ORAL ARGUMENT SCHEDULED FOR OCTOBER 11, 2011

Nos. 10-5383, 11-5008

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

REPLY BRIEF OF APPELLANT CHURCH & DWIGHT CO., INC.

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GLOSSARY OF TERMS

Church & Dwight Op. Br.	Church & Dwight's Opening Brief on Appeal, dated, June 1, 2011
CID	Civil Investigation Demand
Commission	Federal Trade Commission
FTC	Federal Trade Commission
FTC Br.	Federal Trade Commission's Opposition Brief on Appeal, dated July 19, 2011
JA	Joint Appendix
Resolution	June 10, 2009 FTC Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation
OTS	Office of Thrift Supervision

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I. SUMMARY OF ARGUMENT

In its opposition brief, the Federal Trade Commission ("FTC") is attempting to re-litigate the standard set forth in *FTC v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977) (*en banc*), and thereby negate this Court's power to provide meaningful review of an executive agency's Resolution and Subpoena as established in *Texaco*. The FTC attempts to do so in a case where the operative Resolution authorizes an antitrust investigation concerning the distribution or sale of condoms in the United States. No other specific product appears in the Resolution. Nevertheless, one of the primary issues in dispute concerns the FTC staff's ability—under the same Resolution—to gather information on products wholly unrelated to condoms such as cat litter, bulk chemicals, toothpaste, depilatories, and household cleaning products. This Court should preclude the FTC staff from conducting a company-wide audit of Church & Dwight based on a narrow FTC Resolution authorizing the investigation of only one discrete and unique product—condoms.

In the district court, the FTC refused to substantiate a connection between condoms and these obviously unrelated products. Instead, it focused upon the deference traditionally afforded to agencies in subpoena enforcement actions. Now, and largely for the first time, the FTC advances speculative and unpersuasive arguments not raised in the district court concerning the supposed relevancy of non-condom product information to its investigation. But even now, the FTC's

approach is curious. Despite being provided several months ago with 1.4 million pages of the very documents that form the basis of this appeal pending resolution, the FTC has failed to provide this Court with any valid basis for its relevancy arguments—which therefore remain mere hypotheticals.[1]

Moreover, the parties here are faced with a Magistrate Judge Report and Recommendation (later transformed without change into a Memorandum Opinion) that does not follow the basic analytical framework established by this Court in *Texaco*. For instance, rather than interpret the Resolution, as required by *Texaco*, the Magistrate Judge accepted the FTC's interpretation of the Resolution without any analysis. Rather than apprise himself of the information sought in order to determine relevancy, the Magistrate Judge only broadly described the information

[1] In its opposition brief, the FTC attempts to portray Church & Dwight as obstructive. This depiction is unwarranted, unfair, and untrue. To date, Church & Dwight has produced more than 13.8 million pages of documents from the United States and Canada from over 250 custodians in response to the FTC's comprehensive CID and Subpoena. During the pendency of this appeal alone, Church & Dwight has taken timely, good faith measures to respond to the FTC's investigative demands. On August 4, 2011, Church & Dwight certified that it had produced all documents requested from the company's Canadian subsidiary with accompanying privilege logs. On January 28, 2011, Church & Dwight completed its production of U.S. documents in response to the FTC's original document request, and on July 22, 2011, Church & Dwight completed a supplemental production from U.S. custodians. Church & Dwight will provide its remaining privilege log on August 19, 2011, as agreed to by the FTC. Based on current projections, the entire production will be complete by the end of August. In short, Church & Dwight has been complying—and continues to comply—with incredibly burdensome and costly investigative demands despite the FTC's effort to persuade the Court otherwise.

sought as non-condom product information found in otherwise responsive condom documents. Rather than make any finding as to the reasonable *relevance* of the information sought, the Magistrate Judge concluded that it is *plausible* that such information could be relevant merely because that information is found in otherwise responsive documents. As a result, the Magistrate Judge's conclusions are unsupported and should be reversed. At the very least, this Court should remand this case to the District Court to properly apply the *Texaco* standard.

II. ARGUMENT

The Resolution authorizing FTC inquiry into Church & Dwight's sales practices 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.

(JA at 30.) The Magistrate Judge, sitting as the District Court, conducted no independent inquiry to determine whether this language authorized the FTC to investigate Church & Dwight's sales and marketing practices for non-condom

products, including products totally unrelated to condoms, such as cat litter, toothpaste and household cleaning products. Instead, the Magistrate Judge adopted the FTC's interpretation of the Resolution without any analysis whatsoever. (JA at 311-12.) The absence of meaningful independent review from the Magistrate Judge renders his opinion fatally flawed under *Texaco* and its progeny.

