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

Office of the Secretary

May 23, 2011

VIA E-MAIL AND COURIER DELIVERY

Mark W. Nelson, Esq.
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006

RE: *Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011 Directed to W. L. Gore & Associates, Inc., File No. 101-0207*

Dear Mr. Nelson:

On April 19, 2011, the Commission received from counsel for W.L. Gore & Associates, Inc. ("Gore") a petition to limit or quash a subpoena *duces tecum* issued by the Commission on March 10, 2011, and directed to Gore. The Commission issued the subpoena in connection with its investigation of whether Gore has engaged in unfair methods of competition "by contracts, exclusionary practices, or other conduct relating to waterproof or waterproof and breathable membranes or technologies and related products."[1] This letter advises you of the Commission's disposition of the petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission's delegate.[2]

For the reasons explained below, the petition is denied, and the documents required by the subpoena must be produced on or before June 7, 2011.[3] Gore has the right to request review of this ruling by the full Commission, and any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.[4] The timely filing of a

---

[1] Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, File No. 101-0207 (Feb. 16, 2011).

[2] *See* 16 C.F.R. § 2.7(d)(4).

[3] Gore has been in possession of the subpoena for over ten weeks and therefore has had ample opportunity to study and develop a plan for responding.

[4] 16 C.F.R. § 2.7(f). This letter ruling is being delivered by email and courier delivery. The email copy is provided as a courtesy, and the deadline by which an appeal to the full Commission must be filed shall be calculated from the date Petitioners receive the ruling by courier delivery. *Id.*

request for review of this ruling by the full Commission does not stay the return date established by this ruling. [5]

1. ***PROCEDURAL POSTURE***

The subpoena required Gore to produce the demanded documents by April 1, 2011. At Gore's request, and pursuant to Commission Rules 2.7(c) and 2.7(d)(3), on March 18, 2011, Commission staff extended both the return date on the subpoena and the deadline for the filing of a petition to quash to Friday, April 15, 2011. In early April, Gore made a token production, totaling approximately two boxes of documents.

On April 15, 2011, Gore submitted a petition labeled "Confidential" to limit or quash the subpoena. This version did not comply with Commission Rules 4.2(d)(4) and 4.9(c), because Gore did not simultaneously submit (1) an explicit request for confidential treatment, conforming to the requirements of Rule 4.9(c); (2) a redacted public version; and (3) copies of the exhibits to the petition. Gore's counsel was notified by the Commission's Secretary that a redacted public version of the petition and a request for confidential treatment had to be filed at the same time as the version labeled "confidential."

On April 18, 2011, Gore submitted the exhibits to the petition, and on April 19, 2011, Gore submitted a version of the petition labeled "Public Version" that included many redactions, and in particular redacted Gore's name. Gore's counsel also submitted a cover letter with its April 19, 2011 submission which in its view supported the request for confidentiality of the redacted material. Pursuant to authority delegated by the Commission, the Commission's Principal Deputy General Counsel, David C. Shonka, addressed Gore's request for confidential treatment in letters dated May 3, 2011 and May 9, 2011, granting in part and denying in part Gore's request for confidential treatment of the redacted material.

Although Gore attempted to correct the above deficiencies, it did not finalize that effort until April 19, 2011, after the April 15, 2011 filing deadline. Thus, its petition was not timely filed. As a matter of discretion, this petition will be considered on the merits. Petitioners are reminded that the Commission's Rules provide that if they wish to request confidential treatment with respect to any portion of a petition to quash, they must adhere to the Commission's Rules. Specifically, they are required simultaneously to provide the Commission with (1) a specific statement making such a request, as described in Rules 4.2(d)(4)(i) and 4.9(c)(1); and (2) a redacted public version of the petition and any supporting exhibits.[6] Thus, any petitions labeled "confidential" that redact the identity of the petitioner or matter name, or lack an accompanying public redacted version "will be rejected for filing pursuant to [Commission Rule] 4.2(g), and

