UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF	)	
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W.L. GORE & ASSOCIATES, INC.	)	**File No. 101-0207**
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	)	

W.L. GORE & ASSOCIATES INC.'S PETITION TO LIMIT OR QUASH SUBPOENA DUCES TECUM DATED MARCH 10, 2011

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Pursuant to Rule 2.7(d) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 2.7(d) and all other applicable regulations, statutes, and rules of practice, W.L. Gore & Associates, Inc. ("Gore") hereby petitions to limit or quash the subpoena *duces tecum* dated March 10, 2011 (the "subpoena") (attached as Exhibit A).

The subpoena requests the production of virtually all documents relating to major aspects of Gore's fabrics business over a 10-year period. If Gore were to comply with its literal terms, the company would have to collect and review millions – perhaps tens of millions – of documents from many or all of its 1,500 Fabrics Division employees located around the world, plus possibly other custodians. Compliance would cost many millions of dollars, and would literally be impossible to accomplish in the four weeks that have been provided.

To be sure, Gore has fully cooperated with the Commission staff both before the subpoena was issued and after. Before even receiving the subpoena, Gore voluntarily produced relevant documents, met with the staff to provide explanations about its business and respond to questions, and offered to produce further materials to assist the staff in understanding the

industry and Gore's contracts with its customers, which Gore understands to be at the heart of the staff's investigation. In the short time since the subpoena was received on March 14, 2011, the company already has produced thousands of pages of documents and offered to produce many more. Unfortunately, because the staff is unwilling even to extend the return date to allow for negotiations over the reasonable scope of what should be produced in response to the subpoena, Gore is left with no alternative but to file this petition to quash.

BACKGROUND[1]

On November 5, 2010, the staff sent a letter to Gore informing it that the Commission was conducting a non-public investigation into whether Gore may have engaged in conduct in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 by "restricting competition for water repellant, waterproof, waterproof and breathable, or chemical resistant fabrics, coating or laminates or the markets for products which use any of those technologies."[2] The letter stated that the "[c]onduct under investigation includes, but is not limited to Gore policies, practices or contracts, agreements, and communications with customers, manufacturers, distributors, or retailers that restrict customers' ability to deal with competing suppliers."

Gore has cooperated fully with the investigation. The company made a voluntary production of business plans and sample contracts in January 2011.[3] It also made several of its executives available for an interview for half a day, which included a detailed presentation to the staff in January about Gore's business, showing how it is organized, what segments it serves, who it competes with, samples of Gore products and competitive products, and other relevant

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1 The factual statements made in this motion are based on the declaration of Michelle Katz, attached as Exhibit B.

2 *See* Letter from Karen A. Mills to Terri Kelly, attached as Exhibit C.

3 *See* Letter from Mark Nelson to Karen A. Mills, attached as Exhibit D.

information.[4] After the January meeting, Gore's counsel expressed willingness to produce additional documents and products on a voluntary basis.

On March 10, 2011, without further communication from the staff (including, for example, any requests for further production of documents or information), the subject subpoena was issued, with Gore receiving it on March 14, 2011. The subpoena demands the production of numerous extremely broad categories of documents, ranging across a broad portion of Gore's business, dating back more than ten years, to January 1, 2001. It calls for "a complete search of all the files of the Company" for responsive documents, which in effect would include virtually every scrap of paper (or its electronic equivalent)[5] that Gore might have that in any way relates to a "relevant product," which is broadly defined to include "any membrane, coating, laminate, seam tape, equipment, technology, intellectual property, or know-how used to make waterproof or waterproof and breathable outerwear, clothing, footwear, gloves, accessories, or other apparel or items."[6] Specification 3 calls for "[a]ll documents relating to the Company's studies, forecasts, plans, strategy or decision relating to research, development, intellectual property protection, manufacturing, branding, licensing, pricing, sales, or marketing of any relevant product ...." Specification 14 calls for "[a]ll documents relating to communications between the Company and any person outside the Company who manufactures or creates and sells, licenses, or leases any relevant product." Specification 10 calls for "[d]ocuments sufficient to identify all Company intellectual property and know how related to any relevant product." Taken together, these three requests alone call for all documents relating to the development, manufacturing, sales, or marketing of Gore's Fabrics Division for the last ten years.

