

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FEDERAL TRADE COMMISSION,)	
600 Pennsylvania Ave., N.W.,)	
Washington, DC 20580,)	
)	
Petitioner,)	
)	
v.)	Misc. No. _____
)	
CHURCH & DWIGHT CO., INC.,)	
c/o Carl W. Hittinger, Esq.,)	
DLA Piper LLP (US),)	
One Liberty Place,)	
1650 Market Street, Suite 4900,)	
Philadelphia, PA 19103,)	
)	
Respondent.)	
)	
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**PETITION OF THE FEDERAL TRADE COMMISSION
FOR AN ORDER ENFORCING SUBPOENA *DUCES TECUM*
AND CIVIL INVESTIGATIVE DEMAND ISSUED
IN FURTHERANCE OF A LAW ENFORCEMENT INVESTIGATION**

Preamble

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

distribution and sale of condoms in the United States through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by C&D.

The Declaration under penalty of perjury of Sylvia Kundig, which verifies the allegations of this Petition, is attached hereto as Petition Exhibit (Pet. Exh.) 1.

Petition Allegations

To support this Petition, the Commission alleges the following:

1. The Commission is an administrative agency of the United States government, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.* The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prevent the use of unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

2. Section 3 of the FTC Act, 15 U.S.C. § 43, empowers the Commission to prosecute any inquiry necessary to its duties in any part of the United States. Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of, any person, partnership or corporation engaged in or whose business affects commerce, with certain exceptions not relevant here. Section 9 of the FTC Act, 15 U.S.C. § 49, authorizes the Commission to issue subpoenas to compel the testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Section 20 of the FTC Act, 15 U.S.C. § 57b-1, empowers the Commission to require by CID the production of documents or other information relating to any Commission law enforcement investigation.

3. This Court has jurisdiction to enforce the Commission's duly issued subpoenas, including the subpoena issued to Respondent, under Section 9 of the FTC Act, 15 U.S.C. § 49, which provides, in pertinent part:

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The Commission's investigation of C&D is being carried on in this district. Pet. Exh. 1, ¶ 8.

4. This Court also has jurisdiction to enforce the Commission's duly issued CIDs, including the CID issued to Respondent, under Section 20(e) of the FTC Act, 15 U.S.C. 57b-1(e), which provides, in pertinent part:

Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

C&D transacts business in this district. Pet. Exh. 1, ¶ 3.

5. C&D is a publicly held company. It develops, manufactures and markets a broad range of household, personal care, and specialty products under well-recognized brand names, including Trojan brand condoms. It is incorporated in the State of Delaware, with its principal place

of business at 469 North Harrison Street, Princeton, N.J. Pet Exh. 1, ¶ 3. C&D is engaged in, and its business affects, “commerce,” as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

6. On June 10, 2009, the Commission issued a Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (FTC File No. 091-0037). Pet. Exh. 1, ¶ 8; Pet. Exh. 2. The Resolution authorized all compulsory process available to the Commission to be used in connection with the investigation, to determine “whether Church & Dwight Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.” Pet. Exh. 2.

7. This investigation focuses on C&D’s marketing practices for its condoms, which include the Trojan brand. Condoms are sold or distributed to consumers through a variety of channels, including food stores, drug stores, and mass merchandisers, such as Wal-Mart and Target. C&D controls at least 70% of the latex condom market in the U.S. Pet. Exh. 1, ¶ 4.

8. Because there is minimal television and print advertising for condoms, the principal way that consumers learn about the different brands and styles of condoms available at retail is at the store. Accordingly, a significant animating factor for condom sales is that the product be present on retail shelves and be placed in an advantageous position, *i.e.*, at eye level, on those shelves. Pet. Exh. 1, ¶ 5.

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

10. As part of this investigation, on June 29, 2009, the Commission issued a subpoena *duces tecum* (subpoena) and a civil investigative demand (CID) to C&D requiring it to produce certain documents and data relating to the subject matter of the investigation. Pet. Exh. 1, ¶ 10; Pet. Exh. 3; Pet. Exh. 4. The subpoena contains 23 specifications, and the CID contains 21. Both the subpoena and CID required full compliance by July 30, 2009. *Id.*

11. The subpoena seeks, *inter alia*, documents related to the marketing practices that C&D has employed over time. Documents to be produced include organizational charts (Specification 1); selling aids and promotional materials (Specification 2); business plans, analyses, and data (Specifications 2-3, 6, 12-15); documents relating to contracts and prices (Specifications 7-11); and documents relating to competition in the sale of condoms (Specifications 15-19). Pet. Exh. 3. C&D's counsel, DLA Piper, LLP, accepted service of the subpoena. Pet. Exh. 1, ¶ 10.

12. The CID seeks, *inter alia*, detailed data relating to the sale of condoms, including pricing and discounts at wholesale and retail, as well as quantities sold and through which channel of distribution (Specifications 2-5, 7 and 8); detailed information about C&D's marketing programs (Specification 9 and 12); identification of regularly prepared corporate documents (Specification 14);

and information about competition in the market for condoms (Specifications 11,13,15, and 16).
Pet. Exh. 4. C&D's counsel, DLA Piper, LLP, accepted service of the CID. Pet. Exh.1, ¶ 11.

13. Throughout the investigation, C&D has engaged in dilatory conduct that appears designed to frustrate the Commission's legitimate law enforcement investigation. Pet. Exh. 1, ¶ 12. C&D has ignored three Commission-set compliance deadlines even for documents to which C&D has raised no compliance objections. *Id.*

14. C&D failed to comply with the subpoena's and CID's July 30, 2009 response deadlines. Prior to passage of those deadlines, it did not avail itself of the procedure set forth in Rule 2.7(d) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(d), which permitted it, within 20 days of service, to petition the Commission to either limit or quash the subpoena or CID. Nor did C&D request additional time to comply. Rather than seek timely modification of the subpoena and CID, C&D simply refused to comply with their terms and instructions. Pet. Exh. 1, ¶ 13.

15. The subpoena and CID require C&D to provide responsive information regarding sales in both the United States and Canada. Pet. Exh. 1, ¶ 15; Pet. Exh. 3, Definition K; Pet. Exh. 4, Definition H. United States-based C&D has a wholly owned subsidiary in Canada, Church & Dwight Canada Corp. (C&D Canada). C&D has custody, control and possession of its subsidiary's documents and information in Canada. Pet. Exh. 1, ¶ 14.

16. Despite the foregoing and despite repeated FTC staff requests that it do so, C&D refused, and continues to refuse, to produce documents and information located in Canada. Although C&D has searched the files of C&D employees located in the United States in C&D's International Division, who work on behalf of C&D Canada, and produced some of their responsive documents and information, it has refused to search files located in Canada. Pet. Exh. 1, ¶ 16.

17. C&D has also thwarted the Commission's law enforcement investigation by defying subpoena Instruction R, which states: "All Documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form ... shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files and shall not be shuffled or otherwise rearranged." Pet. Exh. 1, ¶ 18; Pet. Exh. 3. Despite Instruction R, C&D has insisted on redacting non-privileged, non-condom information from otherwise responsive documents. Pet. Exh. 1, ¶ 19.

18. On October 28, 2009, FTC staff sent a letter to C&D memorializing some of the shortcomings in C&D's response to the subpoena and CID, as well as setting a new compliance deadline of November 20, 2009. Pet. Exh. 1, ¶ 20. C&D, however, did not comply by November 20, 2009. *Id.*

19. On November 12, 2009, C&D filed a petition (November 12 Petition) asking the Commission to "quash[] or limit [] [the subpoena and CID] to the extent they purport that the 'Relevant Area' to the investigation includes Canada and to the extent that they request documents and other information located in Canada." Pet. Exh. 1, ¶ 21; Pet. Exh. 6.

20. On December 4, 2009, C&D filed a Request for Leave to File Out of Time a second Petition to Quash (December 4, Petition). Pet. Exh. 1, ¶ 22; Pet. Exh. 7. The December 4 Petition requested that the subpoena be quashed or limited to the extent it requires C&D to produce confidential information regarding non-condom products not included in the definition of "Relevant Product." C&D also sought permission "to redact discoverable documents only to the extent the documents contain confidential and proprietary information concerning products other than male condoms." Pet. Exh. 1, ¶ 22; Pet. Exh. 7.

21. On December 23, 2009, the Commission denied both the November 12th Petition and the December 4th Petition as time barred and otherwise wholly without merit (the Ruling). Pet. Exh. 1, ¶ 23; Pet. Exh. 8. The Ruling required full compliance with the subpoena and CID by January 26, 2010. *Id.*

22. On December 28, 2009 and pursuant to 16 C.F.R. § 2.7(f), C&D filed a Request for Rehearing and requested a stay of the January 26, 2010 compliance deadline. Pet. Exh. 1, ¶ 24; Pet. Exh. 9.

23. In a January 11, 2010 teleconference between C&D's attorneys and FTC staff, C&D stated that C&D would not comply with the subpoena and CID by January 26, 2010. Pet. Exh. 1, ¶ 25. C&D further made clear that, if the Commission denied C&D's rehearing of the Ruling, the Commission would need to enforce the subpoena and CID in Federal District Court. *Id.*

24. The Commission did not grant C&D's request for the stay, and C&D did not comply with the subpoena and CID by the January 26, 2010 deadline set by the Commission. Pet. Exh. 1, ¶ 26. It was the third compliance deadline ignored by C&D. *Id.*

25. On February 16, 2010, the Commission denied C&D's Request for Rehearing. It also denied as moot C&D's request for a stay. Pet. Exh. 1, ¶ 27; Pet. Exh. 10. C&D has since reiterated that it will not comply fully with subpoena and CID unless ordered to do so by this Court. Pet. Exh. 1, ¶ 27.

26. C&D's failure to comply fully with the subpoena and CID, including its failure to timely produce documents for which C&D has raised no objection, burdens the Commission's investigation, forces the Commission to expend additional public resources, and makes it impossible for the Commission to assess the legality of C&D's competitive practices. It also prevents the

Commission from completing its investigation in a timely manner, or from determining whether it wishes to challenge the conduct identified in the Commission resolution authorizing the investigation. Pet. Exh. 1, ¶ 28.

27. The subpoena and CID directed to C&D are within the Commission's statutory authority, the information and documents sought are reasonably relevant to the Commission's investigation, and the subpoena and CID do not impose an unreasonable burden on C&D. Further delays in the Commission's investigation caused by C&D's failure to comply are contrary to the public interest. Therefore, the subpoena and CID should be enforced in full.

28. No previous application for the relief sought herein has been made to this Court or any other.

Prayer for Relief

WHEREFORE, the Commission invokes the aid of this Court and prays:

a. For the immediate issuance of an order directing C&D to show cause why it should not comply in full with the subpoena and CID;

b. For a prompt determination of this matter and an order requiring C&D to fully comply with the subpoena and CID within ten (10) days of such order;

c. For such other relief as the Court deems just and proper.

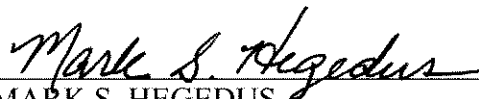
Respectfully submitted,

WILLARD K. TOM
General Counsel (D.C. Bar No. 297564)

DAVID C. SHONKA
Principal Deputy General Counsel
(D.C. Bar No. 224576)

JOHN F. DALY
Deputy General Counsel for Litigation
(D.C. Bar No. 250217)

LAWRENCE DeMILLE-WAGMAN
Assistant General Counsel for Litigation
(D.C. Bar No. 929950)


MARK S. HEGEDUS
Attorney (D.C. Bar No. 435525)

Dated: February 26, 2010

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2115
Fax (202) 326-2477
mhegedus@ftc.gov

Petition Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney employed by the U.S. Federal Trade Commission (“FTC” or “Commission”), in San Francisco, CA. I am assigned to the FTC’s investigation of Church & Dwight Co., Inc.’s, (C&D) marketing practices for its condoms, including Trojan brand condoms.
2. I am authorized to execute a declaration verifying the facts that are set forth in the Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation. I have read the petition and exhibits thereto (those exhibits are hereinafter referred to as “Pet. Exh.”), and verify that Pet. Exh. 2 (this declaration is Pet. Exh. 1) through Pet. Exh. 10 are true and correct copies of the original documents. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties.
3. C&D is a publicly held company. C&D develops, manufactures and markets a broad range of household, personal care, and specialty products under well-recognized brand names,

including Arm & Hammer and Trojan. It is incorporated in the State of Delaware, with its principal place of business at 469 North Harrison Street, Princeton, N.J. C&D transacts business throughout the United States, including Washington, D.C. C&D is represented in this investigation by the law firm of DLA Piper, LLP, which has offices in Washington, D.C. and Philadelphia, Pennsylvania, among other locations.

4. This investigation focuses on C&D's marketing practices for its condoms, which include the Trojan brand. 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 has at least a 70% market share of the latex condom market in the U.S.
5. Because there is minimal television and print advertising for condoms, the principal way that consumers learn about the different brands and styles of condoms available at retail is at the store. Accordingly, a significant animating factor for condom sales is that the product be present on retail shelves and be placed in an advantageous position, *i.e.*, at eye level, on those shelves.
6. C&D has a marketing program designed to take advantage of consumers' buying behavior. Under this program, C&D offers to rebate, for example, 7.5% of a retailer's net purchases if it agrees to dedicate 70% of its shelf space to Trojan brand condoms. The rebate is contingent on the amount of shelf space dedicated to Trojan brand condoms, not the volume of condoms purchased by the retailer or sold to its customers.
7. One issue in this investigation is whether C&D, through these shelf-share agreements, unlawfully enhanced or maintained its monopoly power.

8. 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 (Resolution). Pet. Exh. 2. Under the Resolution, the Commission seeks to determine whether C&D has engaged in unfair methods of competition in the distribution or sale of condoms. This investigation is being conducted from the FTC offices in both San Francisco, CA and Washington, D.C.
9. As part of this investigation, on June 29, 2009, the Commission issued a subpoena *duces tecum* (subpoena) and a civil investigative demand (CID) to C&D requiring it to produce certain documents and data relating to the subject matter of the investigation. Pet. Exh. 3; Pet. Exh. 4. The subpoena contains 23 specifications, and the CID contains 21. Both the subpoena and CID required full compliance by July 30, 2009. *Id.*
10. The subpoena seeks, *inter alia*, documents related to the marketing practices that C&D has employed over time. Documents to be produced include organizational charts (Specification 1); selling aids and promotional materials (Specification 2); business plans, analyses, and data (Specifications 2-3, 6, 12-15); documents relating to contracts and prices (Specifications 7-11); and documents relating to competition in the sale of condoms (Specifications 15-19). Pet. Exh. 3. C&D's counsel, DLA Piper, LLP, accepted service of the subpoena.
11. The CID seeks, *inter alia*, detailed data relating to the sale of condoms, including pricing and discounts at wholesale and retail, as well as quantities sold and through which channel of distribution (Specifications 2-5, 7 and 8); detailed information about its marketing programs (Specification 9 and 12); identification of regularly prepared corporate documents (Specification 14); and information about competition in the market for condoms

- (Specifications 11,13,15, and 16). Pet. Exh. 4. C&D's counsel, DLA Piper, LLP, accepted service of the CID.
12. Throughout the investigation, C&D has engaged in dilatory conduct that appears designed to frustrate the Commission's legitimate law enforcement investigation. C&D has ignored three Commission-set compliance deadlines, even for documents to which C&D has raised no objections.
 13. C&D failed to comply with the subpoena's and CID's July 30, 2009 response deadlines. Prior to those deadlines, it did not avail itself of the procedure set forth in Rule 2.7(d) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(d), which permitted it, within 20 days of service, to petition the Commission to either limit or quash the subpoena or CID. Nor did C&D request additional time to comply. Rather than seek timely modification of the subpoena and CID, C&D simply refused to comply with their terms and instructions.
 14. United States-based C&D has a wholly owned subsidiary in Canada, Church & Dwight Canada Corp. (C&D Canada). C&D has custody, control, and possession of its subsidiary's documents and information in Canada. C&D's Canadian operations are based in a suburb of Toronto, Ontario.
 15. The subpoena and CID define the Relevant Area to include Canada, Pet Exh. 3, Definition K; Pet. Exh. 4, Definition H, and require C&D to provide responsive information regarding sales in both the United States and Canada.
 16. Despite the foregoing and despite repeated FTC staff requests that it do so, C&D refused, and continues to refuse, to produce documents and information located in Canada. Although C&D has searched the files of C&D employees located in the United States in C&D's

International Division, who work on behalf of C&D Canada, and produced some of their responsive documents and information, it has refused to search files located in Canada.

17. On September 18, 2009, C&D certified compliance with the CID, even though it did not search for or produce information from the offices of its Canadian subsidiary.
18. C&D's efforts to thwart the Commission's law enforcement investigation are also evident in its defiance of the subpoena's Instruction R, which states: "All Documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form ... shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files and shall not be shuffled or otherwise rearranged." Pet. Exh. 3.
19. Despite Instruction R, C&D has insisted on redacting non-privileged, non-condom information from otherwise responsive documents.
20. On October 28, 2009, I wrote a letter to C&D describing some of the shortcomings in C&D's response to the subpoena and CID, as well as setting a compliance deadline of November 20, 2009. Pet. Exh. 5. C&D, however, did not comply by November 20, 2009.
21. On November 12, 2009, C&D filed a petition (November 12 Petition) asking the Commission to "quash[] or limit [] [the subpoena and CID] to the extent they purport that the 'Relevant Area' to the investigation includes Canada and to the extent that they request documents and other information located in Canada." Pet. Exh. 6.
22. On December 4, 2009, C&D filed a Request for Leave to File Out of Time and second petition to limit or quash (December 4 Petition). Pet. Exh. 7. The December 4 Petition requested that the subpoena be "quashed or limited to the extent it requires C&D to produce

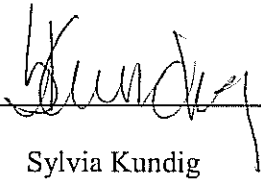
confidential information regarding non-condom products not included in the definition of “Relevant Product.” C&D also sought permission “to redact discoverable documents only to the extent the documents contain confidential and proprietary information concerning products other than male condoms.” *Id.*

23. On December 23, 2009, Commissioner Pamela Jones Harbour, the Commission’s designated “Compulsory Process Commissioner,” denied both the November 12th Petition and the December 4th Petition as time barred and otherwise wholly without merit (the Ruling). Pet. Exh. 8. The Ruling required full compliance with the subpoena and CID by January 26, 2010.
24. On December 28, 2009, C&D filed a Request for Rehearing of the Ruling and requested a stay of the January 26, 2010 compliance deadline. Pet. Exh. 9.
25. In a January 11, 2010 teleconference with C&D’s attorneys, C&D made clear to FTC staff that C&D would not comply with the subpoena and CID by January 26, 2010. C&D further made clear that, if the Commission denied C&D’s appeal of the Ruling, the Commission would need to enforce the subpoena and CID in Federal District Court.
26. The Commission did not grant the request for the stay, and C&D did not comply with the subpoena and CID by the January 26, 2010 deadline set by the Commission. It was the third compliance deadline ignored by C&D.
27. On February 16, 2010, the Commission denied C&D’s Request for Rehearing. It also denied as moot C&D’s request for a stay. Pet. Exh. 10. C&D has since reiterated that it will not comply fully with the subpoena and CID unless ordered to do so by this Court.

28. C&D's failure to comply fully with the subpoena and CID, including its failure to timely produce documents for which C&D has raised no objections, burdens the Commission's investigation, forces the Commission to expend additional public resources, and makes it impossible for the Commission to assess the legality of C&D's competitive practices. It also prevents the Commission from completing its investigation in a timely manner, or from determining whether it wishes to challenge the conduct identified in the Commission resolution authorizing the investigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 25, 2010.



Sylvia Kundig

Petition Exhibit 2

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

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

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

File No. 091-0037

Nature and Scope of Investigation:

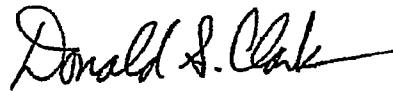
To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.

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

Authority to Conduct Investigation:

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

By direction of the Commission.



Donald S. Clark
Secretary

Issued: June 10, 2009

Petition Exhibit 3



SUBPOENA DUCES TECUM

1. TO Church & Dwight Co. Inc. Carl W. Hittinger, Esq. DLA Piper One Liberty Place 1650 Market St., Ste 4900 Philadelphia, PA 19103-7300	2. FROM <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described in Item 6.

3. LOCATION OF HEARING Federal Trade Commission Suite 570 901 Market St. San Francisco, CA 94103	4. YOUR APPEARANCE WILL BE BEFORE Sylvia Kundig, Esq.
	5. DATE AND TIME OF HEARING OR DEPOSITION July 30, 2009

6. SUBJECT OF INVESTIGATION

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

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

See attached Commission Resolution.

7. RECORDS YOU MUST BRING WITH YOU

See attached definitions, instructions and specifications.

8. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN Dean Graybill, Esq. (Custodian) Sylvia Kundig, Esq. (Deputy Custodian)	9. COMMISSION COUNSEL Sylvia Kundig, Esq. (415)848-5188
---	---

DATE ISSUED 06/29/09	COMMISSIONER'S SIGNATURE
------------------------------------	---

GENERAL INSTRUCTIONS

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

PETITION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

RETURN OF SERVICE

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

in person.

by registered mail.

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

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

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

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

SPECIFICATIONS

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

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

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

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

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

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

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

DEFINITIONS AND INSTRUCTIONS

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

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

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

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

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

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

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

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

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

smallest scale at which average costs are minimized.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CERTIFICATION

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

TYPE OR PRINT NAME AND TITLE

(Signature)

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

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

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

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

File No. 091-0037

Nature and Scope of Investigation:

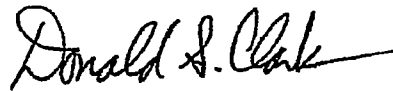
To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.

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

Authority to Conduct Investigation:

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

By direction of the Commission.



Donald S. Clark
Secretary

Issued: June 10, 2009

Petition Exhibit 4



United States of America
Federal Trade Commission

CIVIL INVESTIGATIVE DEMAND

1. TO

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

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

<p>LOCATION OF HEARING</p> <p>Federal Trade Commission Suite 570 901 Market St. San Francisco, CA 94103</p>	<p>YOUR APPEARANCE WILL BE BEFORE</p> <p>Sylvia Kundig</p>
	<p>DATE AND TIME OF HEARING OR DEPOSITION</p> <p>July 30, 2009</p>

You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE

July 30, 2009

3. SUBJECT OF INVESTIGATION

FTC File 091-0037 Church & Dwight Co., Inc. Church & Dwight's marketing practices through retail chains in the United States of America. See attached Commission Resolution.

<p>4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN</p> <p>Dean Graybill, Esq. (Custodian) Sylvia Kundig, Esq. (Deputy Custodian)</p>	<p>5. COMMISSION COUNSEL</p> <p>Sylvia Kundig, Esq. (415)848-5188</p>
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<p>DATE ISSUED</p> <p>06/29/09</p>	<p>COMMISSIONER'S SIGNATURE</p> 
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INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

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

Form of Certificate of Compliance*

I/We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

**CIVIL INVESTIGATIVE DEMAND
ISSUED TO CHURCH & DWIGHT CO., INC.**

Unless modified by agreement with the staff of the Federal Trade Commission, each specification of this Civil Investigative Demand ("CID") requires a complete search of "the Company" as defined in Paragraph "A" of the Definitions and Instructions which appear after the following Specifications. If the Company believes that the required search or any other part of the CID can be narrowed in any way that is consistent with the Commission's need for information, the Company's representatives are encouraged to discuss such questions and possible modifications with the Commission representative identified on the last page of this CID. All modifications to this CID must be agreed to in writing by that Commission representative.

SPECIFICATIONS

1. **Submit:**
 - a. a list of all agents and representatives of the Company, including, but not limited to, all attorneys, consultants, advertising agencies, product distributors, sales agents, and other persons retained by the Company in any capacity relating to any Relevant Product covered by this CID (excluding those retained solely in connection with environmental issues, tax, human resources, pensions, benefits, ERISA, or OSHA issues); and
 - b. for each agent and representative listed above, the agent's or representative's title, and the agent's or representative's business address and telephone number.
2. List each Relevant Product developed, manufactured, licensed, distributed, or sold by the Company, and for each product:
 - a. describe the product in detail, including, but not limited to, its stock keeping unit ("SKU") and Uniform Product Code ("UPC") numbers, packaging type, packaging size, ingredients, product features, the date it was first sold, planned to be discontinued or discontinued;
 - b. state the brand or trade name under which the product is sold (and identify the Person who owns the brand or trade name);
 - c. state the division, subsidiary, or affiliate of the Company that manufactures, distributes, or sells, or has manufactured, distributed, or sold, the product;
 - d. state whether the Company manufactures, distributes, or sells the product as an agent for another Person, or whether another Person manufactures, distributes, or sells the product as an agent for the Company, in either case identifying the relevant agent or principal;

- e. state whether a third Person manufactures the product for the Company and, if so, identify the manufacturer;
 - f. state whether a third Person packages the product for the Company and, if so, identify the packager;
 - g. state the terms of the contract with the third Persons identified in 2(e) and 2(f);
 - h. state the name, address, telephone numbers and other contact information of the Persons that purchased the Relevant Product from the Company;
 - i. state the name, address, estimated sales, and estimated market share, stated separately in units and dollars, of each of the Company's competitors that develop, manufacture and sell the Relevant Product; and
 - j. state the Company's estimated market share, stated separately in units and dollars, in the development, manufacture and sale of the Relevant Product.
3. For each SKU and UPC (or least aggregated product grouping level available) identified in the Company's response to Specification 2, state weekly, monthly and annually and in total:
- a. the Company's Sales, stated separately in units and dollars;
 - b. that portion of the Company's Sales, stated separately, in units and dollars, that were of products purchased from sources outside of the Company, and resold by the Company rather than of products produced by the Company;
 - c. any deductions (such as promotions or off-invoice discounts) from the Company's gross sales, identified, described, and stated separately, that the Company uses to calculate net Sales;
 - d. the Company's cost of goods sold stated separately in units and dollars for:
 - i. direct production cost per unit, in total, and by the following components, (1) raw materials, (2) packaging, (3) labor, (4) plant overhead costs, (5) any other costs, and (6) if the product is purchased, the cost of the purchased goods;
 - ii. indirect production cost, per unit;
 - iii. total production cost, per unit;
 - e. the Company's production cost variances stated separately by type;

- f. the Company's distribution and freight costs including cost center expense summaries showing costs by type for each distribution center, expenses by type incurred for moving product from production facilities to distribution centers, expenses by type for third-party distribution and warehousing services;
- g. gross margins and state the method of computation; and
- h. the Company's prices, including, but not limited to, wholesale prices, retail prices and list prices (including any underlying data used to calculate these prices).

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

- 4. For each least aggregated product grouping level available, e.g., SKU, UPC, brand or trade name, for those products identified in the Company's response to Specification 2, state weekly, monthly and annually:
 - a. stated separately, the amount of the Company's variable trade promotions by type, consumer promotions by type, fixed trade promotions by type, fixed consumer promotions by type, media advertising and expenditures by type, any other promotional and marketing expenditures by type;
 - b. the Company's research and development costs; and
 - c. the Company's other costs, such as selling, general and administrative, and other overhead expenditures, by type.

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

- 5. Separately for each customer by Channel, by week, for each SKU and UPC identified in response to Specification 2, provide the following information and data:
 - a. the SKU number;
 - b. the UPC number;
 - c. all available product descriptors, including but not limited to (i) a text description of the product; (ii) classification variables, such as category, subcategory, segment, form, company, brand, and sub-brand; (iii) package size and package type (such as single-serve vs. multi-pack); and (iv) other product descriptors, such as flavor, quality, brand image, and price characteristics;

- d. date (week ending date and year);
- e. the All Commodity Volume ("ACV") for each product;
- f. stated separately in units, equivalent units, dollars, average unit price, and percent ACV, all available sales information, including but not limited to (i) total sales; (ii) total non-promoted sales; (iii) total sales sold with a temporary price reduction only; (iv) total sales sold with a feature only; (v) total sales sold with a display only; and (vi) total sales sold with a feature and display;
- g. total value of coupon redemptions;
- h. when the purchase triggered a "Catalina," or any other type of check-out coupon; and
- i. the quantity and value of other promotions.

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

- 6. Identify each product, and provide the bases for the claim, that the Company claims competes, or will compete, with each Relevant Product identified in the Company's response to Specification 2.
- 7. Separately for each of the Company's customers, for each week, from 1999 to the present, provide the following information:
 - a. the customer's name, address, contact person, and telephone number;
 - b. all financial terms offered to the customer, stated separately, including, but not limited to, wholesale prices, discounts, rebates, allowances, including those offered under the Planogram Program;
 - c. The quantity sold to the customer, stated separately in units and dollars, for each week and month;
 - d. The selling expenses attributable to the customer, stated separately, for advertising, in-store promotions, discounts, allowances, "Catalina" coupons, rebates, and other expenses, for each week and month;
 - e. The location of all distribution locations serving the customer;
 - f. The freight cost per unit paid by the seller;

- g. The freight cost per unit paid by the buyer; and
 - h. The net delivered price per unit (net of all freight, taxes, discounts, allowances, and rebates attributed to the sale);
 - i. all financial transactions executed with the customer, stated separately, including, but not limited to, whether the customer has agreed to purchase all or some portion or percentage of the Relevant Product from the Company.
8. Describe the Company's policies relating to suggested retail prices, list prices, and wholesale prices, including but not limited to how and why these prices differ among customers and Channels.
9. Provide the following information regarding the Planogram Program:
- a. a list of the Company's customers and state whether and when the customer was offered participation in the Planogram program, including, but not limited to offers to move to a "tier" (e.g., 8.5% rebate if 80% of facings are the Company's Relevant Product);
 - b. if a customer was not offered participation in the Planogram Program, state the reason(s) why;
 - c. for each customer who was offered participation in the Planogram Program, or participation in the Planogram Program at a different "tier," state the terms and conditions offered, accepted, or rejected by the Company or its customers, including, but not limited to:
 - i. the percentage of the rebate and when it was to be paid;
 - ii. the facings or display space requirement for the rebate;
 - iii. the "tiers" offered, rejected or accepted;
 - iv. whether the rebate was paid on an annual, quarterly, or other basis;
 - v. how the facings/display requirement was determined or measured;
 - vi. the amount of the rebate paid; and
 - vii. how compliance with the program was determined or measured; and whether a compliance issue ever arose, and if so, what the Company did to address it.
 - d. for each customer identified in 9(a) that declined to participate in the Planogram Program, state the reasons given;
 - e. for each customer identified in 9(a) that moved to a higher "tier," identify, by SKU and UPC, the Company's recommended change in planogram facings and state the change in sales to that customer;

- f. all costs associated with implementation and enforcement of the Planogram Program and how those costs were determined; and
 - g. for each year, calculate the market share of the Relevant Product, by Channel, by unit and dollar sales, for the United States, of the combined participants in the Planogram Program.
10. State the location of each facility that manufactures or sells, or has manufactured or sold, any Relevant Product for the Company, and for each such facility state:
- a. whether the facility was leased, acquired, or built by or for the Company, and, if not built by the Company, the name of the person who built the facility for the Company or from whom the facility was leased or acquired;
 - b. the date of the facility's opening or acquisition, the length of time and cost in dollars required to open the facility from initial plan to full production, and its current estimated replacement cost and time necessary to replace it; and
 - c. the current nameplate and practical capacity and the annual capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity, the number of shifts normally used at the facility, and the feasibility of increasing capacity, including the costs and time required.

If the Company believes that this Specification may be narrowed in any way that is consistent with the Commission's need for documents and information it is encouraged to discuss possible modifications with Commission representatives who will consider modifying this Specification on a case-by-case basis.

11. For any SKU or UPC introduced since 1999, that has been discontinued, provide the following:
- a. product development costs;
 - b. all marketing and promotional expenditures including, but not limited to, slotting allowances, advertising expenditures, including coop, sales expenses, etc.;
 - c. annual sales in dollars and units;
 - d. cost of goods sold and how that was determined;
 - e. expenditures incurred to remove product from retail and distribution locations and any return or discontinuance allowances.

12. From conception to implementation, for each Relevant Product, describe how the Company's promotional activities and strategies (including advertisement, trade promotions, rebates, and coupons) are developed, instituted, and maintained, including the specific people who propose and approve the promotional plans.
13. Provide a list of every customer since January 1, 2001, that has discontinued carrying one or more SKUs, UPCs, or any other applicable unique identification numbers of the Company's Relevant Products that, at the time of the customer's discontinuance, were still being sold by the Company, and for each such customer:
 - a. describe the area of the country that was previously served;
 - b. identify the Relevant Product that was discontinued;
 - c. state the reason given for the discontinuance;
 - d. describe the efforts the Company made to retain the customer;
 - e. identify the name of the firm and the product that displaced the Company's Relevant Product; and
 - f. state when the customer discontinued carrying the Company's Relevant Product.
14. Identify, provide the title, and describe the contents of each financial statement, budget, profit and loss statement, cost center report, profitability report, and other financial report regularly prepared by or for the Company on any periodic basis relating to (a) the Company as a whole; (b) each of the Company's production facilities, sales offices, and distribution facilities that relate to the production and sale of any Relevant Product; and (c) any Relevant Product line or customer for any Relevant Product. For each such report, state how often each is prepared and the person responsible for the preparation of each such report.
15. State the name and address of each person that has entered or attempted to enter into, or exited from, the research, development, manufacture, distribution, or sale of any Relevant Product. For each such person, identify the Relevant Product(s) it researches, develops, manufactures, distributes, or sells or researched, developed, manufactured, distributed, or sold, the Relevant Area in which it sells or sold the product(s), and the date of its entry into or exit from the market. For each person that has exited due to an acquisition or merger, identify the acquiring person or the resulting merged person. For each entrant, state whether the entrant built a new facility, converted assets previously used for another purpose (identifying that purpose), or began using facilities that were already being used for the same purpose.
16. For each Relevant Product, identify and describe (including the bases for your response):

- a. requirements for entry into the manufacture or sale of the product including, but not limited to, research and development, planning and design, production requirements, distribution systems, access to shelf space, service requirements, patents, licenses, sales and marketing activities, brand establishment, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement;
 - b. the total costs and costs by type required for entry into the manufacture or sale of the product; the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the manufacture or sale of the product; the methods and amount of time necessary to recover such costs; and the total sunk costs entailed in satisfying the requirements for entry;
 - c. possible new entrants into the research, development, manufacture or sale of the product; and
 - d. the minimum viable scale, the minimum and optimum plant size, production line size, capacity utilization rate, production volume, requirements for multi-plant, multi-product, or vertically integrated operations, or other factors required to attain any available cost savings or other efficiencies necessary to compete profitably in the manufacture or sale of the product.
17. Describe all quotas, tariffs, government regulations and transportation costs relating to imports into, or exports from, each Relevant Area of any Relevant Product.
18. Identify, and state whether the Company is a member of or subscribes to, all trade associations, information services, and other organizations relating to the research, development, manufacture, distribution, or sale of any Relevant Product.
19. For each electronic database maintained by the Company that contains information relating to prices, sales, research and development, production, costs, or customers for any Relevant Product, provide the following information:
- a. the size and format of the database, including, but not limited to, the authoring application, operating system, and application version;
 - b. a detailed description of the data contained in the database;
 - c. the date range for which data has been input;
 - d. a record layout and the title and a description of each record or field contained in the database;
 - e. a description of all regularly prepared and ad hoc reports generated using information contained in the database, including, but not limited to, the name of

the report, the distribution list for the report, the frequency with which the report is generated (e.g. daily, weekly, monthly, annually), and the person responsible for generating the report; and

- f. an identification of databases, spreadsheets, or other electronic files that are linked to the database.
20. Describe in detail the Company's policies and procedures relating to the retention and destruction of documents.
21. Identify the person(s) responsible for preparing the response to this CID and submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this CID. Where oral instructions were given, identify the person who gave the instructions and describe the content of the instructions and the person(s) to whom the instructions were given. For each specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the persons (identified by name and corporate title or job description) whose files were searched by each.