Further, the FTC accuses Church & Dwight of crafting a new test from this Court's decision in *Texaco*. In actuality, it is the FTC that contorts *Texaco* and reads the opinion in a manner that, if accepted, would strip federal courts of their power to place reasonable limits on agency investigatory authority.

A. The FTC improperly seeks to preclude federal courts from exercising meaningful review over the actions of administrative agencies.

The FTC basically attempts to remedy the Magistrate Judge's improper enforcement of the administrative subpoena by invoking, as it did in the district court, the language of judicial deference throughout its opposition. According to the FTC, federal courts must defer to an agency's interpretation of a resolution and subpoena, even when the agency's position is excessive in scope. (FTC Br. at 14, 19.) In so arguing, the FTC fails to acknowledge, even after this Court's *en banc* decision in *Texaco* thirty-four years ago, that the judicial role in a subpoena enforcement proceeding is neither "minor nor ministerial." 555 F.2d at 872 (quoting *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 217 n.57 (1946)

(Rutledge, J.)). As this Court recently stated, an agency's "[s]ubpoena enforcement power is not limitless," and—deference notwithstanding—a district court must conduct an independent review of an agency subpoena to ensure that the subpoena falls within the bounds of the authorizing Resolution. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (Edwards, J.). The FTC's position would deprive federal courts of the power: (1) to interpret even an unclear Resolution; and (2) to limit an overbroad subpoena once the same agency that issued the Resolution concludes the subpoena is consistent with the Resolution. Such a result abrogates meaningful judicial review and places virtually unfettered authority in the hands of agencies to probe and pry into a respondent's business without justification. Administrative agencies of the Executive Branch do not have, nor have they ever had, such power untempered by judicial review.

This Court made this fundamental premise clear in *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412 (D.C. Cir. 1994) (Edwards, C.J., Sentelle & Tatel, JJ.).[2] In that case, the Office of Thrift Supervision ("OTS") commenced an investigation into suspicious deposits and withdrawals made at the respondent bank by a law firm controlled by one of the bank's directors. *Id.* at 1414-15. The OTS served a subpoena demanding production of the bank's financial records as

[2] Despite citation and discussion of this controlling decision in Appellant's opening brief at 20, 23, and 32, the FTC makes no reference to it in its opposition brief.

well as the personal financial records of the directors and their spouses. *Id.* at 1415. The agency claimed that the records were necessary to determine whether the directors personally benefitted from the transactions. *Id.* at 1416. The directors, however, responded that some of the records sought by the OTS covered periods preceding the allegedly suspect transactions, and that those records could not possibly have any relationship to the agency's inquiry. *Id.* at 1419. This Court agreed, holding that "the record does not indicate whether information prior to [the] period [under investigation] is also relevant to [the agency's] valid purposes." *Id.* at 1420. The Court reversed and remanded the case for the OTS to develop a factual record showing the reasonable relevance, if any, that each director's personal financial records had to the investigation. *Id.*

Sealed Case demonstrates that deference does not insulate an agency's acts from judicial review. *Id.* Instead, the court must conduct an independent inquiry and verify that the subpoenaed documents are reasonably relevant to the investigation based on the facts of record. *See United States v. Exxon Corp.*, 628 F.2d 70, 77 (D.C. Cir. 1980) (*per curiam*) ("In a subpoena enforcement … the District Court can inquire into all relevant matters, unlimited by the scope of the agency's own inquiry….").

Like in *Sealed Case*, where the OTS sought personal financial records that were facially unrelated to the banking transactions at issue, here the FTC has

demanded production of information that does not concern "the distribution or sale of condoms in the United States." (JA at 30.) At no time did the FTC's opening brief to the Magistrate Judge explain why the agency needs proprietary and business sensitive information about non-condom products, like cat litter and toothpaste, to investigate Church & Dwight's conduct in the condom market. Nor did it point to any support from the millions of documents already produced to establish the reasonable relevance of those materials. When justifying the subpoena in the District Court, the FTC merely argued that Church & Dwight "should not be permitted to control the course of the Commission's investigation," and that removal of non-condom information might impair the comprehensibility of otherwise responsive documents. (JA at 160.) As Church & Dwight has repeatedly explained, the redactions it proposes will have no such effect. (*See* Church & Dwight Op. Br. at 24-31; *infra* Part II.B.3.c.) The agency's unyielding position is insufficient under *Sealed Case*, and fails to satisfy *Texaco*. *See Sealed Case*, 42 F.3d at 1419-20 (reversing the district court's subpoena enforcement order because the agency failed to identify record support for its claims of reasonable relevance); *Texaco*, 555 F.2d at 875 (identifying the particular purposes for which the FTC could potentially use subpoenaed information about unproved reserves of natural gas).

