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

Office of the Secretary

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,

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[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.

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]

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[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.

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

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

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[5] Docket No. 9327.

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

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[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.

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]

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[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.

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