DEFINITIONS AND INSTRUCTIONS

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

- A. "The Company" or "Church & Dwight" means Church & Dwight Co., Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms "subsidiary", "affiliate" and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.
- B. "Person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- C. "Relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
- D. "And" and "or" have both conjunctive and disjunctive meanings.
- E. "Plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
- F. "Sales" means net sales, *i.e.*, total sales after deducting discounts, returns, allowances and excise taxes. "Sales" includes sales of the Relevant Product whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.
- G. "Relevant Product" as used herein means, (1) male latex condoms; and (2) male non-latex condoms.
- H. "Relevant Area" means (a) the United States; (b) Canada; and (c) each area as to which the Company separately collects and maintains information and data within the United States, including, but not limited to, each Metropolitan Statistical Area ("MSA") or comparable metropolitan area designation.
- I. "Planogram Program" means the Program the Company offers to customers that is based on the percentage of facings or other types of display space the customer dedicates to Trojan brand condoms.
- J. "Minimum viable scale" means the smallest amount of production at which average costs equal the price currently charged for the Relevant Product. It should be noted that minimum viable scale differs from the concept of minimum efficient scale, which is the smallest scale at which average costs are minimized.

- K. "Channel" means (i) convenience stores; (ii) supermarkets and grocery stores; (iii) drug stores; (iv) club stores; (v) mass merchandisers; (vi) internet; (vii) public or nonprofit; (viii) adult market; (ix) distributors; and (x) all other outlets from which consumers purchase Relevant Products.
- L. "Sunk costs" means the acquisition costs of tangible and intangible assets necessary to manufacture or sell the Relevant Product that cannot be recovered through the redeployment of these assets for other uses.
- M. All references to year refer to calendar year. Unless otherwise specified, each of the specifications calls for information and data for each of the years from January 1, 1999 to the present. Provide information separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the Company's fiscal year data indicating the twelve month period covered, and provide the Company's best estimate of calendar year data.
- N. Unless otherwise specified, each specification calls for information and data to be provided separately for each Relevant Product, by Relevant Area, by Channel.
- O. This CID shall be deemed continuing in nature so as to require production of all information responsive to any specification included in this CID produced or obtained by the Company up to forty-five calendar days prior to the date of the Company's full compliance with this CID.
- P. Each specification and subspecification of the CID shall be answered separately and fully in writing under oath. All information submitted shall be clearly and precisely identified as to the specification(s) or subspecification(s) to which it is responsive.
- Q. If any information is withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof.
- R. If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.
- S. In order for the Company's response to this CID to be complete, the attached certification form must be executed by the official supervising compliance with this CID, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this CID or suggestions for possible modifications thereto should be directed to Sylvia Kundig at

415.848.5188. The response to the CID shall be addressed to the attention of Sylvia Kundig and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission, Western Region-San Francisco, 901 Market Street, Suite 570, San Francisco, CA, 94103. If you wish to submit your response by United States mail, please call the person listed above for mailing instructions.

CERTIFICATION

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

TYPE OR PRINT NAME AND TITLE

(Signature)

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

(Notary Public)

My Commission Expires: _____

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

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

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

File No. 091-0037

Nature and Scope of Investigation:

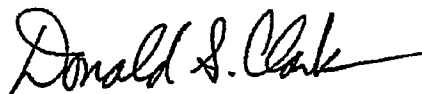
To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.

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

Authority to Conduct Investigation:

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

By direction of the Commission.



Donald S. Clark
Secretary

Issued: June 10, 2009

Petition Exhibit 5



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

October 28, 2009

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

VIA US Mail and Email

Re: Church & Dwight
FTC File 091-0037

Dear Lesli and Carl:

This is to recap our discussions Monday, October 26th and Tuesday, October 27th. It also reiterates several requests for compliance that were discussed this week and previously.

Importantly, we are perplexed and frustrated by C&D's apparent confusion in responding to our data request in Specification 7. CID Specification 7, explicitly asks for information about discounts etc. by customer. After you provided us with unresponsive and unusable data, our economist explained to you what we needed and we wrote a letter on September 19th explicitly restating the instructions. (Letter attached). After you again provided us with unresponsive and unusable data, our economist again explained what we needed and requested to speak with an C&D IT person who had knowledge of how data, which results in C&D's profit and loss statements, are kept by the company. To that end, we arranged for today's conference call. We then received an email from Lesli that directed us to a document that did not fully respond to the question and instructions. I responded by email that the document we were directed to, while responsive, did not answer our questions. I drew your attention to C&D-FTC2376, which sets forth discounts in an aggregated format, by quarter and by type. I stated that C&D-FTC2376 contained the type of information that we are requesting, broken down weekly by customer.

During the much anticipated telephone call, we learned that while C&D's Ms. Coffey was knowledgeable about planogram discounts, and to some extent knew about coupons, but

nothing further. We once again restated that we require the discount data, by customer, in its least aggregated form kept by the company. We again pointed to C&D-FTC2376 as delineating 6 categories of discounts (cash discounts, returns & allowances, trade promotion, coupon redemption, slotting, planogram). Presumably, C&D has, at a minimum, collected this information from its customers on a quarterly basis. But please understand, if C&D collects this data in an even further refined form, that breakdown would also be responsive.

In Carl's email after the meeting, he committed to telling us how C&D keeps its data by customer for each of the categories of discounts reflected in C&D-FTC2376. Please understand, that we also expect to receive the responsive data. Again, if you remain uncertain as to what we are requesting, please refer to our letter of September 19th. Of course, please do not hesitate to call us immediately with any questions and we will make ourselves available for conference call tomorrow.

Second, you undertook to provide a letter to us by Friday, October 30th, which details with specificity those Specifications you believe should be modified or limited as they relate to Canada. As I said, this letter must explicitly provide the reasons for your request. We will then evaluate your request for a modification.

Third, by Friday, October 30th, you will provide to us, in electronic format, the Quarterly Planogram Accrual Reports for the years 2007, 2008, & 2009, by quarter. C&D will attest to the fact that these reports are the best source to determine which customer is at which tier. In addition, C&D will attest to what tier each percentage rebate level represents.

Fourth, on Monday, we again asked for the Bates range of those POG summaries C&D represents as accurately delineating which customer is at which tier over time. We understand that Lesli has requested this information from C&D. Please understand that we will need a response to this by Friday as well.

Fifth, on Monday, we again brought up the issue of strategic plans, including C&D's, which we haven't received, but which we asked you to prioritize as early as August 20, 2009. Please provide those no later than Friday, November 6, 2009. This refers to Subpoena Duces Tecum Specifications 3, 4, and 13.

Sixth, on Monday we also discussed data and responsive information regarding the not-for-profit channel. To clarify, we also require a complete response for the not-for-profit channel, as well as all channels. Public or nonprofit is explicitly defined as a "Channel."

Finally, on Monday, we asked for a date certain when the complete return would be made. In light of the fact that the return date was July 30th, we believe that November 20th is a reasonable date.

Sincerely,


Sylvia Kundig

Petition Exhibit 6

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

CHURCH & DWIGHT, INC.

Defendant.

FTC FILE 091-0037

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

Carl W. Hittinger, Esquire
Lesli C. Esposito, Esquire
Matthew A. Goldberg, Esquire
DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, PA 19103
T.: (215) 656-2449
F.: (215) 606-2149

Attorneys for Petitioner Church & Dwight, Inc.

November 12, 2009

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INTRODUCTION

Pursuant to 16 C.F.R. § 2.7(d), Church & Dwight Co., Inc. (“Church & Dwight”) hereby petitions to limit or quash the subpoena *duces tecum* (“subpoena”) and civil investigative demand (“CID”), both served on June 29, 2009 (Exhibits A and B, respectively).¹ More specifically, Church & Dwight petitions to limit or quash the subpoena and CID only to the extent that they describe the “Relevant Area” of the investigation as including the Canadian market and to the extent that they call for the production of documents located in Canada. Such documents are patently and demonstrably irrelevant to the FTC’s investigation, which is focused solely on Church & Dwight’s efforts to market male latex condoms in the United States. Moreover, requiring Church & Dwight to produce documents currently located in Canada would be unduly burdensome and require the company to squander significant assets to fulfill the FTC’s requests.

BACKGROUND

On June 29, 2009, the FTC issued a subpoena *duces tecum* and a CID to Church & Dwight in connection with its investigation under Section 2 of the Sherman Act and Section 5 of the FTC Act regarding “Church & Dwight’s marketing practices through retail chains in the United States of America.” *See* Exhibits A and B (emphasis added). The accompanying Resolution Authorizing Use of Compulsory Process states that the general purpose of the investigation is to investigate Church & Dwight’s sales and distribution of condoms “in the United States.” (Exhibit D)

Although the subpoena and CID clearly state that the subject of the investigation is Church & Dwight’s practices in the United States, both the subpoena and CID include Canada in

¹ On November 4, 2009, the FTC staff granted Church & Dwight’s request for an extension of time, affording the company until November 13, 2009 to file the instant Petition. *See* November 4, 2009 correspondence from Assistant Director Dean Graybill to Carl Hittinger, Esquire (Exhibit C).

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the definition of the term "Relevant Area." During the very first conversation regarding the discovery requests, Church & Dwight raised objections concerning the scope of the "Relevant Area" to the Commission staff. Specifically, Church & Dwight expressed to the Commission staff its position that Canada should not be included in the "Relevant Area" because the FTC has no jurisdiction in Canada and because documents relating to Church & Dwight's sales practices in Canada are irrelevant to its sales practices in the United States. Church & Dwight has explained to the FTC staff and economist that while the Canadian company is a wholly-owned subsidiary of the United States corporation, Church & Dwight, Inc., their managements are separate and distinct from each other – they have different policies and practices in place addressing different markets with different regulatory requirements, retail structures and consumer demands. Moreover, their sales and marketing data are on two entirely separate document and computer systems, one located in the United States and one in Canada. Thus, even assuming documents located in Canada bear any relevance to the United States investigation (and they do not), production of those documents would be unduly burdensome and expensive.

In light of these objections, the Commission staff and Church & Dwight agreed to tentatively compromise on the issue. The parties entered into an oral agreement, whereby Church & Dwight agreed to search for and produce documents related to the sale and marketing of male condoms in Canada to the extent that those documents were physically located in the United States. If after reviewing the initial production the Commission staff still wanted to pursue documents located in Canada, both parties agreed that they would revisit the issue and engage in further discussions. In addition to compromising regarding the production of Canadian documents, the parties agreed that Church & Dwight could begin producing responsive documents on a rolling basis. Pursuant to these agreements, Church & Dwight began producing

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the many documents requested in the subpoena and CID. To date, over 182,000 pages of documents have been produced involving thousands of hours of review and analysis. Seventeen paralegals nationwide have been assigned to the review process. Church & Dwight produced its lengthy responses to the CID by the July 30, 2009 return date and has continued to steadily produce at enormous cost and burden, the documents requested by the subpoena on a rolling basis over the past several months. This has included, as agreed, documents located in the United States that relate to Canadian condom sales.

While Church & Dwight was still in the process of producing responsive documents and before the Commission staff had an opportunity to review all Canadian documents located in the United States, the Commission staff once again insisted that Church & Dwight produce documents located in Canada relating to its sales practices in Canada. Again, Church & Dwight resisted not only for grounds previously asserted, but also because the Commission staff and Church & Dwight had an agreement in place. However, the Commission staff took the position that they had authority to nevertheless discover these documents as a part of its investigation. When counsel for Church & Dwight questioned this authority and the relevance of the documents to the issues involved in the United States investigation, the Commission staff and its economist responded that the documents were relevant for the purposes of the Commission staff and its economist to conduct a "natural experiment" comparing Church & Dwight's sales, marketing practices and market share for male condoms in Canada with the United States. Unsatisfied with this response and unable to reach a resolution through good faith negotiations, Church & Dwight now files the instant petition to limit or quash the subpoena and CID to the extent that they purport that the "Relevant Area" of the scope of the investigation includes Canada, and seek documents physically located in Canada.

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**I. DOCUMENTS RELATED TO CHURCH & DWIGHT'S
SUBSIDIARIES' SALES PRACTICES IN CANADA
ARE NOT RELEVANT TO THE FTC'S INVESTIGATION
IN THE UNITED STATES**

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

Here, the information sought is not relevant to the stated general purpose of the Commission’s investigation. The general purpose of the investigation is set forth in the Resolution Authorizing Use of Compulsory Process from the four Commissioners and signed by the Secretary of Commerce. The Resolution clearly states that the purpose is only to investigate Church & Dwight’s marketing practices with regard to male condoms throughout retail chains “in the United States.”² Documents related to Canadian condom sales and marketing practices, by Church & Dwight or a competitor, are in no way relevant to this inquiry.