In fact, the FTC's opposition brief shows that it is essentially an attempt to re-litigate the *Texaco* standard. Nowhere in its brief does the FTC recognize that a federal court has a duty to conduct an independent review of a subpoena-enforcement petition, nor has the FTC identified any support from the massive record upon which this Court could predicate a finding of reasonable relevance.[3] Nowhere does the FTC explain why the redactions proposed by Church & Dwight will impair its investigation. Instead, the FTC merely repeats the mantra that the Court must "defer[] to the administrative agency." (FTC Br. at 14.) Simply stated, from the FTC's brief, it appears that an agency is ***entitled*** to an enforcement order simply because it asks for one.

Texaco does not countenance that untenable result. Under *Texaco*, the court must review the authorizing resolution and subpoena to determine whether a link exists between the two. *Id.* at 875 (illustrating the type of analysis that a court must perform in a subpoena-enforcement proceeding). That link must be supported by the record, not merely by agency conjecture or say so. *See Sealed Case*, 42 F.3d at 1420 (remanding a subpoena enforcement action to the district

[3] Tellingly, after the Magistrate Judge ordered the production of the documents at issue in unredacted form pending the outcome of this appeal, Church & Dwight produced over 1.4 million pages of (specifically designated) documents on January 27, 2011. Despite having possession of the documents for over six months, the FTC has failed to identify a single document showing that non-condom information is reasonably relevant to its investigation under any of the theories it is now espousing.

court because the agency had failed to show why subpoenaed documents were reasonably relevant). While an agency has latitude to interpret its own resolution, the judicial function remains separate from the investigative one. The court must conduct an unencumbered review to verify that the subpoena represents an appropriate exercise of the agency's investigative power, regardless of the agency's opinion on the matter.[4] *See Resolution Trust Corp. v. Thornton*, 41 F.3d 1539, 1544, 1549 (D.C. Cir. 1994) (Edwards, C.J., Sentelle & Tatel, JJ.) (stating

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[4] This Court does not simply accept FTC assertions and findings even where deference may be due. For example, in *Rambus, Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008) (Williams, J.), "[a]fter lengthy proceedings" the Commission held that Rambus' failure to disclose its patent interests to a private standard-setting organization violated § 2 of the Sherman Act and § 5(a) of the FTC Act. Notably, an administrative law judge originally dismissed the FTC's complaint in its entirety. *Id.* at 461. However, the FTC reopened the record, conducted its own plenary review, and vacated the ALJ's decision en route to its holding. *Id.* While noting that "the Commission's findings are conclusive so long as they are supported by substantial evidence[,]" *id.* at 467, this Court set aside the FTC's orders noting that "[o]nce again, the Commission has taken an aggressive interpretation of rather weak evidence," *id.* at 469.

Likewise, in *Trans Union Corp. v. FTC*, though acknowledging that deference may be due to the FTC, this Court reviewed the merits of the FTC's underlying contentions and found them "sweeping and arbitrary." 81 F.3d 228, 235 (D.C. Cir. 1996) (Williams, J.); *see also Am. Bar. Ass'n v. FTC*, 430 F.3d 457, 458, 467-468 (D.C. Cir. 2005) (Ginsburg, C.J., Sentelle & Roberts, JJ.) (rejecting the FTC's position and stating that the Commission's "scant reasoning" did not warrant deference, in part because the FTC was engaged in little more than an "attempted turf expansion"); *Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859, 862 (D.C. Cir. 1993) (Edwards, Sentelle & Henderson, JJ.) (reiterating that the Court's review of the Commission's informal adjudication was "limited to determining whether the Commission's decision [wa]s arbitrary and capricious" but reversing because the Commission did not provide a reasoned explanation for its conclusion that a proposed acquisition should not be approved pursuant to the "failing company" doctrine.).

that "we have not given agencies *carte blanche* in the exercise of [subpoena] power" while refusing to enforce an administrative subpoena issued for the purpose of determining the cost-effectiveness of future litigation). As explained in greater detail below, the Magistrate Judge failed to perform such an analysis in this case.

B. Church & Dwight's analysis of the Resolution remains faithful to the standard set forth by this Court in *Texaco*.

Under *Texaco*, a federal court will grant an agency's request to 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." 555 F.2d at 872. The FTC claims that Church & Dwight has extracted from *Texaco* a "novel 'three-part analytical framework'" unsupported by this Court's precedent. (FTC Br. at 22 (quoting Church & Dwight Op. Br. at 15).) That is simply not true.

Texaco made clear that reasonable relevance requires a comparison between the subpoenaed materials and the operative resolution. *Id.* at 874 ("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."). That comparison entails three distinct, logical, albeit implicit, steps that a court must follow to exercise meaningful review over an agency's investigative power. (Church & Dwight Op. Br. at 10.)

At the first step, the court must interpret the resolution to ascertain its permissible scope of inquiry. *See Texaco*, 555 F.2d at 875 (concluding that the resolution at issue "envisions an examination of all phases of the estimating process"). It is not possible to evaluate whether a subpoena falls within the resolution's scope without first identifying the subject matter into which the resolution authorizes inquiry. Second, the court must determine what materials the subpoena seeks. *Id.* (enumerating the materials requested under the FTC's subpoena). This step is as important as the first, in that the court cannot assess the propriety of the subpoena without identifying the materials subject to it. Third and finally, the court must compare the scope of inquiry authorized by the resolution with the materials subpoenaed to determine whether a logical connection exists between them. *See Sealed Case*, 42 F.3d at 1420 (refusing to enforce a subpoena because the record failed to show how they were relevant to the agency investigation). As set forth below, the Magistrate Judge did none of these three things.

1. The Magistrate Judge failed to interpret the Resolution.

The FTC acknowledges that the Magistrate Judge did not interpret the Resolution but claims that such failure was of no consequence because the Resolution "on its face authorizes an investigation regarding the marketing of all of C&D's products." (FTC Br. at 24 (quoting JA at 139).) In the FTC's parlance, the

Resolution was clear, so "there was nothing to interpret." (*Id.* (citing JA at 303-04 (quoting JA at 30)).) However, the FTC's interpretation of the Resolution is "obviously wrong." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (Mikva, C.J, Silberman & Williams, JJ.).

a. The face of the Resolution excludes information about non-condom products from the investigation's scope.

A document is unambiguous when, on its face, it is susceptible to only one meaning. *See Consol. Rail Corp. v. United States*, 896 F.2d 574, 579-80 (D.C. Cir. 1990) (Wald, C.J., Ginsburg & Edwards, JJ.) (rejecting the Interstate Commerce Commission's interpretation of the Railroad Revitalization and Regulatory Reform Act of 1976 because it was contrary to the plain, unambiguous meaning of the statute). In determining ambiguity, the court must review the entire document and give effect to the meaning that emerges from the whole. *See Republican Nat'l Comm. v. Taylor*, 299 F.3d 887, 894 n.8 (D.C. Cir. 2002) (Garland, J.) (quoting *Davis v. Davis*, 471 A.2d 1008, 1009 (D.C. 1984) (Belson, J.)) ("'[T]o find a writer's intent,' a court should 'construe[] the document as a whole.'" (second alteration in original)). The court should not extract phrases or sentences from their context, as a provision that conveys one meaning in isolation might evince another when placed in context. *See Newspaper Guild v. Levi*, 539 F.2d 755, 757-58 (D.C. Cir. 1976) (McGowan, J.) (quoting *Richards v. United States*, 369 U.S. 1,

11 (1962) (Warren, C.J.)) (The court "must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law[.]").

The District Court did not follow those fundamental rules of construction, and the FTC urges this Court to do the same. The FTC focuses on the Resolution's singular statement that the investigation concerns "exclusionary practices, including, *but not limited to*" shelf-share discounts on "Trojan-brand condoms *and other products.*" (FTC Br. at 25 (emphases added).) Based on those two phrases, the agency claims that its investigative authority necessarily stretches to any product distributed by Church & Dwight. (FTC Br. at 2 (the FTC claims that it is investigating "exclusionary conduct related to the marketing of condoms and non-condom products."); FTC Br. at 16 (the FTC claims that the Resolution authorizes inquiry into Church & Dwight's "sales and marketing practices involving condoms and other products.").) That interpretation, however, ignores the remainder of the Resolution. Read as a whole, the Resolution limits right up front the FTC's investigative focus to "the distribution or sale of condoms in the United States," identifies condoms as the product at issue, and focuses on Church & Dwight's condom discount share of shelf program as the primary investigatory target. (JA at 30.) Placing the excerpts cited by the FTC alongside these three separate references to condoms, it becomes clear that the Resolution is susceptible to only one interpretation: it authorizes the FTC to investigate Church & Dwight's

activities in the condom market, namely, the company's distribution and sale of Trojan-brand condoms as well as "other products" sold under other condom labels, such as Elexa and Naturalamb.

b. Assuming that the Resolution is ambiguous, the Magistrate Judge erred by failing to interpret the Resolution.