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4 [redacted].

5 Indeed, unlike Second Requests, the subpoena defines documents to include purely transactional documents such as "bills" and "invoices." Subpoena, Def. IX.

6 Subpoena, Def. II.

After receiving the subpoena, Gore's counsel had several conversations with the staff regarding the scope of the subpoena and noted that it was patently overbroad and would require the production of nearly every document from the past ten years from nearly every employee of Gore's Fabrics Division.[7] This includes not only the 1,500 current employees of the Fabrics Division, but also every ex-employee who worked for Gore in the past ten years. Despite these issues, Gore expressed its willingness to provide a substantial production of key documents quickly, without in any way prejudicing the staff's ability to seek additional information after reviewing Gore's initial submission.[8] In other words, Gore proposed to produce documents immediately without seeking *any* modification to the subpoena, with its only request being that the staff defer the subpoena's return date so as to avoid the need to file a motion to quash. During a March 28, 2011 conversation with Gore, the staff requested that Gore put its proposal in writing, which Gore did on March 31, 2011.[9]

While it awaited the staff's response to its proposal, Gore unilaterally began producing documents responsive to the subpoena. Within three weeks after receiving the subpoena, on April 1 and April 4, 2011, Gore produced more than 10,000 pages of materials, including its current organization chart, a number of current and historical business plans, all of its technical specifications, and the majority of its contracts related to the relevant products.[10] It was Gore's hope that by producing those documents immediately and agreeing to produce more documents as reasonably agreed, including the remaining contracts, the staff would be able to assess what if

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7 See Declaration of Mark Nelson, attached as Exhibit F.

8 Nelson Declaration at 1-2.

9 See Letter from Mark Nelson to Karen Mills, attached as Exhibit G. The only extension the staff has agreed to was an initial two-week extension to April 15, 2011.

10 See Letters from Elaine Ewing to Karen Mills, attached as Exhibit H and Exhibit I.

any next steps it should take in its investigation while minimizing the need to burden Gore with requests for enormous volumes of irrelevant documents.[11]

On April 6, 2011 and April 8, 2011, Gore's counsel had further conversations with the staff during which the staff rejected Gore's proposal out of hand.[12] During the course of the April 8 discussion, the staff requested historical organization charts and stated that that such information, as well as unspecified details on the "burden" of complying with the subpoena, would be necessary before the staff would be willing to engage in discussions about narrowing the scope of the subpoena.[13] With the April 15 return date looming, Gore produced historical organizational charts (they are not responsive to the subpoena, which asked only for a current organizational chart), along with information regarding the amount of electronic data its custodians have and the associated burden of complying with the subpoena.[14] Gore also requested a modest two-week extension to the subpoena's return date, in order to continue negotiations with the staff. On April 14, while acknowledging that these submissions "will be useful," the staff denied the request without explanation and has neither agreed to Gore's proposal for the production of documents nor proposed its own suggestions for narrowing the scope of the subpoena.[15] On April 15, Gore's counsel sent a letter to the staff expressing its disappointment with the denial of Gore's request for a two-week extension.[16]

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11 Gore is confident that such a review would substantially narrow, if not eliminate, the need for further productions. For example, the staff can readily see from a review of Gore's contracts that [redacted] Gore's [redacted] t Gore's [redacted] [redacted]

12 Nelson Declaration at 2.

13 *Id.*

14 See Emails from Elaine Ewing to Karen Mills, attached as Exhibit J and Exhibit K.

15 *See* Letter from Karen A. Mills to Mark Nelson, attached as Exhibit L.

16 *See* Letter from Mark Nelson to Karen Mills, attached as Exhibit M.