² “Nature and Scope of Investigation: To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.” (emphasis added)

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Significantly, the Commission staff does *not* allege that Canadian documents directly address issues central to their investigation. Nor does the Commission staff claim that crucial documents needed for its investigation into Church & Dwight's United States activities exist only in Canada. *See In re Polypore*, Docket No. 9327, 2009 WL 569708 (F.T.C. Feb. 3, 2009) (Chappell, A.L.J.) (holding that a U.S. corporation was required to produce document located with a foreign subsidiary because the documents related to central issues in the case and because certain information contained in those documents could only be obtained from their overseas location). Instead, the Commission staff merely asserts that the documents located in Canada may be necessary for purposes of indulging in an economic "natural experiment" that purports to compare Church & Dwight's condom sales and distribution activities in the United States with the same type of activities in the male condom market in Canada.

However, the Commission staff has no basis for believing that this "natural experiment" is relevant or based on any logically sound premise. As stated by former Chairman Deborah Platt Majoras and current Commissioners William E. Kovacic and J. Thomas Rosch, "natural experiments" look to whether "the posited harm has occurred under *circumstances similar to the proposed transaction*[".]” *See FTC v. Foster*, No. CIV 07-352 JB/ACT, 2007 U.S. Dist. LEXIS 47606, *97 (D.N.M. May 29, 2007) (Browning, J.) (emphasis added) (quoting "Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications"). Here, the Commission staff has provided absolutely no indication that the sale and distribution of male condoms by Church & Dwight's Canadian subsidiary in the Canadian market constitute actions taken "under circumstances similar" to the sale and distribution of male condoms by Church & Dwight in the United States market. Moreover,

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jurisdictional constraints (such as the FTC's inability to compel, for example, (1) testimony from Church & Dwight's Canadian based employees, (2) documents and testimony from Canadian based retailers, and (3) documents and testimony from Church & Dwight's competitors in Canada) preclude any argument by the Commission staff that the requisite similarity can ever be demonstrated if they are able to obtain documents from Church & Dwight that are located in Canada. Thus, from the start, the proposed "natural experiment" is flawed on its face and devoid of a reliable and adequate foundation.

Indeed, the inherently speculative nature of this experiment by the FTC's economist renders it immediately susceptible to an attack under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (Blackmun, J.). For example, the Commission staff has not established that the natural experiment "fits" with its investigation of Church & Dwight's sale and distribution of male condoms in the United States. *Id.* at 591-92 (explaining that Federal Rule of Evidence 702 requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility). As the Supreme Court explained, the concept of fit is not always obvious, "and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert*, 509 U.S. at 591. To illustrate, the Supreme Court used the following hypothetical:

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

Id.

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The same reasoning applies here. Namely, the Commission staff has not offered any indication or independent support whatsoever of a “credible link” between the United States and Canadian markets for male condoms. They have not adduced any affirmative support for the concept that the Canadian market is analogous to the United States market, that, for example, Church & Dwight does not use planogram agreements in Canada, or that Church & Dwight’s market growth rate has been substantially different in Canada than in the United States. *Cf. United States v. Dentsply Int’l, Inc.*, No. 99-5, 2000 U.S. Dist. LEXIS 6925 (D. Del. May 10, 2000) (Schwartz, J.) (allowing the DOJ to obtain documents for comparative market analysis purposes from foreign subsidiaries but only where the DOJ was found to be seeking information to confirm and supplement discovery that it had obtained through third-party discovery, which supported its belief that further comparative market analysis was necessary).

Moreover, even if the Commission staff is ultimately permitted to obtain documents from Church & Dwight’s subsidiary related to that subsidiary’s distribution and marketing practices in Canada, the Commission staff is simply unable jurisdictionally to take the next needed steps and compel document production from competitors and retailers located in Canada. Nor would the Commission staff be able to jurisdictionally obtain related and needed testimony from Church & Dwight’s subsidiaries’ employees residing in Canada or other relevant persons who are residents of and living in Canada, not the United States. All this would be necessary to lay the proper evidentiary foundation for the admissibility of such information for purposes of the “natural experiment.” *See Fed. R. Evid. 803(6)* (stating that the testimony of a custodian or other qualified witness is required to lay foundation for the admission of documents relating to a regularly conducted business activity). In other words, the jurisdictional inability of the Commission staff to obtain other related documents and take needed testimony renders the entire

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proposed economic “natural experiment” doomed from inception, as being inherently unreliable because it would be based entirely upon inadmissible evidence. *See In re Universal Serv. Fund Telephone Billing Practices Litig*, Case No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 74548, *23-*24 (D. Kan. Sept. 26, 2008) (Lungstrum, J.) (excluding expert’s damage calculations related to antitrust claim where calculations were based solely on an inadmissible and unreliable documents completely lacking in foundation).

Simply put, the Commission staff and economist’s insistence on Canadian data will prove to be nothing more than an attempt to engage in an enormously costly and time consuming exercise that is not based on credible facts. Thus, the Commission staff and economist should be precluded from obtaining documents from Church & Dwight’s Canadian subsidiary.

II. THE EXPENSE OF PRODUCING THE DOCUMENTS LOCATED IN CANADA WOULD BE UNDULY BURDENSOME

Even if the documents relating to Church & Dwight’s sales practices in Canada were relevant to the issues in the United States investigation, the cost of producing the documents would be unduly burdensome. As explained above, documents and records relating to Church & Dwight’s sales and marketing practices in Canada are maintained on a completely separate system than the system that houses records relating to sales practices in the United States. As such, complying with this production would likely cost Church & Dwight hundreds of thousands of dollars and would likely involve over a thousand staff-hours by Church & Dwight employees located in both Canada and the United States.

This expense is even more oppressive given the fact that the cost of producing the documents greatly outweighs the benefits of production, since, as previously discussed, any

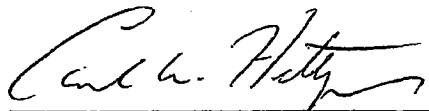
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evidence pertaining to the so-called economic “natural experiment” will likely be inadmissible if this matter is ultimately adjudicated.

CONCLUSION

For the foregoing reasons, the subpoena *duces tecum* and civil investigative demand issued in connection with the FTC’s investigation regarding Church & Dwight’s marketing practices in the United States, should be quashed or limited to the extent they purport that the “Relevant Area” to the investigation includes Canada and to the extent that they request documents and other information located in Canada.

Respectfully submitted,



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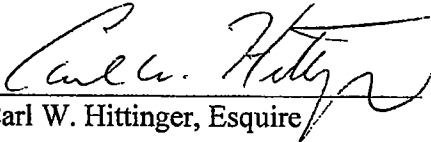
Attorneys for Petitioner Church & Dwight, Inc.

November 12, 2009

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CERTIFICATION OF GOOD FAITH

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


Carl W. Hittinger, Esquire

Dated: November 12, 2009

EXHIBIT A

Exhibit A is the Subpoena, which is Petition Exhibit 3

EXHIBIT B

Exhibit B is the CID, which is Petition Exhibit 4

EXHIBIT C



901 Market Street, Suite 570
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Dean Graybill
Assistant Director

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

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November 4, 2009

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

VIA Email and US Mail

Re: Church & Dwight
FTC File 091-0037

Dear Ms. Esposito and Mr. Hittinger:

By letter of October 30, you have requested that FTC staff limit the Commission's subpoenas and CIDs to exclude the production of documents and information held by Church & Dwight's wholly-owned subsidiary in Canada. You further request that FTC staff, absent such agreement, grant permission to file a petition to quash asking the Commission to limit the discovery requests in this fashion. Although you directed these requests to staff, I felt I should respond given the Commission's delegation of authority to Regional Office managers to rule on requests for extension of time to file petitions to quash, *see*, 16 C.F.R. § § 2.7(d)(3).

As staff has repeatedly stated, we do not agree with your position on the Canadian production issue.¹ Therefore, we cannot agree to limit the scope of the subpoenas and CIDs in this fashion. However, we are willing to grant a short extension of time to file a petition to quash on that issue alone. By this letter I grant an extension until c.o.b. Friday, November 13 for the filing of such a petition. I should emphasize that the extension is granted only with respect to the issue of the discoverability of Canadian-held documents and information, and no other.

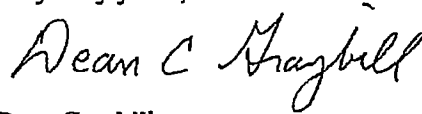
¹ I should note that we also disagree with the contention in your letter that staff agreed to a two-step process whereby we would accept Canada-related documents located in the United States and then determine whether to request information held in Canada. Although that had been proposed by C&D, staff never agreed to this procedure or to forego Canada-held documents under any circumstance.

Esposito, Esq. and Hittinger, Esq..
November 5, 2009
Page 2

Finally, your letter contends that producing such information would impose undue burdens. In this regard, please know that staff stands ready to discuss possible ways of reducing undue burdens with respect to the production of documents and information held by C&D's subsidiary in Canada.

If you have any questions, feel free to confer with staff as has been customary. However, I also am happy to discuss this with you personally if you wish.

Very truly yours,

A handwritten signature in cursive script that reads "Dean C Graybill". The signature is written in black ink and is positioned to the right of the typed name.

Dean Graybill
Assistant Director
Western Region – San Francisco

EXHIBIT D

Exhibit D is the Resolution, which is Petition Exhibit 2

Petition Exhibit 7

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

CHURCH & DWIGHT, INC.

FTC FILE 091-0037

To: Donald S. Clark
Secretary of Commission

REQUEST FOR LEAVE TO FILE OUT OF TIME

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

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

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

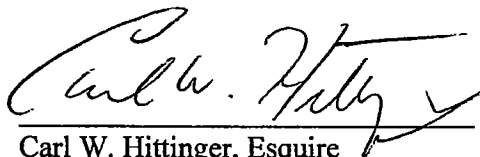
Specifically, the tentative agreement arose after Church & Dwight produced discovery documents from its pending parallel civil litigation with Mayer Laboratories (“Mayer Labs Documents”) addressing the same antitrust issues raised in the FTC’s investigation about male condoms. Aiming to produce these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

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

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

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



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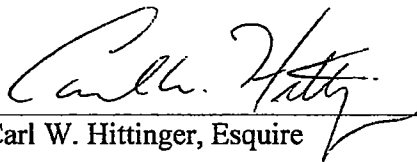
Attorneys for Petitioner Church & Dwight, Inc.

December 4, 2009

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CERTIFICATION OF GOOD FAITH

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


Carl W. Hittinger, Esquire

Dated: December 4, 2009

ATTACHMENT 1

PUBLIC

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

In the Matter of

CHURCH & DWIGHT, INC.

FTC FILE 091-0037

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

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Attorneys for Petitioner Church & Dwight, Inc.

December 4, 2009

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INTRODUCTION

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

BACKGROUND

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

"To determine whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including,

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but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.” (Exhibit B) (*emphasis added*).

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

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

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

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

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

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

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

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

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

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

The test for the relevancy of an administrative subpoena is “whether the information sought is ‘reasonably relevant’ to the agency’s inquiry.” *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979) (Leventhal, J.). Moreover, “the relevancy of an investigative subpoena is measured against the ‘general purposes of (the agency’s) investigation[.]’” *Id.* Indeed, “[w]hen a conflict exists in the parties’ understanding of the purpose of an agency investigation, *the language of the agency’s resolution must govern.*” *FTC v. Invention Submission Corp.*, No. 89-272, 1991 U.S. Dist. LEXIS 5523, at *8 (D.D.C. Feb. 13, 1991) (Lamberth, J.) (*emphasis added*). As Chief Judge Bazelon held in *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977), “[t]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC’s investigation, as set forth in the Commission’s resolution.” (*emphasis added*).

