UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Petitioner,** **v.** **CHURCH & DWIGHT CO., INC.,** **Respondent.**	**Misc. No. 10-149 (JMF)**

Order of October 29, 2010 [#22]. Before me now are Church & Dwight, Co., Inc.'s Motion to Stay Pending Appeal [#27] and Petitioner Federal Trade Commission's Emergency Motion for an Enforcement Order Requiring Full Compliance with the District Court's October 29 Order or Requiring Church & Dwight Co., Inc. to Show portion of the do

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not relate to its sale of condoms. The FTC asks me to order C&D to produce the unredacted documents, while C&D asks me to stay my October 29, 2010 order pending the resolution of the appeal it has taken.

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I. MOTION TO STAY

I had recent occasion to speak to the standards for granting a stay pending appeal, wherein I stated:

> Last year the Supreme Court described the "traditional standards" for the issuance of a stay pending appeal as follows: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 129 S.Ct. 1749, 1756 (2009).

Friendship Edison Public Charter School Collegiate Campus v. Nesbitt, 704 F. Supp 2d 50, 51 (D.D.C. 2010).

The court of appeals has emphasized that the traditional factors are "typically evaluated on a 'sliding scale.'" Id. at 52 (quoting Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291 (D.C. Cir. 2009)). Thus, a strong showing of one factor may excuse a relatively weaker showing on another. Id.

A. Likelihood of Success on the Merits

The first factor concerns the likelihood that the stay applicant will be successful with his appeal. While, as noted above, all factors need not be of equale.'"

questions raised that go to the merits of a case that are "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation," the balance of equities will be in favor of a stay. Id. (quoting Hamilton Watch Co. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam)).

1. The Seriousness of the Issues on Appeal

C&D asserts that it has raised serious legal questions on its appeal, such that a stay is warranted. Church & Dwight Co., Inc.'s Reply to Petitioner Federal Trade Commission's Opposition to Church & Dwight Co., Inc.'s Motion to Stay Pending Appeal ("C&D Reply") [#33] at 3. In particular, C&D claims that its appeal "raises serious legal questions concerning the interpretation and continuing validity of *Texaco*."[1] Memorandum in Support of Church & Dwight Co., Inc.'s Motion to Stay Pending Appeal ("C&D Memo.") [#27-1] at 5. C&D alleges that "the *Texaco* standard and/or its application in the district courts requires clarification by the D.C. Circuit, after thirty years, as to how the 'reasonably relevant' prong of the standard is to be employed–and how far it can be stretched by the government." Id. at 6. C&D adds that "in the current technological age, with the added demands of e-discovery obligations, Texaco needs to be revisited as the burdens on corporations and prevalence of sweeping searches grow." Id. C&D likens this case to Al-Adahi v. Obama, 672 F. Supp. 2d 81 (D.D.C. 2009), wherein the court determined that the appeal "raise[d] serious and difficult issues, including the proper application of the well-established evidentiary standard in habeas corpus to the facts presented in this case." Id. at 83; C&D Reply at 3.

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[1] FTC v. Texaco, 555 F.2d 862 (D.C. Cir. 1977) (en banc).

The FTC, in turn, objects to C&D's raising these issues on appeal, because C&D did not raise the issue of Texaco's needing to be "clarified" in this Court. Petitioner Federal Trade Commission's Opposition to Church & Dwight Co., Inc.'s Motion to Stay Pending Appeal ("FTC Opp.") [#29] at 3. The FTC claims that, because C&D failed previously to raise its arguments regarding the interpretation of Texaco, it has waived those arguments on appeal. Id. at 3-4. Indeed, as the FTC points out, C&D relied heavily

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would involve greater time and expense than turning over the documents without redactions). The question of technological advances as they may bear on the validity of Texaco is not relevant to this case.

To speak plainly, it appears less that C&D is claiming that anything is wrong with Texaco, and more that it is claiming that there is something wrong with my interpretation of that case. That is no different from most appeals cases.

2. The Merits of the Issues on Appeal

I wish to focus on one of C&D's key refrains throughout its briefing on the stay. C&D repeatedly quotes a sentence from my October 29, 2010 Memorandum Opinion, wherein I stated, "By the broad standards of Morton Salt and Texaco, it is entirely plausible that information appearing in the same document with relevant information

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of the sort, and to read my "entirely plausible" phrasing as meaning something other than the well-established "reasonably relevant" standard is truly to split hairs.

Finally, C&D continues to emphasize the language in the subpoena and civil investigative demand that turns in its favor, and to ignore the language that undercuts its argument. C&D reprints the paragraph from the FTC's Resolution Authorizing Use of Compulsory Process in a Non Public Investigation ("Resolution") concerning the nature and scope of the investigation thusly:

> 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 the 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.

C&D Memo. at 2 (emphasis C&D's).

It must be recalled that, as I pointed out in my opinion, "[t]he FTC resolution itself states that the investigation will concern itself with 'potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on **the percentage of shelf display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight**.'" FTC, 2010 WL 4283998, at *6 (emphasis added). While I cannot say the question is free from doubt, I also cannot say that the redactions C&D made were so clearly correct that reversal of my order is more likely than not.

B. Likelihood of Irreparable Injury to the Applicant if the Stay is Denied

A showing of irreparable harm is crucial. See Wisconsin Gas Co. v. Fed. Energy Regulatory

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United States, would gain valuable new leads from the disclosure, and “it would be

impossible for a court to sort out and redress the harm caused by the incorr

grant the FTC's motion in its other aspects, and require full compliance with the Court's October 29, 2010 order, or require C&D to show cause why it should not be found in civil contempt.

III. CONCLUSION

I will deny Church & Dwight, Co., Inc.'s Motion to Stay Pending Appeal [#27]. I will grant Petitioner Federal Trade Commission's Emergency Motion for an Enforcement Order Requiring Full Compliance with the District Court's October 29 Order or Requiring Church & Dwight Co., Inc. to Show Cause Why It Should Not Be Held in Contempt [#28] to the extent that I will require C&D's full and immediate compliance with my order of October 29, 2010, or, if it does not comply, I will require C&D to show cause why it should not be held in civil contempt. I will, however, stay my order until January 11, 2011, to permit C&D to seek relief in the court of appeals.

A separate Order accompanies this Memorandum Opinion.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE