *see also* JA–160.[10]

In sum, the FTC demonstrated to the district court the reasonable relevance of non-condom product information to its investigation. The court agreed and concluded that, "in light of the record before" it (JA–303) and "[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." JA–311. The court correctly recognized that "requested materials, including those that do not

[10] Indeed, the redaction of even "irrelevant" information from otherwise responsive documents can affect the evidentiary value of the redacted documents. *See Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. 534, 545-46 (D. Md. 2007).

obviously concern male condoms, need only be *reasonably relevant* to the investigation, not to any potential outcome." JA–311-12 (citing *Invention Submission Corp.*, 965 F.2d at 1090, emphasis added). The court's decision was fully supported by the record and case law, and is not clearly erroneous.

C. C&D Failed to Show that Non-Condom Information is Not Reasonably Relevant

Under the Court's precedents, C&D faced a "difficult standard." *Invention Submission*, 965 F.2d at 1090. "In these sorts of cases, in light of the broad deference [this Court] afford[s] the investigating agency, it is essentially [C&D's] burden to show that the information is irrelevant." *Id.*; *see also In re: Sealed Case*, 42 F.3d 1412, 1419 (D.C. Cir. 1994). As the district court recognized, "C&D failed to demonstrate anything of the sort." JA–433-34.

C&D maintains that the FTC's Resolution "says nothing about Church & Dwight's sales practices with respect to toothpaste, cat litter, baking soda, laundry detergents, cleaning products, and bulk chemicals, among a vast number of other products, that bear no conceptual relationship to condoms." C&D Br. 37. This argument ignores the language of the Resolution, the Commission's explanation of its scope, and the deference due that explanation.

The Resolution's language is expansive, authorizing investigation into

"*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 Co., Inc." JA–30 (emphasis added). C&D tries to wish away this language by omitting the phrase "potentially exclusionary practices including, but not limited to" when it describes the Resolution in its brief. C&D Br. 11, 21-22, 36-37, 37-38.[11] That omission, however, does not prove that non-condom product information is irrelevant. Nor can C&D succeed by reading into the phrase "other products" the term "condom." C&D Br. 37-38. In this respect, C&D commits the same error made by gas producers in *Texaco* that sought to read the word "proved" into the phrase "natural gas reserves." 555 F.2d at 874. This Court, sitting *en banc*, rejected that reading, finding "no merit to the producers' contention that the FTC is only investigating possible underreporting of proved reserves to the AGA." *Id.* Here, too, the Court should reject C&D's attempt to modify the phrase "other products."

Furthermore, the Commission itself ruled that the "[R]esolution on its face authorizes an investigation regarding the marketing of all of C&D's products."

[11] The only time C&D accurately quotes the Resolution is when it produces the text in full in C&D's Statement of Facts. C&D Br. 4. All the other times C&D quotes the Resolution, it replaces the exclusionary practices language with ellipses.

JA–139. As this Court has said repeatedly, "the agency's own appraisal of relevancy must be accepted so long as it is not 'obviously wrong.'" *Invention Submission*, 965 F.2d at 1089 (quoting *Carter*, 636 F.2d at 788 (quoting *Texaco*, 555 F.2d at 877 n.32)). C&D presents no reason why it is "obviously wrong" that the Resolution's reference to "other products" encompasses non-condom products sold by C&D.

C&D incorrectly asserts that non-condom products are not reasonably relevant because the "FTC Staff has never explained why information about any specific non-condom product has any bearing on the methods Church & Dwight uses to distribute Trojan brand condoms and related condom brand products." C&D Br. 38. This argument completely ignores the reasons articulated by the Commission and explained above: the propriety of investigating potential exclusionary practices involving both condom and non-condom products,[12] the usefulness of comparative analysis of marketing practices, and the need for

[12] The dissimilarity of the products that C&D emphasizes by no means forecloses the possibility of exclusionary practices involving multiple products. Under some circumstances, a multi-product manufacturer can deprive rivals of shelf space by the terms on which it will sell bundles of products to *retailers*. Thus, even if the products are as disparate as condoms and cat litter, such that *consumers* would view the products as unrelated, a dominant firm can insist on terms that make them highly related from the point of view of distributors or retailers.

context. *See* JA–139, 160, 291-94; Part I.B, *supra*. The district court recognized the validity of the Commission's explanation of the relevance of non-condom information in responsive documents, relying on that explanation in reaching its relevancy conclusion. JA–303, 311. Given this record, the reasons underlying the district court's relevancy determination are "quite apparent," *see Pardo-Kroneman v. Donovan*, 601 F.3d 599, 612 (D.C. Cir. 2010), and there is no merit to C&D's contention that the court's articulation of those reasons was somehow inadequate. C&D Br. 36, 39.[13]

II. THE DISTRICT COURT COMMITTED NO LEGAL ERROR

A. Texaco Does Not Prescribe C&D's New, Three-Part Analytical Framework

Although C&D does not dispute that this Court's decision in *Texaco* governs the relevancy determination, C&D attributes to that case a novel "three-part analytical framework" and asserts that the district court erred by not applying it. *See* C&D Br. 15. C&D also contends that this "Court has regularly followed

[13] C&D also seems to harbor an expectation that the district court's analysis should have been as detailed as this Court's opinion in *Texaco*. *See, e.g.*, C&D Br. 32-34. The thoroughness of the Court's decision in *Texaco* is not surprising, however, because the *en banc* Court was reversing an earlier decision of a panel of the Court. In addition, as the district court below observed, the present case is not "complex litigation." JA–314. Given the record and the clear relevance of the non-condom product information to the FTC's investigation, there was no need for the district court to write a lengthy decision.

Texaco's three-part analytical framework in enforcement actions during the decades since that decision was issued." C&D Br. 20. Yet, none of the cases cited by C&D, nor any that the FTC can identify, relies on such a framework. This purported framework is a contrivance and provides no ground for disturbing the district court's decision.

C&D maintains that its three-part analytical framework requires a district court to (1) "interpret the permissible scope of investigation under the Resolution at issue," (2) "describe[] the precise information sought by the FTC," and (3) "make a finding regarding the reasonable relevance of that information based on the scope of the investigation as defined in the Resolution." C&D Br. 21. In reality, C&D's new framework misstates this Court's *Texaco* standard, which provides that "[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. If applied, C&D's framework would inappropriately require courts to oversee and second-guess agency investigations, contrary to the decisions of this Court and the Supreme Court.

B. The Court Below Correctly Declined to "Interpret" the Unambiguous Resolution

Applying its contrived three-part framework, C&D first maintains that "the Magistrate Judge failed to interpret the Resolution to define the scope of the FTC investigation." C&D Br. 21. But there was nothing to interpret, because the Resolution clearly and unambiguously defines the investigation. JA–303-04 (quoting JA–30). The district court specifically stated that the Resolution "defines the nature and scope of the investigation." JA–303. According to the Commission, the "[R]esolution on its face authorizes an investigation regarding the marketing of all of C&D's products." JA–139. On this record, there was no need for the district court to say anything further "about the language of the Resolution at issue, the Commission's intent in issuing it, or the scope of the products involved in the investigation." *See* C&D Br. 22.

Despite the Resolution's clarity, C&D attempts to create ambiguity by taking language from the district court's decision out of context. C&D claims that the district court characterized the "intent" of the Resolution as "not so clear." C&D Br. 22, 23. In fact, the district court concluded that *C&D's reading* of the "other product" language was "not so clear." The court did not conclude that the Resolution itself was ambiguous.

The court stated: "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.'" JA–311 (quoting JA–30). It then noted that "C&D alleges that 'other products' is '*clearly intended*' only to address other non-Trojan brand condom products made by C&D." JA–311 (emphasis added). The court, however, rejected C&D's interpretation, stating: "That intent, however, is not so clear." JA–311. The court was not referring to the Resolution itself, but rather was disagreeing with C&D's view that "other products" was "clearly intended" to refer only to other Trojan-brand condoms.

Because the district court never concluded that the Resolution was ambiguous, C&D is wrong to claim that its reading of "other products" should prevail because "ambiguity is typically resolved against the drafter." C&D Br. 23. Indeed, the law here is to the contrary. Even if the lower court had found any ambiguity in the Resolution, this Court requires that it be resolved in favor of the Commission's reading: "We have said that the agency's own appraisal of relevancy must be accepted so long as it is not 'obviously wrong.'" *Invention Submission*, 965 F.2d at 1089 (quoting *Carter*, 636 F.2d at 788 (quoting *Texaco*,

555 F.2d at 877 n.32)).

C. The District Court Identified the Material Sought by the FTC and Properly Declined to Assess It for Possible Redaction

1. The District Court Had No Obligation to Review the Precise Non-Condom Product Information in Each Document

Ignoring much of what the lower court said, C&D next claims that the district court never identified the materials sought by the FTC. C&D Br. 24. In fact, multiple times in its decision, the district court identified the requested materials as information regarding non-condom products contained in otherwise responsive documents. JA–304, 310, 311, 312. Indeed, C&D admits that "the FTC seeks all non-condom product information located in the same document as condom product information." C&D Br. 25.

As part of its claim that the district court failed to identify the material sought by the FTC, C&D reproduces what it represents is an example of a responsive document with C&D's proposed redactions of non-condom information. C&D Br. 28-30. C&D seems to suggest that the district court should have conducted a document-by-document review to identify the "precise information being sought by the FTC." C&D Br. 21; *see also* C&D Br. 25 ("Church & Dwight provided the Magistrate Judge with samples of the redacted documents for review, but there is no indication that the Magistrate Judge ever

reviewed them, much less offered an explanation of why the redactions were inadequate to provide the information sought by the FTC."); JA–313.

C&D cites no authority for the proposition that a district court must review responsive documents to identify the "precise information" that is allegedly not reasonably relevant to the investigation. Indeed, C&D's proposal would draw the district court deeply into the agency's investigation, a result that is at odds with the courts' limited role in proceedings to enforce administrative process. *Texaco*, 555 F.2d at 871-72 (citing *Endicott*, 317 U.S. 501; *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946); *Morton Salt*, 338 U.S. 632). Accordingly, the district court had no obligation to examine any document proffered by C&D. Rather, the district court's statements that the FTC sought non-condom product information in otherwise responsive documents sufficed to identify the material sought by the FTC.

2. The District Court Had No Obligation to Assess Non-Condom Information for Potential Redaction

C&D expands its attack on the district court's correct decision not to review the details of individual responsive documents by suggesting that the court should have explained "why the redactions [of non-condom information] were inadequate to provide information sought by the FTC." C&D Br. 25. Because C&D cannot

show why such redactions would have been proper in the first place, the Court should reject C&D's claim that the district court erred by not examining them.

The genesis of C&D's redaction position is the practice of at least some district courts of permitting parties to produce documents in discovery with redactions of irrelevant information. *See* C&D Br. 26 n.5. The court below, like the Supreme Court and this Court, *see Morton Salt*, 338 U.S. at 642-43; *Texaco*, 555 F.2d at 872, recognized that FTC investigations are different from post-complaint, federal court proceedings. JA–312. In the latter, the litigation is governed by the complaint, which also helps to set the parameters for permissible discovery. In a pre-complaint agency investigation, however, relevancy parameters are rightly broad and flexible because the agency must be free to pursue lines of inquiry wherever they may lead. *See Morton Salt*, 338 U.S. at 642 (agencies "exercise powers of original inquiry").

The district court recognized that C&D's redaction proposal "places the court in an inappropriate position at this stage of the investigation." JA–313. "At the pre-complaint stage, the court is not free to speculate as to possible charges in a future complaint, and then to determine relevancy." JA–312 (citing *Texaco*, 555 F.2d at 874); *see also Invention Submission*, 965 F.2d at 1090. Without the aid of a defined theory of violation, it would be very difficult for the district court to

develop redaction standards that protect an agency's investigational latitude. Information that at first glance appears irrelevant may become relevant as the investigation progresses. *See Invention Submission*, 1991 U.S. Dist. LEXIS 5523, at *22; *Invention Submission*, 965 F.2d at 1090. Redaction of information based on a prematurely and improperly circumscribed view of relevance could short-circuit legitimate lines of inquiry.

Judicial oversight of redactions could entangle courts in the agency's investigation, thus diverting limited court resources and possibly slowing the progress of the investigation itself. C&D below proposed either that the FTC be permitted to bring its objections to C&D's redactions to the district court for resolution or that the court review a sample of documents with C&D's proposed redactions so the court could endorse or modify C&D's redaction methodology. JA–225-26. Such review is inconsistent with the court's "strictly limited role" in subpoena enforcement. *See* JA–313 (quoting *Texaco*, 555 F.2d at 871-72).[14] The time required for such review is also likely to greatly slow the FTC's investigation, a result that cannot be reconciled with the fundamental principle that the "'very backbone of an administrative agency's effectiveness in carrying out the

[14] Moreover, the court's involvement could be ongoing, if prior determinations need to be revisited as the relevance of information only becomes evident in the course of the investigation.

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 at 431, 433 (9th Cir. 1975)).

Ignoring the fact that information about other products is reasonably relevant, *see* Part I, *infra*, C&D claims that the sample redactions it proposed to the district court "amply demonstrate that no information about condoms is lost through redaction." C&D Br. 26. C&D also tries to distinguish the cigarette advertisements at issue in *FTC v. Carter*, 464 F. Supp. 633, *aff'd*, 636 F.2d 781, from C&D's documents, C&D Br. 26-27, asserting that its redactions "do not conceal relevant information or adversely affect a document's comprehensibility." C&D Br. 27. C&D's proposal, however, provides no means to ensure that the proposed redactions are benign.[15]

Under C&D's proposal, the FTC would apparently not know what information C&D proposes to conceal. The district court, while knowing what information C&D would redact, would not have access to the information and analysis developed in the course of the FTC's investigation. Without knowing

[15] Such redactions also threaten to leave the agency with documents that would be inadmissible in any subsequent judicial proceeding. *See Victor Stanley, Inc. v. Creative Pipe*, 269 F.R.D. 497, 532 (D. Md. 2010) (spoliation adversely affects ability to authenticate a document); *Lorraine*, 241 F.R.D. at 545-46 (alterations may hinder authentication).

both the information redacted and how it relates to other information obtained through the investigation, neither the FTC nor the court could judge the correctness of C&D's redaction claims. Nor would C&D be in a position to make such judgments, since it would not have access to the FTC's investigatory materials and analyses, including information collected from third parties. C&D's proposal cannot overcome these problems and thus is irremediably flawed.

C&D's examples of documents it would redact also underscore the arbitrariness and untrustworthiness of C&D's approach to redaction.[16] For example, the document reproduced at page 30 of C&D's brief includes information regarding pregnancy testing products that C&D would redact, even though such products are in the same product class as condoms. At footnote 6, C&D describes how it would redact "proprietary sales figures concerning non-condom departments and/or products," while leaving unredacted other kinds of information for the products. C&D's standards for differentiating between redacted and

[16] C&D also claims that redactions from multi-page documents responsive to the FTC's subpoena are different from the redactions from the single-page cigarette ads at issue in *Carter*, because the information proposed to be redacted by C&D has "nothing to do with condoms." C&D Br. 27. This claim is patently incorrect because, as shown above, non-condom product information is reasonably relevant. Moreover, the harm associated with the redaction of such data will not depend upon the length of the document. Rather, it will depend upon the nature of the information and the context in which it appears.

unredacted information are indeterminate,[17] and raise the risk that C&D would redact relevant information that C&D would rather the FTC not see. *See Morton Salt*, 338 U.S. at 642 ("The only power that is involved here is the power to get information from those who best can give it and who are not interested in doing so.") In effect, C&D is trying to control the course of the FTC's law enforcement investigation, which is not permitted.

Finally, the district court found that C&D's redaction proposal would reverse subpoena enforcement burdens. JA–313. The court observed that "C&D attempts to improperly shift its burden of proving that redacted information is irrelevant." JA–313 (quoting *Invention Submission*, 965 F.2d at 1090). By flipping the burden in this way, C&D would eliminate the deference ordinarily paid to agency appraisals of relevance. *See Invention Submission*, 965 F.2d at 1089. Such deference does not make the FTC the sole judge of relevancy, but rather is consistent with "a presumption of administrative regularity and good faith" to which agencies are entitled. *Id.* at 1091 (quoting *FTC v. Owens-Corning*

[17] Since C&D began to produce responsive documents that it has separately Bates-numbered for possible redaction, *see* C&D Br. 10, its designations (involving hundreds of thousands of documents) have included documents containing only condom information. Even if such designations are an oversight, it clearly illustrates the risk that C&D's redaction proposal could result in C&D's withholding indisputably relevant information.

Fiberglas Corp., 626 F.2d 966, 975 (D.C. Cir. 1980)).

D. The District Court Did Not Depart from the Reasonably Relevant Standard

Finally, C&D asserts that the district court applied a "plausibility" rather than a "reasonable relevance" standard. C&D Br. 31. Presented with this claim when C&D sought a stay of the October 29 Order, the district court rightly rejected it, noting that C&D "fixates on the words '*entirely plausible*' (italics C&D's)" and observing that "when read in the full context, I am not deviating from the 'reasonably relevant' standard, but reinforcing it." JA–433. The court then concluded that "to read my 'entirely plausible' phrasing as meaning something other than the well-established 'reasonably relevant' standard is truly to split hairs." JA–434.

Nonetheless, C&D repeats the claim in this Court. C&D Br. 32-33. It suggests that a "plausibility" standard would allow an agency to satisfy the reasonably relevant standard using pretextual justifications. C&D Br. 32, 34 n.7. C&D also complains that the district court's analysis was not "meaningful." C&D Br. 35. C&D's claims do not withstand scrutiny.

As demonstrated above, the FTC showed that non-condom product information is reasonably relevant, because it allows the FTC to examine possible

exclusionary conduct involving, *inter alia*, bundling and tying, permits product-to-product comparisons, and provides needed context. The district court accepted the FTC's explanation for why non-condom product information is reasonably relevant to the FTC's investigation. It found that, under the broad relevancy standards of *Morton Salt* and *Texaco*, not to mention the deference owed to an agency's own appraisal of relevance and the court's limited role, the FTC's explanation of why non-condom information is reasonably relevant was "entirely plausible." In so finding, the district court did not apply a standard other than reasonably relevant. Rather, as the district court concluded, it "reinforced" the "reasonably relevant" standard. JA–433. C&D provides no grounds for this Court to second-guess the district court's well-supported determination.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's decision to enforce the FTC's subpoena and CID regarding non-condom product information found in responsive documents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 7,642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that I have on this day served via the Court's CM/ECF System copies of this brief on the following:

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