ORAL ARGUMENT SCHEDULED FOR OCTOBER 11, 2011

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

FEDERAL TRADE COMMISSION,

Appellee,

v.

CHURCH & DWIGHT CO., INC.,

Appellant.

On Appeal From the United States District Court
For the District of Columbia

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

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GLOSSARY OF TERMS

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I. SUMMARY OF ARGUMENT

In its opposition brief, the Federal Trade Commission ("FTC") is attempting to re-litigate the standard set forth in *FTC v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977)

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an executive agency's Resolution and Subpoena as established in *Texaco*. The

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

Moreover, the parties here are faced with a Magistrate Judge Report and

sought as non-condom product information found in otherwise responsive condom documents. Rather than make any finding as to the reasonable *relevance* of the information sought, the Magistrate Judge concluded that it is *plausible* that such information could be relevant merely because that information is found in otherwise responsive documents. As a result, the Magistrate Judge's conclusions

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remand this case to the District Court to properly apply the *Texaco* standard.

products, including products totally unrelated to condoms, such as cat litter, toothpaste and household cleaning products. Instead, the Magistrate Judge adopted the FTC's interpretation of the Resolution without any analysis whatsoever. (JA at

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enforcement power is not limitless," and—deference notwithstanding—a district court must conduct an independent review of an agency subpoena to ensure that the subpoena falls within the bounds of the authorizing Resolution. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (Edwards, J.). The FTC's position would deprive federal courts of the power: (1) to interpret even an unclear Resolution; and (2) to limit an overbroad subpoena once the same agency that issued the Resolution concludes the subpoena is consistent with the Resolution. Such a result abrogates meaningful judicial review and places virtually unfettered authority in the hands of agencies to probe and pry into a respondent's business

well as the personal financial records of the directors and their spouses. *Id.* at 1415. The agency claimed that the records were necessary to determine whether

directors, however, responded that some of the records sought by the OTS covered periods preceding the allegedly suspect transactions, and that those records could

demanded production of information that does not concern "the distribution or sale of condoms in the United States." (JA at 30.) At no time did the FTC's opening brief to the Magistrate Judge explain why the agency needs proprietary and

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In fact, the FTC's opposition brief shows that it is essentially an attempt to

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reasonably relevant). While an agency has latitude to interpret its own resolution, the judicial function remains separate from the investigative one. The court must conduct an unencumbered review to verify that the subpoena represents an appropriate exercise of the agency's investigative power, regardless of the agency's opinion on the matter.[4] *See Resolution Trust Corp. v. Thornton*, 41 F.3d

that "we have not given agencies carte blanche in the exercise of [subpoena]

At the first step, the court must interpret the resolution to ascertain its permissible scope of inquiry. *See Texaco*, 555 F.2d at 875 (concluding that the resolution at issue "envisions an examination of all phases of the estimating process"). It is not possible to evaluate whether a subpoena falls within the

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

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

A document is unambiguous when, on its face, it is susceptible to only one meaning. *See Consol. Rail Corp. v. United States*, 896 F.2d 574, 579-80 (D.C. Cir. 1990) (Wald, C.J., Ginsburg & Edwards, JJ.) (rejecting the Interstate Commerce Commission's interpretation of the Railroad Revitalization and Regulatory Reform Act of 1976 because it was contrary to the plain, unambiguous meaning of the statute). In determining ambiguity, the court must review the entire document and give effect to the meaning that emerges from the whole. *See Republican Nat'l Comm. v. Taylor*, 299 F.3d 887, 894 n.8 (D.C. Cir. 2002) (Garland, J.) (quoting *Davis v. Davis*, 471 A.2d 1008, 1009 (D.C. 1984) (Belson, J.)) ("'[T]o find a

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

The District Court did not follow those fundamental rules of construction, and the FTC urges this Court to do the same. The FTC focuses on the Resolution's

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including, *but not limited to*" shelf-share discounts on "Trojan-brand condoms *and other products*." (FTC Br. at 25 (emphases added).) Based on those two phrases,

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

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

Assuming, *arguendo*, that the Resolution does not clearly exclude non-condom products from the scope of administrative inquiry, judicial interpretation of its intent and reach is still required. Here the parties have offered competing

> including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight." Pet., Exh. 2. In response, C&D alleges that "other products" is "clearly intended" only to address other non-Trojan brand condom products made by C&D." Opp. at 19.
>
> *That intent, however, is not so clear.*

(JA at 311 (emphasis added).) Foremost, the Magistrate Judge's statement alone does not constitute the type of resolution interpretation required under *Texaco*. The FTC characterizes the final sentence, not as a finding by the Magistrate Judge that the Resolution was ambiguous, but as a statement "that C&D's reading of the

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

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

mentions those practices and the products at issue. *See, e.g.*, Resolution in *In re*

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http://www.ftc.gov/os/adjpro/d9341/091215intelmotion.pdf, at 66 (authorizing investigation regarding "predatory pricing, loyalty rebates and discounts,

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

The FTC faults Church & Dwight for seeking to add words to the Resolution by claiming that the phrase "Trojan brand condoms and other products" should be interpreted as "Trojan brand condoms and other [condom] products." (FTC Br. at 20). According to the FTC, this Court rejected a similar reading of the resolution

Magistrate Judge here never conducted a similar review and instead, in the

Realizing the shortcomings in the Magistrate Judge's opinion, the FTC has attempted on appeal to this Court to offer three purported justifications as to why

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relevant to a pending [6] Specifically, the FTC asserts that the information will: (1)

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arguments establish a finding of reasonable relevance.

a. Tying and Bundling

The FTC asserts, in the abstract, that because tying and bundling are potential exclusionary practices that necessarily include other products, the FTC

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Dwight Op. Br. at 2 (citing JA at 328).) Indeed, since Church & Dwight produced over 1.4 million pages of documents containing the disputed information on January 27, 2011, the FTC has identified no support to the contrary. Where in any of the 1.4 million pages of documents at issue is there support for the FTC's claimed "possibility" of any tying or bundling of condoms with cat litter? FTC

markets, where competition is more robust." (FTC Br. at 17.) This justification is flawed because the FTC has failed to present enough information to make a valid

market comparison with any non-condom product, while simultaneously

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

Moreover, the FTC's attempt to analogize its proposed comparison to the one performed in *Texaco* is unfounded. In *Texaco*, the FTC sought to compare bid files with proved reserve estimates, both of which related to natural gas, the subject

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of that investigation. 555 F.2d at 875, 876-77. A similar comparison here would

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these grounds are flawed.

First, the information at issue here is fundamentally different than the information in *Carter*, which concerned single-page cigarette advertisements. 464 F. Supp. at 640. Such documents are completely distinguishable from the multi-

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

Second, the FTC's authentication argument is rebutted by the very case law that the agency cites to support it. The FTC cites *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 545-46 (D. Md. 2007) (Grimm, J.) for the

III. CONCLUSION

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analysis that comports with this Court's decision in *Texaco*. The Magistrate Judge never interpreted the Resolution; never identified the information sought by the subpoena; and never explained why those materials were reasonably relevant to the

FTC investigation. The FTC's eleventh hour attempt to backstop the Magistrate

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/ Carl W. Hittinger
Carl W. Hittinger

Dated: August 15, 2011

CERTIFICATE OF SERVICE

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

/s/ Carl W. Hittinger
Carl W. Hittinger