Assuming, *arguendo*, that the Resolution does not clearly exclude non-condom products from the scope of administrative inquiry, judicial interpretation of its intent and reach is still required. Here, the parties have offered competing interpretations of the operative document: the FTC believes the Resolution authorizes inquiry into any product marketed by Church & Dwight, while Church & Dwight responds that it is limited to condoms bearing the Trojan brand or another condom label. That the parties have expended so much time and ink to define the proper boundaries of the Resolution suggests that the Magistrate Judge should have reviewed the record and issued a ruling interpreting the intent underlying the Resolution, as this Court did in *Texaco*.

As explained in Church & Dwight's initial brief, the Magistrate Judge commented that the Resolution's intent was ambiguous, but failed to take the next logical step and interpret its language to resolve the ambiguity. Addressing the intent underlying the Resolution, the Court merely 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." 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.*

(JA at 311 (emphasis added).) Foremost, the Magistrate Judge's statement alone does not constitute the type of resolution interpretation required under *Texaco*. The FTC characterizes the final sentence, not as a finding by the Magistrate Judge that the Resolution was ambiguous, but as a statement "that C&D's reading of the 'other product' language was 'not so clear.'" (FTC Br. at 24.) That is not the case. The Magistrate Judge was addressing Church & Dwight's claim that the "other products" language, read in conjunction with the remainder of the Resolution, limits the FTC investigation to condom-related information. (JA at 311 (quoting JA at 219).) In response, the Magistrate Judge held that, notwithstanding Church & Dwight's argument, the intended meaning of "other products" was unclear. (JA at 311.) The Magistrate Judge failed to resolve that ambiguity, instead holding that, because *Texaco* broadly construed the resolution at issue in that case, the FTC's interpretation, without independent judicial review, must necessarily be

correct. (*Id.*) This conclusory analysis does not comport with the standard set forth by this Court in *Texaco*.[5]

In fact, the Magistrate Judge should have resolved any ambiguity in the Resolution in Church & Dwight's favor. Church & Dwight's interpretation reads the Resolution as a unified document. *See supra* Part II.B.1.a. The FTC argues that its Subpoena is proper because under the Resolution, the investigation is "not limited to" discounts offered in exchange for display space. But it is wrong to read that language as contemplating inquiry into *any* product manufactured by Church & Dwight, when the whole of the Resolution expressly focuses on condoms, not cat litter or toothpaste. When the Commissioners intend to investigate tying and bundling, they have traditionally issued a resolution that expressly and clearly

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[5] The FTC cannot claim that the Resolution is unambiguous while advancing two different interpretations of the document in its brief. While Church & Dwight disputes that either of the FTC's interpretations are correct, the fact that the agency has simultaneously advanced competing definitions of the same document shows that the Resolution contains no definitive expression of the intent underlying it and must be reviewed and resolved by the District Court.

To illustrate, the FTC first claims that the Resolution allows the Agency to investigate "exclusionary conduct related to the marketing of *condoms* and *non-condom products*." *See, e.g.,* Issues Presented Section and Part I of the Argument Section. In other words, the FTC can obtain documents regarding every single product marketed by Church & Dwight, whether or not they relate to condoms. Yet, later in its brief, the FTC backs away from its sweeping interpretation and asserts that the Resolution only permits the agency to obtain "information regarding non-condom products contained in otherwise responsive documents." (FTC Br. at 26-27.). Simply put, these inconsistent interpretations by the FTC itself lend support for the Resolution's arguable ambiguity.

mentions those practices and the products at issue. *See, e.g.*, Resolution in *In re Intel Corp.*, FTC File No. 061-0247 (May 29, 2008), *available at* http://www.ftc.gov/os/adjpro/d9341/091215intelmotion.pdf, at 66 (authorizing investigation regarding "predatory pricing, loyalty rebates and discounts, exclusionary payments, *bundled pricing*, exclusive dealing, *tying*, or other exclusionary practices respecting x86 microprocessors *and related products*" (emphases added)).

If the Commissioners intended to also authorize investigation into all non-condom products distributed by Church & Dwight, they could have easily crafted language with that effect. For example, they could have drafted the Resolution to read and expressly include such non-condom products:

- "To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms *[and/or other products]* in the United States, or in any part of that commerce, through potentially exclusionary practices…."; or

- "To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly [] 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 *[] 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 Resolution says neither of those things, and the Magistrate Judge should have construed the Resolution as written and according to its most natural meaning: as

authorizing discovery of any information about condom products alone for the purpose of determining whether Church & Dwight has monopolized or attempted to monopolize the condom market, whether through shelf-share discounts or some other method.

The FTC faults Church & Dwight for seeking to add words to the Resolution by claiming that the phrase "Trojan brand condoms and other products" should be interpreted as "Trojan brand condoms and other [condom] products." (FTC Br. at 20.) According to the FTC, this Court rejected a similar reading of the resolution in *Texaco*, in which the respondent gas producers sought to insert the word "proved" into the phrase "natural gas reserves." (*Id.* (citing *Texaco*, 555 F.2d at 874).) That analogy is ill-drawn. In *Texaco*, the gas producers sought to inject a completely new word into the controlling resolution. Church & Dwight, in contrast, does not seek to add to the Resolution's text. Instead, it urges the Court to logically interpret two parts of the Resolution in conjunction with one another. *See Republican Nat'l Comm.*, 299 F.3d at 894 n.8 (quoting *Dodek v. CF 16 Corp.*, 537 A.2d 1086, 1096 (D.C. 1988) (Ferren, J.)) ("[E]very part [of a document must] be interpreted with reference to the whole."). Specifically, in the Resolution's final clause, the phrase "other products" follows three separate references to "condoms." The Resolution limits the investigation to the U.S. "condom" market; it identifies Church & Dwight's "condom" discount program as the primary investigatory

focus; and it cites Church & Dwight's sales practices for Trojan brand "condoms" as an example of the activities under investigation. In light of this context, a court need not superimpose any words to the FTC's Resolution to conclude that "other products," like the remainder of the Resolution, refers to Church & Dwight's other condom brands and not cat litter and toothpaste.

2. The Magistrate Judge failed to identify the documents sought by the FTC.

The Magistrate Judge also failed to adequately describe the information sought, which is also necessary under *Texaco* so that the district court can accurately compare that information with the scope of inquiry authorized by the resolution. Contrary to the FTC's suggestion, this does not require the Magistrate Judge to "conduct[] a document-by-document review to identify the 'precise information sought by the FTC.'" (FTC Br. at 26 (quoting Church & Dwight Op. Br. at 21, 25).) *Texaco* does not impose, and Church & Dwight does not advocate for, such a burden in the district courts.

In *Texaco*, this Court summarized the information at issue as "documents and underlying data relating to all reserve estimates for the Southern Louisiana area made by the producers, both for internal purposes and for reports to the [government], during the period 1962-1970." 555 F.2d at 868. That description was not onerous, but it nevertheless provided a point of reference for the Court to compare how, if at all, the information was relevant to the FTC investigation. The

Magistrate Judge here never conducted a similar review and instead, in the broadest sense possible, described the materials at issue as simply "[i]nformation [p]ertaining to [p]roducts [o]ther than [c]ondoms." (JA at 310.) This description falls far short of *Texaco*'s requirement.

3. The Magistrate Judge failed to explain why information about non-condom products was reasonably relevant to the investigation.

Finally, the District Court erred at the third step of the *Texaco* analysis because it never explained what link, if any, existed between the Resolution and the information sought. Instead, the Court enforced the subpoena based on a finding that "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 at 311.) Plausibility, however, is not the same as reasonable relevance. The Magistrate Judge's opinion stands in marked contrast to the example set by this Court in *Texaco*, where it offered myriad ways in which information about unproved reserves affected the FTC's investigation. Here, the District Court failed to identify a single reason why information about cat litter and toothpaste sold separately from condoms might show whether Church & Dwight monopolized or attempted to monopolize the U.S. condom market. Such an analysis does not comply with *Texaco*, and remand is appropriate for the Magistrate Judge to evaluate reasonable relevance in the first instance.

Realizing the shortcomings in the Magistrate Judge's opinion, the FTC has attempted on appeal to this Court to offer three purported justifications as to why information about cat litter and toothpaste, for example, is somehow reasonably relevant to condoms.[6] Specifically, the FTC asserts that the information will: (1) help "identify[] potential exclusionary practices"; (2) enable a comparison with "C&D's marketing for products where it may or may not have market power"; and

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[6] Church & Dwight notes that the FTC has waived the arguments discussed, *infra*, regarding tying/bundling and market share. In the District Court, the FTC never discussed them in its opening brief, instead raising them for the first time in its reply. (JA at 294.) However, raising an issue in a reply brief is insufficient to preserve that issue for appeal. *See Del Prado v. B.N. Dev. Co.*, 602 F.3d 660, 664 (5th Cir. 2010) (holding that the "plaintiff waived its argument … by failing to raise it to the district court until the reply brief…."); *Shelby County Health Care Corp. v. Majestic Star Casino*, 581 F.3d 355, 372 n.7 (6th Cir. 2009) ("[A]rguments not raised before the district court, including arguments presented for the first time to a district court in a reply brief, generally are considered waived on appeal…."). Further, in the District Court, the FTC's total discussion of tying, bundling, and product-comparison consisted of a scant four sentences, none of which explained with any detail or substance how the agency planned to investigate those issues or why it believed they would yield information relevant to the condom market. (JA at 294.) This passing discussion would be inadequate to preserve arguments for appellate review even if it appeared in an opening brief, much less in a reply. *See Kaiser Group Int'l v. World Bank*, 420 F. App'x 2, 5 (D.C. Cir. 2011) (Ginsburg, Brown, & Williams, JJ.) (quoting *Edmond v. U.S. Postal Serv. Gen. Counsel*, 953 F.2d 1398, 1400 (D.C. Cir. 1992) (Edwards, J., concurring)) ("[U]nless a legal argument is appropriately identified as such—appearing … not as an obscure or passing reference … —the argument is waived." (alteration in original)).

(3) "provid[e] context to responsive documents."[7] (FTC Br. at 16.) None of those arguments establish a finding of reasonable relevance.

a. Tying and Bundling

The FTC asserts, in the abstract, that because tying and bundling are potential exclusionary practices that necessarily include other products, the FTC should have access to non-condom product information located in otherwise responsive documents. (FTC Br. at 16-17 (citing JA at 291, 294).) This argument has no basis in fact and should be rejected. Otherwise, by stating the "magic words" tying and bundling, the FTC could use its investigatory power delve into any product distributed or sold by a corporation regardless of the scope of the operative resolution and with nothing more to show such linkage.

As Church & Dwight has repeatedly explained, ***condoms are inherently unique products that are advertised differently and cannot be sold, marketed, or co-branded with other products that Church & Dwight distributes***.[8] (Church &

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[7] The FTC then argues that "[t]he district court recognized the validity of the Commission's explanation of the relevance of non-condom information in responsive documents, relying on that explanation to reaching its relevancy conclusion." (FTC Br. at 22 (citing JA at 303, 311).) This is improper because review of the FTC's citations to the record reveals that the Magistrate Judge made no mention and passed no judgment whatsoever on the FTC's alleged articulations of relevancy. That is precisely why Church & Dwight seeks relief from this Court.

[8] Condoms rely on point of sale advertising because they are minimally advertised on television and in print. (JA at 203, 232.) Studies have shown that consumers spend, on average, less than ten seconds selecting a condom for

Dwight Op. Br. at 2 (citing JA at 328).) Indeed, since Church & Dwight produced over 1.4 million pages of documents containing the disputed information on January 27, 2011, the FTC has identified no support to the contrary. Where in any of the 1.4 million pages of documents at issue is there support for the FTC's claimed "possibility" of any tying or bundling of condoms with cat litter? FTC Brief at 21 n.12. More significantly, an investigation into tying or bundling would require the FTC to obtain information about Church & Dwight's sales practices in *both* the condom market and the market for the allegedly tied product. Nonetheless, the FTC has never requested information about any non-condom market, and this omission belies the agency's claim that tying and bundling are legitimately within the scope of its investigation, or that it is seeking non-condom information to investigate those practices.

b. Market Comparison

The FTC also postulates, again in the abstract with no record support, that "[n]on-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" and "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

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purchase due in large part to embarrassment factors. (*Id.*) Thus, in order to aid consumers in locating their condom of choice, retailers generally display the same brand of condoms together and distributors typically minimize color and graphic changes to packages. (*Id.*)

markets, where competition is more robust." (FTC Br. at 17.) This justification is flawed because the FTC has failed to request enough information to make a valid market comparison with any non-condom product, while simultaneously requesting data that is unnecessary to such a comparison.

More specifically, the FTC's purported justification is over-inclusive because, if adopted, it would enable the FTC to examine *all* Church & Dwight products without limitation merely because it chooses to compare them with the product at issue. Suddenly, and once again, the FTC staff could use an investigation into the condom market as a gateway to pry into any Church & Dwight product the agency desires. The Commissioners' Resolution at issue here, which focuses on "the distribution or sale of condoms in the United States," does not authorize such a broad inquiry. (JA at 30.)

At the same time, the FTC's proposed justification is under-inclusive because the information produced by Church & Dwight is insufficient to support the comparison the FTC proposes. To perform an accurate comparison, the FTC would need documents that describe the market for whatever non-condom product the agency chose to compare. A substantial portion of that information appears in documents that do not mention condoms and are not subject to the FTC subpoena. Thus, either the FTC's plans to perform a deeply flawed market analysis, or it has no plans to perform such a comparison. In either case, the agency cannot establish

reasonable relevance by speculating about an apparent market-comparison rationale. *See Sealed Case*, 42 F.3d at 1419-20.

Moreover, the FTC's attempt to analogize its proposed comparison to the one performed in *Texaco* is unfounded. In *Texaco*, the FTC sought to compare bid files with proved reserve estimates, both of which related to natural gas, the subject of that investigation. 555 F.2d at 875, 876-77. A similar comparison here would require the FTC to juxtapose different types of information concerning *condoms*: for example, comparing Trojan condoms with Naturalamb condoms. The FTC, however, seeks to compare condoms with completely unrelated and wide-ranging products including both bulk chemicals and household products. *Texaco* does not support such an analysis.

c. Context

Lastly, the FTC asserts that the "context in which responsive materials appear is also important" for two reasons. (FTC Br. at 18.) First, the agency again relies on the significantly distinguishable decision *FTC v. Carter*, 464 F. Supp. 633, 640 (D.D.C. 1979) (Parker, J.), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980) (MacKinnon, J.), for the proposition that, as a matter of law, "[a]ppropriate documents should be submitted in their entirety to ensure comprehensibility, rather than being edited by respondents." Second, the FTC suggests that "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." (FTC Br. at 18.) Both of these grounds are flawed.

First, the information at issue here is fundamentally different than the information in *Carter*, which concerned single-page cigarette advertisements. 464 F. Supp. at 640. Such documents are completely distinguishable from the multi-page, multi-product documents at issue in this investigation. In *Carter*, the resolution specifically concerned the "*advertising*, promotion, offer for sale, sale, or distribution of *cigarettes* in violation of Section 5 of the [FTC] Act." *Id.* at 636 (emphasis added). The Court refused to allow redactions because withholding any information would have impaired the comprehensibility of the advertisements, and because all information appearing in them necessarily related to the manufacturer's marketing practices. *Id.* at 640. Here, by contrast, the disputed information does not concern the "distribution or sale of condoms." (JA at 30.) Rather, it pertains to unrelated products that happen to appear, for example, in a performance report of company products which includes condoms. (JA at 259-60.) Church & Dwight produced responsive information in full while redacting only confidential and proprietary non-condom product information. As the examples provided by Church & Dwight illustrate, only the actual numbers concerning non-condom products, not the product name or even the fields of the documents, would be redacted. (JA at 259-60.) Information concerning condoms remains visible in full.

Thus, the comprehensibility of the subject matter of this investigation has been preserved.

Second, the FTC's authentication argument is rebutted by the very case law that the agency cites to support it. The FTC cites *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 545-46 (D. Md. 2007) (Grimm, J.) for the proposition that "redaction of even 'irrelevant' information from otherwise responsive documents can affect the evidentiary value of the redacted documents." (FTC Br. at 18 n.10.) Not only does that citation provide no support for the FTC's contention, but the crux of Judge Grimm's opinion is that "courts have been willing to think 'outside of the box' to recognize new ways of authentication." *Lorraine*, 241 F.R.D. at 552. The Court's lengthy opinion canvasses the many ways a document may be authenticated including, but not limited to, testimony of a witness with knowledge, circumstantial evidence, hash values, and admission of a party pursuant to F.R.C.P. 36. *Id.* at 544, 546, 553. Ultimately, "[a] party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be" and "[t]his is not a particularly high barrier to overcome." *Id.* at 542. Thus, the FTC's claimed concern with authentication, assuming any objection is made, provides no basis for precluding redactions.

III. CONCLUSION

In sum, the Magistrate Judge failed to perform the three-step independent analysis that comports with this Court's decision in *Texaco*. The Magistrate Judge never interpreted the Resolution; never identified the information sought by the subpoena; and never explained why those materials were reasonably relevant to the FTC investigation. The FTC's eleventh hour attempt to backstop the Magistrate Judge's omissions with new explanations for relevance of non-condom information that have no basis in law or fact is improper and, at best, requires a remand for the Magistrate Judge to address the issues not previously raised. Accordingly, Church & Dwight requests that this Court reverse the Magistrate Judge's decision, require the return of the unredacted documents to Church & Dwight, and, at the very least, remand this matter to the District Court to conduct a renewed analysis faithful to this Court's mandate in *Texaco*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,995 words as determined by the word-counting feature of Microsoft Word 2003.

/s/ Carl W. Hittinger
Carl W. Hittinger

Dated: August 15, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 15th day of August, 2011, served a copy of the foregoing documents electronically through the Court's CM/ECF system on all registered counsel.

/s/ Carl W. Hittinger
Carl W. Hittinger