ARGUMENT

As is plain from the above, this is not an appropriate way for the staff to conduct an investigation. Gore has sought to be accommodating to the staff and to reach a reasonable compromise on the core documents that will allow the staff to evaluate the theories under investigation while not imposing an undue burden on the company. Without even receiving a subpoena, Gore produced business plans, made its business leaders available for interviews, and made an extensive presentation about its business. It offered to produce more on a voluntary basis. Rather than discuss the matter further, the staff disregarded the FTC Staff Manual and issued a patently overbroad subpoena. *See* FTC Staff Manual § 3.3.6.7.5.1 ("The specifications, which are attached to and become part of a subpoena duces tecum, must be drafted with precision and clarity to produce the desired information and to withstand the test of an enforcement proceeding if one becomes necessary. Care should be taken in describing documents to avoid return of irrelevant or redundant materials.").

Indeed, the staff has resisted or ignored all efforts by Gore to plot a reasonable path forward, which would include Gore searching the paper and electronic files of key custodians. *See also* FTC Staff Manual § 3.3.6.7.5.1 ("Consideration should be given to the use of staggered production schedules allowing companies to produce limited information initially and additional information if it is necessary.") The staff has not offered any proposals of its own. The staff has likewise refused to engage on the substance of the contracts that have been produced, which provide ample evidence for the staff to conclude that Gore's relationships with its customers are not anticompetitive in purpose or effect.

Because of the staff's intransigence, Gore is left with no choice but to petition to quash the subpoena. The subpoena seeks irrelevant information, is overly broad, and would be

outrageously burdensome to comply with. Indeed, the subpoena is not limited to information relevant to whether the business practices at issue violate Section 5 of the FTC Act. Rather, the subpoena seeks virtually every document at Gore from the past decade relating to some of Gore's most significant business activities.

A petition to quash should be granted where, as here, the subpoena is overbroad, unduly burdensome, and seeks large volumes of irrelevant materials. *See Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49, 53 (S.D.N.Y. 1996); *Am. Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637-38 (C.D. Cal. 2005); *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998), *aff'd* 200 F.3d 814 (5th Cir. 1999). The burden is on the staff to demonstrate the relevance of the materials sought, which is evaluated against the burden as demonstrated by Gore. *Am. Elec. Power*, 191 F.R.D. at 136. In addition to quashing the subpoena, the Commission may modify the subpoena to address the objections raised. *See, e.g.*, *Faith Satellite Radio, LLC v. Lutheran Church Missouri Synod*, C-10-1373, 2010 WL 3909467 at *2 (D.D.C. October 4, 2010).

I. A "Complete Search of the Company" Would Be Outrageously Burdensome and Overly Broad

Complying with the subpoena's requirement that Gore conduct "a complete search of all the files of the Company" would impose an undue burden on Gore, which is all the more inappropriate given the manifest overbreadth of many of the specifications in the subpoena. Because the definition of relevant product encompasses virtually all of the products manufactured and sold by Gore's Fabrics Division and the scope of the documents responsive to the subpoena is so broad, Gore believes that to undertake "a complete search of the files of the Company" would, at a minimum, require a search of the files of each employee in its Fabrics Division and the shared files of the Fabrics Division. As discussed above, among other things

the subpoena seeks the production of "all documents relating to" various broad subjects, including the Company's "studies, forecasts, plans, strategy or decision" (Specification 3), "competition or potential competition" (Specification 5), "communications between the Company and any person outside the Company who manufacturers or create and sells, licenses, or leases any relevant product" (Specification 14) as well as "documents sufficient to identify all Company intellectual property and know how related to any relevant product" (Specification 10).[17] All of the Fabrics Division employees, even laborers, can be expected to have at least some documents in at least one of these categories. Moreover, because these categories encompass mainly documents that would have no relevance to the limited stated scope of the investigation, they are likewise overbroad.