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

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

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

One widely accepted method of excising irrelevant information (including other products) from otherwise responsive documents is through redaction. *See Spano v. Boeing Co.*, No. 3:06-cv-00743-DRH-DGW, 2008 U.S. Dist. LEXIS 31306, at * 7 (S.D. Ill. Apr. 16, 2008) (Wilkerson, J.). Indeed, federal courts across the country have found "redaction appropriate where the information redacted was not relevant to the issues in the case." *Id.* *See Talarigo v. Precision Airmotive Corp.*, No. 06-2885, 2007 U.S. Dist. LEXIS 79444, *8 (E.D. Pa. Oct. 25, 2007) (Hart, J.) (allowing defendant to "redact out irrelevant portions of discoverable documents"); *Olson v. City of Bainbridge Island*, No. C08-5513RJB, 2009 U.S. Dist. LEXIS 58171, * 17 (W.D. Wash. June 18, 2009) (Bryan, J.) (permitting plaintiff to produce redacted versions of discoverable documents to the extent they contained irrelevant personal information); *see also Abbott v. Lockheed Martin Corp.*, No. 06-cv-0701, 2009 U.S. Dist. LEXIS 15329, *7 (S.D. Ill Feb. 27, 2009) (Wilkerson, J.) (allowing defendant to redact information about its benefit plans not at issue in the suit and rejecting the notion that "a general assertion that the documents become confusing with redactions trumps the finding that [the information sought] is not relevant").

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

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produced a report entitled "Aircraft Fuel Water Tolerance." *Id.* at 441. The manufacturer redacted from the produced report any section relating to fuel tanks other than the tank at issue. *Id.* While plaintiff objected to the redactions, the manufacturer asserted that the redactions were proper because information about other tanks was irrelevant to the plaintiff's design defect claim. *Id.* In upholding the redactions, the court stated that the plaintiff failed to make a threshold showing of relevance, and thus, the defendant was "[not] obligated to open to discovery a variety of designs not directly at issue in the litigation." *Id.* at 443.

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

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

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

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

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

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

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

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

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

PUBLIC

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

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

* * *

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

* * *

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

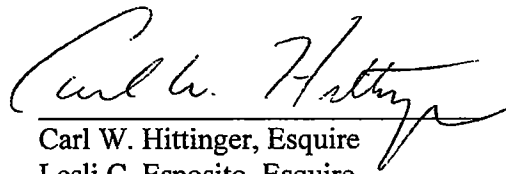
Id. (internal citation omitted) (*emphasis added*).

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

PUBLIC

CONCLUSION

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



Carl W. Hittinger, Esquire
Lesli C. Esposito, Esquire
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DLA Piper LLP (US)
One Liberty Place
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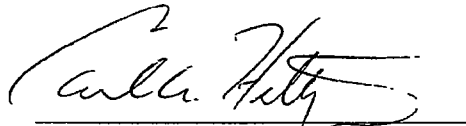
Attorneys for Petitioner Church & Dwight, Inc.

December 4, 2009

PUBLIC

CERTIFICATION OF GOOD FAITH

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



Carl W. Hittinger, Esquire

Dated: December 4, 2009

EXHIBIT A

Exhibit A is the Subpoena, which is Petition Exhibit 3

EXHIBIT B

Exhibit B is the Resolution, which is Petition Exhibit 2

EXHIBIT C



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

July 28, 2009

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

VIA Email

Re: Church & Dwight
FTC File 091-0037

Dear Mr. Hittinger and Ms. Esposito:

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

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

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

Sincerely,



Sylvia Kundig

EXHIBIT D



901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

October 30, 2009

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

VIA Email and US Mail

Re: Church & Dwight
FTC File 091-0037

Dear Lesli and Carl:

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

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

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

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

Sincerely,



Sylvia Kundig

EXHIBIT E

P&L Summary Household Products – Domestic

	<u>Net Sales</u>	<u>Gross Profit</u>	<u>MPC</u>	<u>Organic Sales ▲</u>
A&H Liquid LD	Redacted	Redacted	Redacted	Redacted
XTRA Liquid LD				
Super Scoop				
Oxi Clean Powder				
Baking Soda				
Other Cleaners				
A&H Powder LD				
Other Oxi				
Kaboom				
Carpet Deod				
Other Household				
Total Household				

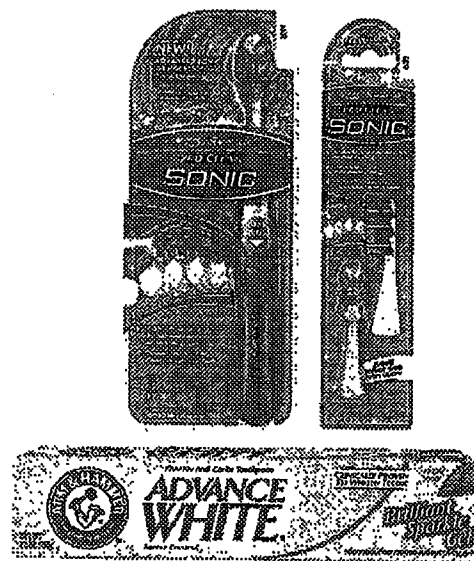
Excludes New Products, Licensing, and SAB

Redacted

Oral Care 2009

Redacted

P&L Including Oral	2009	2008	Chg.
Net Sales	Redacted		
Gross Margin			
MPC			



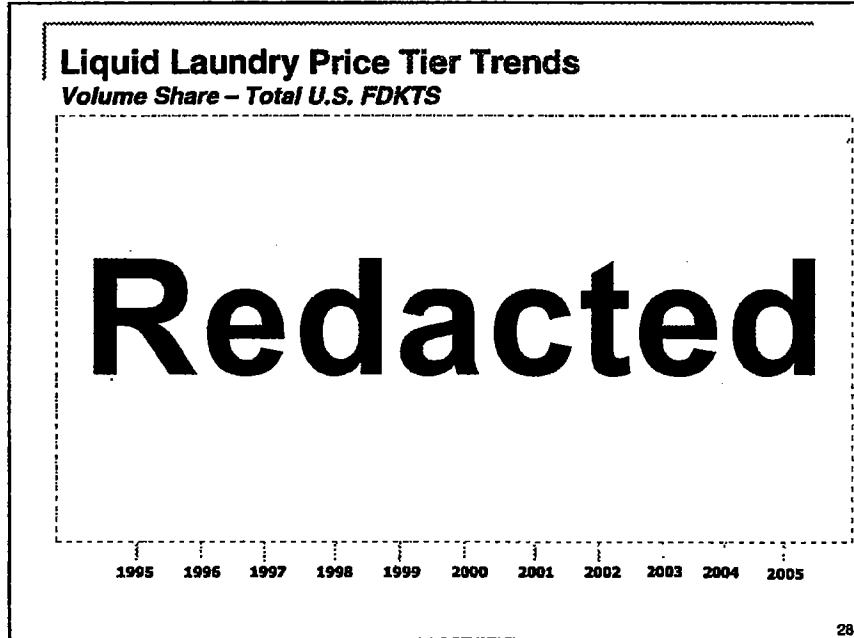
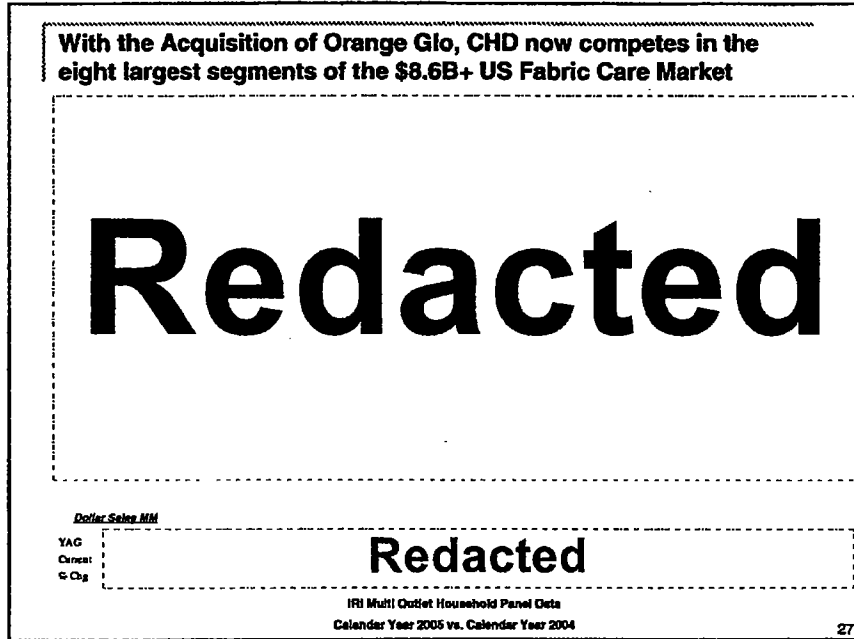


EXHIBIT F

FTC:WATCH

Washington, D.C.
May 4, 2009
No. 741 - 20 pages

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Condom category captain case

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

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

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

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

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

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

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

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FTC:WATCH No. 741

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May 4, 2009

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

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

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

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

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

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

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

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

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

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

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

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

May 4, 2009

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FTC:WATCH No. 741

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

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

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

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

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

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

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

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

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

"Throughout antitrust law, the rule of reason tends to be a euphemism for the absence of liability."
- Commissioner Pamela Jones Harbour.

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

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

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

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

EXHIBIT G

FTC:WATCH

Washington, D.C.

October 26, 2009

No. 750 - 13 pages

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Aye, aye, Captain?

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

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

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

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

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

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

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

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

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

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

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

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

A robust antitrust legislative agenda

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

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

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

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

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

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

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

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

No, really,

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

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

ATTACHMENT 2

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

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

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

Carl W. Hittinger
Partner
DLA Piper US LLP
One Liberty Place
1650 Market Street - Suite 4900
Philadelphia , PA 19103
215-656-2449 T
215-606-2149 F
Sent From My Blackberry

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

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

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

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

Subject: RE: October 30, letter

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

<<http://www.dlapiper.com/>>

Carl W. Hittinger
Partner

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www.dlapiper.com <<http://www.dlapiper.com/>>

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

ProcureSmart - October 26 to 30, 2009

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

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ATTACHMENT 3



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

July 28, 2009

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

VIA Email


Re: Church & Dwight
FTC File 091-0037

Dear Mr. Hittinger and Ms. Esposito:

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

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

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

Sincerely,

Sylvia Kundig

ATTACHMENT 4



901 Market Street, Suite 570
San Francisco, CA 94103

Sylvia Kundig
Attorney

Direct Dial
(415) 848-5188

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

October 30, 2009

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

VIA Email and US Mail

Re: Church & Dwight
FTC File 091-0037

Dear Lesli and Carl:

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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Kundig", written over the word "Sincerely,".

Sylvia Kundig

Petition Exhibit 8



Office of the Secretary

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

December 23, 2009

VIA E-MAIL AND EXPRESS MAIL

Dwight & Church, Inc.
c/o Carl W. Hittinger, Esquire
DLA Piper LLP (US)
One Liberty Place
1650 Market St., Suite 4900
Philadelphia, PA 19103

Re: Petition to Quash or Limit Subpoena Duces Tecum and Civil Investigative Demand Issued to Church & Dwight, Inc. on June 29, 2009

Dear Mr. Hittinger:

The Commission is investigating whether Church & Dwight (“C&D”) has used exclusionary practices to monopolize or attempt to monopolize the domestic distribution and sales of condoms or other C&D products in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.¹ On November 13, 2009, C&D filed, out of time, its Petition to Quash or Limit Subpoena Duces Tecum and Civil Investigative Demand Issued to Church & Dwight, Inc. on June 29, 2009 (“Petition”) on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents,² and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. *Id.*³ By letter dated October 30, 2009, C&D’s counsel for the first time sought an “extension” in time to file a petition to quash or modify the subpoena and CID. Staff responded to this request on November 4, 2009,

¹ The Petition at 1.

² The Petition’s suggestion on page 1 that the investigation is further limited to C&D’s marketing practices through retail chains is incorrect. The scope of the investigation is defined by the resolution authorizing the use of compulsory process. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (“ . . . we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’ [*Fed. Trade Comm’n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)].”). The Petition’s reliance on particular specifications of the subpoena or CID for this claimed limitation is, therefore, unavailing.

³ The subpoena and CID were served on C&D on July 2, 2009, and were returnable on July 30, 2009.

Carl W. Hittinger, Esquire
December 23, 2009

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and indicated that they were “willing to grant a short extension of time to file a petition to quash on that issue alone . . . until c.o.b. Friday, November 13.” Petition, Exhibit C at 1 (Letter from Assistant Regional Director Graybill to Lesli Esposito and Carl Hittinger dated Nov. 4, 2009).

On December 7, 2009, C&D filed a Request for Leave to File Out of Time (“Request”) a further petition to quash or modify the subpoena because staff refused to accede to C&D’s request to be allowed to redact “irrelevant” information from responsive documents that relate to C&D’s non-condom products. C&D claims it should be allowed to redact such information because: (1) non-condom information is irrelevant to the investigation; and (2) press reports about the investigation (based on non-FTC sources) indicate that there may be a potential FTC data security problem that entitles C&D to redact such information, Request, Exhibit 1 at 9.

The FTC cannot prevent private party-witnesses or complainants from providing the media with information about an FTC investigation. In any event, there is nothing in the media reports cited by C&D, Request, Exhibits 1 (F & G), that shows the existence of a data security problem at the FTC. Further, C&D has provided no evidence that its legitimate concerns with the security of its confidential business information in the hands of the FTC will not be adequately protected by the provisions of 15 U.S.C. §§ 46(f) and 57b-2.

The Petition and Request are both time barred and otherwise wholly without merit; and must, therefore, be denied. C&D shall comply with the subpoena and CID on January 26, 2010.

This letter advises you of the Commission’s disposition of the Petition and Request. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.⁴

⁴ This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

Carl W. Hittinger, Esquire
December 23, 2009

Page 3 of 7.

I. The Petition and Request Are Time Barred.

A. The Petition Is Time Barred.

The Commission's rules of practice have separate provisions regarding extensions of time to comply with a subpoena or CID, Rule 2.7(c), 16 C.F.R. § 2.7(c), and extensions of time within which a petition to quash or limit a subpoena or CID may be filed. Rule 2.7(d)(3). Petitions to quash or limit a subpoena or CID must be filed by the earlier of the return date of the subpoena or CID or twenty (20) days after service of the subpoena or CID. In the absence of a timely extension of time within which to file a petition to quash or limit, the Petition and Request in this matter should have been filed no later than July 22, 2009. After the expiration of the time within which to file a petition to quash or limit, the recipient of a subpoena or CID can only file such a challenge if the Commission grants it leave to file a petition out of time based on a showing of extraordinary or unforeseeable circumstances. Rule 2.7(d)(3) grants certain staff managers the authority to "rule upon requests for extensions of time within which to file" a petition to quash or limit; however, the grant of such authority does not extend to requests to revive already expired periods of limitation.

The rules prescribe a reasonably short period within which petitions to quash or limit must be filed in order to insure that such petitions are resolved as early in the investigation as is practicable. The issues raised by the Petition and Request in this matter illustrate why these issues should be resolved as soon as possible. Objections should have been filed by July 22nd, so that these issues could have been resolved in July or August of this year. Because these issues were not presented in a timely manner, the Commission's ability to finish its investigation and assess whether an enforcement action against C&D would be in the public interest has been impaired, without any countervailing benefit to the public. In short, reading the provisions of Rule 2.7(d)(3) so it would permit staff to revive elapsed periods of limitation would eviscerate the rule's salutary purpose (expediting the resolution of petitions to quash or limit process).

There appears to have been some confusion on the part of both staff and C&D with regards to staff's authority to grant an extension of time to file a petition to quash or limit after the expiration of the limitations period for such filing. Accordingly, the Petition will be treated as if it had been filed as a motion for leave to file the Petition out of time.

B. C&D Waived the Right to Raise the Issues Set Forth In the Request.

C&D's justification for not filing the Request raising the redaction issues along with the Petition was "because appropriate grounds for filing [such] a petition to quash or limit the subpoena did not arise before at least October 30, 2009." Request at 2. C&D's Exhibits, however, do not support its claim. Instruction R to the subpoena (Petition, Exhibit A) expressly prohibited redactions on any basis other than a claim of privilege. Additionally, on July 28, 2009, staff advised C&D in writing that it had no right to redact information unless the redaction was based on a claim of privilege. Request, Exhibit (1)(C) (Letter from Sylvia Kundig to Carl Hittinger and Lesli Esposito dated Jul. 28, 2009). That letter directed C&D to "please produce

Carl W. Hittinger, Esquire
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unredacted versions of all non-privileged, responsive documents.” *Id.* at 1. The clear directive contained in the letter of July 28 cannot reasonably be construed to apply only to some subset of documents, instead of the entirety of the documents to be produced. In short, C&D knew, or should have known, that it had no right to redact non-privileged information from responsive documents at least as early as some point shortly after its receipt of the subpoena.

Even if it were assumed, *arguendo*, that there was some lingering ambiguity regarding redaction of non-privileged information until sometime on or about October 30, 2009, it does not explain C&D’s filing of a piecemeal petition with the Commission—Part A on November 13th and Part B on December 7th. *Wellness Support Network*, File No. 072-3179 at 2 (FTC Apr. 24, 2008) (Letter Ruling dismissing appeal from denial of petition to quash CID) (“The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID.”). C&D has offered no evidence to support its decision to file the Petition and Request separately.

As set forth below, the Petition and Request are substantially without merit; therefore, denial of leave to file the Petition and Request out of time leads to the same result that would have been obtained had such leave been granted. Accordingly, leave to file the Petition and Request out of time is denied.

II. The Information Being Sought Is Reasonably Relevant to the Investigation.

A. The Canadian Marketing Documents and Information Are Reasonably Relevant to the Investigation.

The Petition correctly notes that documents are relevant to investigatory process if they are reasonably relevant to the FTC’s investigation measured against the scope and purpose set forth in the resolution authorizing the use of compulsory process. Petition at 4 (quoting *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (“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.”)). The Petition further acknowledges that a United States company may be compelled to produce records of its foreign subsidiaries. Petition at 5 (citing *In re Polypore*, 2009 WL 569708 (F.T.C. Feb. 3, 2009) (Chappell, A.L.J.)).⁵

Petitioner argues that its Canadian marketing documents do not meet the requisite relevance standard because differences in law and practices, as well as market conditions, between the United States and Canada would render the Canadian records incapable of any probative value regarding either comparable or comparative marketing practices undertaken by C&D in the United States. The Petition claims this is so, because the Commission would be

⁵ Docket No. 9327.

Carl W. Hittinger, Esquire
December 23, 2009

Page 5 of 7.

incapable of acquiring data sufficient to support a “natural experiment” that would be admissible in evidence. Petition at 5-8. It is premature to speculate on whether the Canadian marketing documents might be admissible in evidence during an enforcement action to support a natural experiment or for any other purpose.⁶ A fuller quotation from the *Texaco* case relied upon by Petitioner will illustrate the point:

We agree with the FTC that comparative information of this sort is “reasonably relevant” to its investigation. While, in response to the companies’ arguments, the FTC has advanced several examples to demonstrate the relevance of bid files, the Commission emphasized that this approach which requires, in effect, the delineation of a particular theory of violation is inappropriate in the pre-complaint stage; and here, too, we agree. While the FTC has not articulated the specific anti-competitive practices which may be present, it could not reasonably do so without access to the relevant documents. Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance.

Texaco, 555 F.2d at 877 (footnotes omitted). It is early in the Commission’s investigation. The Commission is not yet in a position to “anticipate” potential theories of liability or resolve questions of evidence admissibility; and *Texaco* confirms that the FTC should not be asked to do so at this point in an investigation.

B. Information and Documents About C&D’s Non-Condom Products Are Reasonably Relevant to the Investigation.

The Request claims that C&D should be allowed to redact information regarding C&D’s non-condom products because such information bears “absolutely no relation to the stated purpose of the Commission’s investigation . . . as set forth in the Resolution.” Request, Exhibit 1 at 4. This claim is without merit on a variety of levels. This claim misstates the terms of the resolution authorizing the use of process. Petition, Exhibit D at 1 (“Nature and Scope of Investigation: To determine whether [C&D] has attempted to acquire . . . a monopoly in the

⁶ “There is also this question of what counts as evidence. Economists have this thing that it’s not evidence unless you can run a regression.” Fed. Trade Comm’n Resale Price Maintenance Hearings: Examining Theories of Benefit from Resale Price Maintenance, Tr.100, Feb. 17, 2009 (Dr. Benjamin Klein). It is premature to even speculate either whether the Canadian marketing data will be able to produce reliably predictive regression analyses or whether it might otherwise be admissible for some other purposes at trial. More importantly, however, even if C&D’s Canadian marketing records were neither capable of supporting regression analysis nor admissible at trial, those records will still help the Commission decide whether there is reason to believe that an enforcement action against C&D would be in the public interest.

Carl W. Hittinger, Esquire
December 23, 2009

Page 6 of 7.

distribution or sale of condoms in the United States . . . through exclusionary practices [regarding] . . . Trojan brand condoms and other products distributed and sold by [C&D] . . . in violation of Section 5 of the Federal Trade Commission Act. . .”). The resolution on its face authorizes an investigation regarding the marketing of all of C&D’s products. Additionally, the probative value of any given part of a document can be and is affected by its context; that is to say that context can sometimes be as important as text. It is frequently necessary in a law enforcement investigation for witnesses to be able to identify and authenticate documents; those 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. Finally, a comparative analysis of C&D’s marketing strategies can have significant probative value; for instance, a comparison of marketing strategies for products where C&D may have market power to the marketing practices where it may not have market power could be informative. The request to redact information relating to C&D’s non-condom products must be denied because those materials are reasonably relevant to the Commission’s investigation.

III. No Evidence Supports C&D’s Burden Claim

“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party,” *Texaco*, 555 F.2d at 882, and is not easily met where, as here, the FTC seeks information that is reasonably relevant to its investigation. Petitioner claims that compliance will cost it “hundreds of thousands of dollars” and involve more than 1,000 staff-hours of effort. Petition at 8. C&D has not supported this claim with facts, and has not noted that staff have repeatedly offered to work with it to mitigate production costs wherever possible. “At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting the particular specifications at issue).” *Nat’l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998). C&D made no reasonable attempt to show factually that the production of its Canadian marketing documents would “unduly disrupt or seriously hinder normal operations of [its] business.”⁷

⁷ *Texaco*, 555 F.2d at 882 (“Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”). Further, C&D’s relevance and burden claims appear to be contradicted by its own records. It appears that C&D has already produced some documents showing that C&D can and does readily produce Canadian marketing experience records to interested US retailers.

Carl W. Hittinger, Esquire
December 23, 2009

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IV. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** C&D be, and it hereby is, **DENIED** leave to file its Petition and Request out of time.

IT IS FURTHER ORDERED THAT Petitioner shall comply with the subpoena and CID on January 26, 2010.

By direction of the Commission.

Donald S. Clark
Secretary

Petition Exhibit 9



PUBLIC

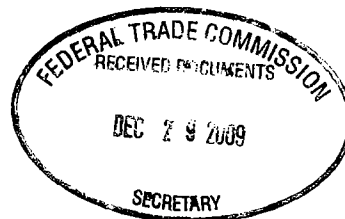
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Carl W. Hittinger
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T 215.656.2449
F 215.656.3301

December 28, 2009

VIA UPS NEXT DAY AIR

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



**Request for Rehearing by the Full Commission of the Denial of Petition to Quash or Limit Subpoena Duces Tecum and Civil Investigative Demand Issued to Church & Dwight, Inc. and Denial of Request for Leave to File Out of Time
File No. 091-0037**

Dear Secretary Clark:

Pursuant to 16 C.F.R. § 27(f), Church & Dwight, Inc. ("C&D") hereby requests a rehearing by the full Federal Trade Commission of Church & Dwight, Inc.'s Petition to Quash or Limit Subpoena Duces Tecum and Civil Investigative Demand, filed November 13, 2009, and Request for Leave to File Out of Time a further Petition to Quash or Modify the Subpoena ("Request"), filed December 7, 2009. A copy of C&D's Petition and Request appears as Appendices "A" and "B" hereto.

C&D's Petition and Request regarding the Subpoena and Civil Investigative Demand, issued on June 29, 2009 ("CID"), was denied by Commissioner Pamela Jones Harbour, by letter dated December 23, 2009, which was received by counsel for C&D by express mail on December 24, 2009. The letter denying the Petition and Request is attached as Appendix "C" hereto.

C&D respectfully disagrees with the ruling of Commissioner Jones Harbour, and accordingly requests that the entire Commission review the Petition and Request and all the issues presented herein.

In addition to the requested full Commission review, C&D respectfully requests that the full Commission issue a stay of compliance with the Subpoena and CID, as now set forth in the letter decision for January 26, 2010, until such time as the full Commission has reviewed the Petition and Request and has reached a final decision on the important issues raised that have not heretofore been addressed by the Commission or the federal courts.

Respectfully submitted,

DLA Piper LLP (US)

A handwritten signature in black ink that reads 'Carl W. Hittinger'.

Carl W. Hittinger

cc: Sylvia Kundig, Esquire
Linda Badger, Esquire

EAST42647538.1

Appendices A, B and C to C&D December 28, 2009 Request for Rehearing are Petition Exhibits 6, 7 and 8

Petition Exhibit 10



Office of the Secretary

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

February 16, 2010

VIA E-MAIL AND EXPRESS MAIL

Church & Dwight, Inc.
c/o Carl W. Hittinger, Esquire
DLA Piper LLP (US)
One Liberty Place
1650 Market St., Suite 4900
Philadelphia, PA 19103

Re: Request for Rehearing by the Full Commission of the Denial of Petition to Quash or Limit Subpoena Duces Tecum and Civil Investigative Demand Issued to Church & Dwight, Inc. ("Petition") and Denial of Leave to File Out of Time ("Request for Leave"), File No. 091-0037

Dear Mr. Hittinger:

This letter advises you of the Commission's disposition of Church & Dwight, Inc.'s ("C&D") Request for Rehearing by the Full Commission of the Denial of C&D's Petition and Request for Leave ("Request for Rehearing"). On November 13, 2009, C&D filed its Petition on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents, and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. On December 7, 2009, C&D filed its Request for Leave seeking to raise a further ground for quashing or modifying the subpoenas and CIDs in order to permit it to redact "irrelevant" information regarding C&D's non-condom products from otherwise responsive documents. On December 23, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying C&D any of the relief requested in either the Petition or Request for Leave on the grounds that: (1) C&D had allowed the time for filing a petition to quash to lapse before seeking an extension from staff of the deadline for filing a petition to quash; (2) C&D had not offered any credible justification for not having filed its Request for Leave at the same time as the Petition; and (3) even if the Petition and Request for Leave had not been time-barred, the requested relief would have been denied because (a) Canadian marketing documents and information regarding non-condom products are relevant to the investigation, (b) C&D had not proven that it would be unduly burdensome for it to produce its Canadian marketing documents, including those kept and maintained in Canada, and (c) C&D had not advanced any plausible data security justification that could only be remedied by its redaction of information related to its non-condom products from otherwise relevant documents.

Carl W. Hittinger, Esquire
February 16, 2010

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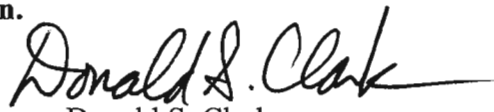
On December 28, 2009, C&D filed its Request for Rehearing based on its disagreement with the Letter Ruling denying its Petition and Request for Leave. Request for Rehearing at 1. The Request for Rehearing presents no new evidence or arguments, and does not suggest that Commissioner Harbour's Letter Ruling is based on any mistakes of law or fact. The Request for Rehearing additionally asks the Commission to stay the January 26, 2010, return dates on the subpoena and CID "until such time as the full Commission has reviewed the Petition and Request [for Leave] and has reached a final decision on the important issues raised that have not heretofore been addressed by the Commission or the federal courts." Request for Rehearing at 1.¹

For substantially the same reasons as those stated in Commissioner Harbour's Letter Ruling of December 23, 2009, the Letter Ruling is affirmed, and the request for a stay of compliance pending the Commission's decision must be denied as moot.

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

IT IS FURTHER ORDERED THAT C&D's request for a stay of compliance with the subpoena and CID be, and it hereby is, **DENIED** because it is moot.

By direction of the Commission.


Donald S. Clark
Secretary

¹ The alleged issues of first impression raised by C&D's claims for relief are not in fact self-evident. As Commissioner Harbour found, C&D's claims for relief are in most cases not even supported by the authorities cited by C&D in its Petition and Request for Leave. *See, e.g.*, Letter Ruling at 5. Counsel for C&D asks the Commission to decide these "important issues" without providing the Commission with any substantial assistance. Further, the issues that are self-evident from the Petition and Request for Leave are relatively settled. It is self-evident that relevant information has to be produced, even if that production entails some burden. *FTC v. Texaco*, 555 F.2d 862, 871-74, 882 (D.C. Cir. 1976); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). It is also self-evident that the relevance of material to be produced must be measured against the purposes stated in the resolution authorizing the use of process. *Texaco*, 555 F.2d at 874. Finally, it is self-evident that the petitioner bears the burden of proving that the specifications of a subpoena or CID are unreasonable. *FTC v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979). And, as Commissioner Harbour found, it is equally self-evident that C&D has not factually or legally supported its claims for relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>		
FEDERAL TRADE COMMISSION,)	
)	
Petitioner,)	
)	
v.)	Misc. No. _____
)	
CHURCH & DWIGHT CO., INC.,)	
)	
Respondent.)	
)	
)	
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**MEMORANDUM IN SUPPORT OF PETITION OF THE
FEDERAL TRADE COMMISSION
FOR AN ORDER ENFORCING A SUBPOENA *DUCES TECUM*
AND CIVIL INVESTIGATIVE DEMAND**

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

including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by C&D.

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

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

JURISDICTION

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

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

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

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

STATEMENT OF FACTS

The Parties

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

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

Background – Condom Market

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

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

The Commission's Investigation and the Subpoena and CID

On June 10, 2009, the Commission opened a formal investigation and issued a Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (FTC File No. 091-0037). Pet. Exh. 1, ¶ 8; Pet. Exh. 2. The Resolution authorized the use of all compulsory process in connection with the investigation to determine "whether Church & Dwight Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated

to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended.” Pet. Exh. 2.

On June 29, 2009, the Commission issued a subpoena *duces tecum* and a CID to C&D requiring the Company to produce documents and data relating to the investigation. Pet. Exh. 1, ¶ 9; Pet. Exh. 3; Pet. Exh. 4. The subpoena contains 23 specifications, while the CID contains 21. *Id.* Both the subpoena and CID seek documents and information regarding C&D’s practices in “(a) the United States; (b) Canada; and (c) each area as to which the Company separately collects and maintains information and data within the United States, including, but not limited to, each Metropolitan Statistical Area (“MSA”) or comparable metropolitan area designation.” Pet. Exh. 3, Definition K; Pet Exh. 4, Definition H.

The subpoena seeks, *inter alia*, documents related to the marketing practices that C&D has employed over time. Documents to be produced include organizational charts (Specification 1); selling aids and promotional materials (Specification 2); business plans, analyses, and data (Specifications 2-3, 6, 12-15); documents relating to contracts and prices (Specifications 7-11); and documents relating to competition in the sale of condoms (Specifications 15-19). Pet. Exh. 1, ¶ 10; Pet. Exh. 3. The CID seeks, *inter alia*, detailed data relating to the sale of condoms, including pricing and discounts at wholesale and retail, as well as quantities sold and through which channel of distribution (Specifications 2-5, 7 and 8); detailed information about C&D’s marketing programs (Specifications 9 and 12); identification of regularly prepared corporate documents (Specification 14); and information about competition in the market for condoms (Specifications 11, 13, 15, and 16). Pet. Exh. 1, ¶ 11; Pet. Exh. 4.

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

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

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

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

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

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

LEGAL STANDARD FOR ENFORCEMENT

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

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

ARGUMENT

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

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

A. The C&D Subpoena and CID Are Lawful

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

Id.

² Section 5 provides, in relevant parts:

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

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

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

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

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

In petitions for enforcement by the Commission, “[t]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC’s investigation, as set forth in the Commission’s resolution.” *Texaco*, 555 F.2d at 874. But, “the agency’s own appraisal of relevancy must be accepted so long as it is not ‘obviously wrong’.” *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (quoting *Carter*, 636 F.2d at 788; *Texaco*, 555 F.2d

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

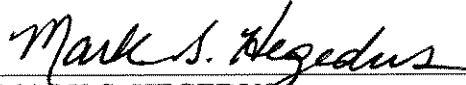
Respectfully submitted,

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Dated: February 26, 2010

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Pursuant to the authority conferred by Sections 9, 16 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 49, 56, 57b-1, Petitioner, the Federal Trade Commission, has invoked the aid of this Court, pursuant to Fed. R. Civ. P. 81(a)(5), for an order requiring Respondent Church & Dwight Co., Inc. to comply in full with the June 29, 2009, subpoena *duces tecum* and the June 29, 2009, civil investigative demand issued to it in aid of a law enforcement investigation being conducted by the Commission (FTC File No. 091-0037).

The Court has considered the Commission’s Petition for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation and the papers filed in support thereof; and it appears to the Court that Petitioner has shown good cause for the entry of this Order. It is by this Court hereby

ORDERED that Respondent Church & Dwight, Inc. appear at _____ a.m./p.m. on the _____ day of _____, 2010, in Courtroom No. _____ of the United States Courthouse in Washington, D.C., and show cause, if any there be, why this Court should not grant said Petition and

enter an Order enforcing the subpoena and civil investigative demand issued to the Respondent and directing it to produce, within ten (10) days of the date of the Order, all responsive documents and information in compliance with the subpoena and civil investigative demand and without any redactions, except those redactions for which Respondent has claimed a privilege or for which it has sought and received the Commission's prior authorization. Unless the Court determines otherwise, notwithstanding the filing or pendency of any procedural or other motions, all issues raised by the Petition and supporting papers, and any opposition to the Petition, will be considered at the hearing on the Petition, and the allegations of said Petition shall be deemed admitted unless controverted by a specific factual showing.

IT IS FURTHER ORDERED that, if Respondent believes it necessary for the Court to hear live testimony, it must file an affidavit reflecting such testimony (or if a proposed witness is not available to provide such an affidavit, a specific description of the witness's proposed testimony) and explain why Respondent believes live testimony is required.

IT IS FURTHER ORDERED that, if Respondent intends to file pleadings, affidavits, exhibits, motions or other papers in opposition to said Petition or to the entry of the Order requested therein, such papers must be filed with the Court and received by Petitioner's counsel by _____ a.m./p.m. on _____, 2010. Such submission shall include, in the case of any affidavits or exhibits not previously submitted, or objections not previously made to the Federal Trade Commission, an explanation as to why such objections were not made or such papers or information not submitted to the Commission. Any reply by Petitioner shall be filed with the Court and received by Respondent by _____ a.m./p.m. on _____, 2010.

IT IS FURTHER ORDERED, pursuant to Fed. R. Civ. P. 26(a)(1)(B)(v) and 81(a)(5), that this is a summary proceeding and that no party shall be entitled to discovery without further order of the Court upon a specific showing of need; and that the dates for a hearing and the filing of papers established by this Order shall not be altered without prior order of the Court upon good cause shown; and

IT IS FURTHER ORDERED, pursuant to Fed. R. Civ. P. 81(a)(5), that a certified copy of this Order and copies of said Petition and Memorandum in support thereof filed herein, be served forthwith by Petitioner upon Respondent or its counsel by personal service, or by certified or registered mail with return receipt requested, or by overnight express delivery service.

SO ORDERED:

United States District Judge

Dated: _____, Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Pursuant to the authority conferred by Sections 9, 16 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 49, 56, 57b-1, Petitioner, the Federal Trade Commission, has invoked the aid of this Court for an order requiring Respondent Church & Dwight Co., Inc. to comply in full with the June 29, 2009, subpoena *duces tecum* and the June 29, 2009 civil investigative demand issued to it in aid of a law enforcement investigation being conducted by the Commission (FTC File No. 091-0037).

After considering the papers of record and the arguments of the parties, the Court has determined that the inquiry is within the authority of the Federal Trade Commission, that the documents and information requested are reasonably relevant to the inquiry, and that Respondent has offered no valid objection for its failure to comply with the Commission’s subpoena and civil investigative demand. Because the Court is of the opinion that the relief sought by the Commission should be granted, it is by this Court hereby

ORDERED that, within ten (10) days of the receipt of this Order, or at such later time as may be agreed upon by the parties, Respondent Church & Dwight, Inc. is, and hereby is, commanded to produce all responsive documents and information in compliance with the subpoena and civil investigative demand and without any redactions, except those redactions for which Respondent has claimed a privilege or for which it has sought and received the Commission's prior authorization.

SO ORDERED:

United States District Judge

Dated: _____, Washington, D.C.