United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 2011 Decided December 13, 2011

No. 10-5383

FEDERAL TRADE COMMISSION,
APPELLEE

v.

CHURCH & DWIGHT CO., INC.,
APPELLANT

Consolidated with 11-5008

Appeals from the United States District Court
for the District of Columbia
(No. 1:10-mc-00149)

Carl W. Hittinger argued the cause for appellant. With him on the briefs was Earl J. Silbert.

Mark S. Hegedus, Attorney, Federal Trade Commission, argued the cause for appellee. With him on the brief were Willard K. Tom, General Counsel, David C. Shonka, Principal Deputy General Counsel, John F. Daly Deputy General Counsel, and Leslie Rice Melman, Assistant General Counsel.

R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Before: SENTELLE, Chief Judge; GINSBURG,* Circuit Judge; and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge: Church and Dwight Co., Inc., the leading manufacturer of condoms in the United States, appeals an order of the district court enforcing a subpoena and an accompanying civil investigative demand (CID) issued by the Federal Trade Commission insofar as the FTC would require it to produce information

sold in the United States.[*] In order to market its condoms, Church & Dwight offers retailers a discount based upon the amount of shelf space they devote to its condoms. Church & Dwight also sells a variety of other products, including such consumer products as cat litter and toothpaste.

In June 2009 the Commission issued a "Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation" in order to determine whether Church & Dwight

> 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

Although the Commission did not explicitly request information on products other than condoms, Specification R of the subpoena provides: "All Documents responsive to this request ... shall be produced in complete form, unredacted unless privileged ...."

Church & Dwight turned over to the Commission documents and data sets relating to its condom business with the information on other products redacted. Church & Dwight petitioned the Commission either to limit or to quash the subpoena and the CID. The Commission denied that request and petitioned the district court to enforce the subpoena and the CID.

In the district court, Church & Dwight argued, "Properly read, the FTC's Resolution's language concerning 'Trojan brand condoms and other products distributed or sold by Church & Dwight' does not include irrelevant non-condom products such as toothpaste, cat litter, baking soda and detergents." The district court, finding the T9, T

reasonably, relevant to the Commission's investigation. It also argues that, even if the district court applied the correct legal standard, the court clearly erred when it found the disputed materials were in fact reasonably relevant to the investigation.

A. Standards of Review

Whether the district court applied the correct standard in deciding an investigative subpoena should be enforced is a question of law, which we decide de novo. See U.S. Int'l Trade Comm'n v. ASAT, Inc., 411 F.3d 245, 253 (D.C. Cir. 2005); FTC v. Texaco, 555 F.2d 862, 876 n.29 (D.C. Cir. 1977) (en banc). We review the district court's determination of relevance, a question of fact, only for clear error. See FTC v. Invention Submission Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992).

In the last-cited case we explained "a district court must enforce a federal agency's investigative subpoena if the information sought is 'reasonably relevant'—or, put differently, 'not plainly incompetent or irrelevant to any lawful purpose of the [agency]'—and not 'unduly burdensome' to produce." 965 F.2d at 1089 (brackets in original) (internal citations omitted) (quoting Texaco, 555 F.2d at 872, 873 n.23, 881). We also reiterated a long-established point quite pertinent to the dispute here: "[T]he validity of Commission subpoenas is to be measured against the purposes stated in the resolution ...." 965 F.2d at 1092 (quoting FTC v. Carter, 636 F.2d 781, 789 (D.C. Cir. 1980)).

B. Scope of the Resolution

The main dispute in this case is whether the Commission's inquiry, as defined by the Resolution, extends

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marks, alterations, and citation omitted)). So long as the material the Commission seeks is "relevant to the investigation—the boundary of which may be defined quite generally," *Invention Submission*, 965 F.2d at 1090; *see also Texaco*, 555 F.2d at 874 n.26 ("resolutions of [a broad] sort are not uncommon in the investigative process"), the district court must enforce the agency's demand.

The Commission maintains its Resolution contemplates an investigation into the possibility Church & Dwight is engaged in exclusionary practices in which products other than condoms may play a role. Such practices include bundling discounts, as in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), and tying sales, as in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Church & Dwight replies that, because the initial clause of the Resolution authorizes an investigation into illegal monopolization "in the distribution or sale of condoms ... through potentially exclusionary practices including, but not limited to, [shelf-space discounts] on Trojan brand condoms and other products," the last two words must refer only to Church & Dwight's condom brands other than Trojan. There is, however, a reasonable interpretation of the (a i(a)49 0 Td [(a)4(nqui

monopoly in one of them was an exclusionary practice in violation of § 2 of the Sherman Act).*

Church & Dwight suggests we should reject this interpretation of the Resolution because the Commission's subpoena and CID are too narrowly focused to support a case premised upon a theory of bundling that includes products other than condoms. The Company reasons the Commission, had it wanted to pursue such a theory, would have requested information on products other than condoms even when that lthat nan lion -2(ut)-Tw 11.3(ow)]TJ -0(i)-2()]TJ TJ [(t)-6(o)-40mmisnf ( )Tj 16.1

potential for liability will result in [firms with sufficient market power and multiple product lines] being deterred from using bundling that would have led to reduced prices for consumers and higher welfare"); Richard A. Epstein, Monopoly Dominance or Level Playing Field? The New Antitrust Paradox, 72 U. CHI. L. REV. 49, 71 (2005) ("highly unlikely that 3M would tailor practices that cover six of its departments solely because of the effects that it would have on" the one product market in which it competed with LePage's); Daniel L. Rubinfeld, 3M's Bundled Rebates: An Economic Perspective, 72 U. CHI. L. REV. 243, 254–56, 262–64 (2005) (by not following test for predatory conduct from Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), or some similar standard for predatory conduct, LePage's condemns behavior that does not obviously reduce, and may even promote, consumer welfare). We need not, however, pass upon the merits of the rule in LePage's in order to resolve this case.

Because LePage's is the law in the Third Circuit, and because Church & Dwight sells both condoms and other consumer products within the Third Circuit, the Commission may lawfully investigate whether the Company's practices would constitute a violation of the law in that circuit. Although this court might someday reach a different resolution of the issue presented in LePage's, "a subpoena enforcement action is [generally] not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced." KCcks9t somedsisaCtaave sW 0 Tw (. h)-2(

As for the factual error, the Company erroneously argues *Texaco* requires the district court to "perform an independent review" of the information sought and "articulate the reasons underlying a finding of relevancy" to the investigation. Again the Company would demand of the district court a more searching probe of the relation between the Commission's inquiry and the information sought than our precedents require or even allow. As we said in *Invention Submission*,

> the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation. *See Texaco*, 555 F.2d at 877. ... [I]n light of the broad deference we afford the investigating agency,

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III. Conclusion

Church & Dwight's claims fail because they rest upon an unduly narrow interpretation of the Resolution, one that is inconsistent with the principles laid out in Texaco