Searching the computer files and offices of (at least) its 1,500 Fabrics Division employees, as well as a decade's worth of former employees, located in more than 40 offices around the world,[18] would be Herculean. As was communicated to the staff, within the Fabrics Division in North America, the average employee's *active* email file contains approximately 7,500 emails comprising approximately 500 megabytes of data.[19] Across the entire universe of custodians, for active email alone, this would suggest more than 10 million email messages and

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[17] Several of the other specifications are similarly overbroad and unduly burdensome. For example, Specification 5 calls for "[a]ll documents relating to the possibility, likelihood, or plans of the Company, or any other person, to begin, resume, expand, reduce, or discontinue the manufacture, sale, licensing, provision, or use of any relevant product." Specification 6 calls for "[a]ll documents relating to the applicability or effect of any import duties or restrictions, including but not limited to the effect of any "Buy American" provision, requirement, or preference on marketing, competition, prices, sales, demand, output profits, sourcing opportunities, or costs of any relevant product." Specification 13, while not requiring an extensive search of custodians, is likewise overbroad in seeking "[d]ocuments sufficient to show, for each customer and for each product separately recognized by the Company, by month: a. sales in units, and both gross sales and net sales in dollars, where net sales means sales after deducting discounts, returns, allowances and excise taxes, and 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; b. prices, and prices net of any discounts; c. costs; and d. spending on advertising, cooperative advertising, or promotional campaigns." This level of detail has no relevance to the investigation the Commission has authorized.

[18] See Katz Declaration, ¶ 3.

[19] *Id.* at ¶ 4.

750 gigabytes of data. Even if half of the Fabrics Division employees worldwide could be eliminated because they have no connection with Gore's U.S. business, there would still be an estimated 375 gigabytes of active email alone to search.

Gore's Fabrics Division employees also store significant amounts of a variety of information in [redacted] including, in many cases, archived emails.[20] For North America alone, the collective volume of the Fabrics Division employees' [redacted] is more than 1.3 terabytes of data.[21]

Employees also use a [redacted]. For the Fabrics Division in North America alone, this [redacted] contains approximately 1 terabyte of information.[22] In addition to the [redacted], employees store documents (including archived emails in some cases) on their local hard drives [redacted] have paper files, and may store documents on disks, CDs, or personal computers.[23] There are also shared databases, with thousands of records as well as potentially documents from former employees.[24]

Even eliminating those custodians that plainly have no connection to Gore's business in the United States, searching, reviewing, and producing the documents that would be responsive to the subpoena would require tens if not hundreds of thousands of hours of personnel time and cost many millions of dollars.[25] Although Gore (and its counsel) are unaware of any instance where such a search has been attempted and therefore there is no baseline to predict the total expense, typical second request document productions involving only a few dozen custodians

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20 *Id.* at ¶ 5.

21 *Id.*

22 *Id.* at ¶ 6.

23 *Id.* at ¶ 7.

24 *Id.* at ¶ 8.

25 See Declaration of Tom Hall, attached as Exhibit N.

over two to three years can cost a company millions of dollars.[26] The costs here would obviously be astronomical.

II. Requiring Production of "All Documents Prepared, Received, Circulated, Transmitted, or In Use on or After January 1, 2001" Until "Fourteen Days Prior to Full Compliance" Would Be Unduly Burdensome and Overbroad

In addition to casting an unduly burdensome and overbroad net potentially ensnaring more than 1,500 custodians, the subpoena calls for the production of responsive "documents prepared, received, circulated, transmitted, or in use on or after January 1, 2001" and "all documents responsive to any Specification included in this subpoena produced or obtained by the Company up to fourteen (14) calendar days prior to the date of the Company's full compliance with this subpoena."

Complying with this requirement would be incredibly and unduly burdensome. A production that encompasses "all documents prepared, received, circulated, transmitted, or in use on or after January 1, 2001" would require Gore to investigate archived storage and dated electronic records, including files of long-departed employees. Moreover, determining whether a document dated outside the period was "in use" during the period would be essentially impossible. In addition, requiring a production spanning back more than a decade is overly broad given the five-year statute of limitations for actions under Section 5 of the FTC Act.

Requiring a production current to within 14 days of "full compliance" would also be unduly burdensome. As noted, the subpoena would require searching hundreds if not thousands of employees' files plus numerous shared files and databases. Conducting such a search,

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[26] In its 2007 report to Congress, the Antitrust Modernization Commission, which was formed to examine the current application of antitrust laws and to recommend legislative changes, estimated that on average, a second request investigation takes approximately seven months with legal and expert fees (not including vendor fees) in the range of $3.3 to $5.2 million. The ABA's Antitrust Section also provided the AMC with reports that suggest compliance with second requests typically takes around six months and costs $5 million, with more complex transactions taking as long as 18 months and costing the merging parties as much as $20 million.

reviewing the results, and producing responsive documents within 14 days on the scale demanded by the subpoena, to the extent it were even possible (which it plainly is not), would require an army of personnel working around the clock and entail millions of dollars of incremental expense.

III. Several of the Specifications Seek Documents that Can Be Expected to Largely Be Privileged

The subpoena is also unduly burdensome because it seeks numerous privileged documents and requires a log to be submitted on or before the return date of the subpoena as to any documents withheld. For example, Specification 11 seeks "[a]ll documents that refer or relate to any allegation, investigation, lawsuit or settlement relating to any claim that the Company or a competitor violated any federal, state, or foreign antitrust law in connection [with] the manufacture, sale, marketing, or provision of any relevant product." Specification 12 calls for "[a]ll documents related to communications with or proceedings before the U.S. International Trade Commission in connection with any relevant product." Specification 9 seeks "[a]ll documents" relating to certain contractual arrangements (which the subpoena defines as "Exclusive Dealing Arrangements"), which presumably includes counsel prepared drafts and legal advice pertaining to those contracts. Specification 10 seeks "all documents related to suspected, possible, alleged, or actual violations of the Company's intellectual property or threats to its know-how."

The cost of preparing the demanded log would be significant, particularly given the little time that has been provided to comply. In addition, many of the documents sought in these requests would be at best tangential to the investigation. For example, whatever relevance documents about litigation or ITC proceedings Gore might have, the investigation would not be advanced by requiring Gore to log all privileged communications about such matters.

Identifying the matter by docket number would certainly suffice and the requests are excessively and overly broad in light of their limited (if any) relevance.

IV. In the Alternative, Gore Remains Willing to Make the Productions Set Forth in Its March 31 Letter or to Continue to Negotiate an Appropriate Scope

As discussed above, on March 31, Gore made a concrete written proposal for responding to the subpoena. The staff has made no counterproposals of any kind but in its April 14 letter indicated that the custodian information that Gore has provided "will be useful" should there be further negotiations over the scope of the subpoena.

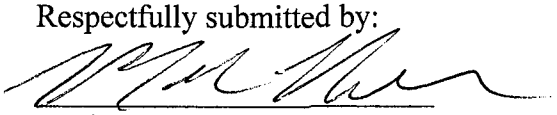
Gore remains willing to produce the substantial volume of documents identified in the March 31 letter, itself a significant burden, assuming a sufficient amount of time is provided. In the alternative, Gore is willing to continue negotiations with the staff if the staff is willing to do so as well. Gore would welcome, in that context, an order requiring the parties to negotiate the scope of the subpoena for up to thirty days, followed by mediating any remaining disputes with the Commission's general counsel's office or other suitable official, with the return date suspended in the meantime. If that process did not lead to a full resolution of the scope of the subpoena, Gore would then renew its motion to quash on whatever grounds remained.

CONCLUSION

Gore has attempted in good faith to negotiate a reasonable process for providing documents on a timely basis. The staff has rejected and continues to reject those efforts, and has offered no modification at all to the subpoena. Rather, the staff has in effect insisted on full compliance with an outrageously overbroad and burdensome 10-year subpoena on the vague assertion that Gore has not demonstrated "burden" or provided enough information about its organization and employees. The subpoena should be quashed and the staff instructed to deal reasonably with Gore in any further requests for documents or information.

Date: April 15, 2011

Respectfully submitted by:



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