---

[5] *Id.*

[6] 16 C.F.R. §§ 4.2(d)(4), 4.9(c). In particular, Rule 4.2(b) provides that the identity of the petitioner and the matter name – which constitute the title of the action – must be "clearly show[n]" and may not be redacted. 16 C.F.R. § 4.2(b).

will not stay compliance with any applicable obligation imposed by the Commission or the Commission staff * * *[,]" including in particular the obligation to comply with the subpoena or CID at issue.[7]

2. *ANALYSIS*

i. The subpoena is not unduly burdensome

Gore's principal contention is that the subpoena should be quashed because it is unduly burdensome. In support, Gore claims that compliance could require production of documents from over 1,500 employees, requiring a search of over 1.3 terabytes of data that would require possibly hundreds of thousands of hours of personnel time and cost up to ten million dollars. Gore also argues that the time period for relevant documents identified in the subpoena is unduly burdensome because it demands documents dating back to 2001. Gore argues that complying with this requirement would require it to investigate archived storage and dated electronic records, including files of long-departed employees. Gore further argues that the requirement to produce documents current to within 14 days of "full compliance" would also be unduly burdensome because of the volume of documents demanded by the subpoena. Finally, Gore argues that requiring a privilege log is overly burdensome because a large number of documents responsive to the subpoena are likely privileged.

As a preliminary matter, Gore's claims of undue burden are premised on an erroneous reading of the case law relevant to administrative investigations. Indeed, all of the cases cited in Gore's petition involve third party discovery under the Federal Rules of Civil Procedure.

The applicable standard for burden in the context of an administrative investigation is well-established. Over thirty years ago, in *FTC v. Texaco, Inc.*, the D.C. Circuit stated that "the question is whether the demand is *unduly* burdensome or *unreasonably* broad[,]" meaning that it "threatens to unduly disrupt or seriously hinder normal operations of a business."[8] The court distinguished "undue burden" from the "expected" and "necessary" costs imposed in any

---

[7] 16 C.F.R. § 4.2(d)(4).

[8] 555 F.2d 862, 882 (D.C. Cir. 1977) (emphasis in original). *Accord Solis v. Food Employers Labor Rel'ns Ass'n. & United Food & Comm'l Workers Pension Fund*, No. 10-1687, 2011 U.S. App. LEXIS 9110, *8 (4th Cir. May 4, 2011); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089, 1090 (D.C. Cir. 1992); *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986); *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 8 (D.D.C. 2010).

investigation.[9] Moreover, the court found that the fact that a burden resulted from a recipient's chosen method of operating did not make that burden undue.[10]

In citing to cases involving third party discovery, Gore is using standards derived from the Federal Rules of Civil Procedure and applying them – improperly – to an administrative investigation. By their own terms, the Federal Rules of Civil Procedure apply only to civil actions brought in the United States district courts.[11] But administrative investigations are not such civil actions. They are not conducted in court, and, in fact, they may never appear in court.[12] Indeed, the Federal Rules themselves recognize that subpoenas in administrative investigations should be treated differently from subpoenas for discovery; the Advisory Committee Notes that accompanied adoption of Rule 45 specifically recognized that the Rule does not apply to administrative process, including, among others, subpoenas issued pursuant to the FTC Act.[13] Moreover, the Federal Rules of Civil Procedure are intended to serve a purpose completely different from that of an administrative investigation.[14] The Federal Rules of Civil Procedure were created "to secure the just, speedy, and inexpensive determination of every action and proceeding."[15] In contrast, through administrative investigations, the FTC is investigating possible violations of law.[16]

---

[9] *Texaco*, 555 F.2d at 882.

[10] *Id.*

[11] FED. R. CIV. P. 1.

[12] *See e.g.*, *Texaco*, 555 F.2d at 874 ("The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, *and that a complaint may not, and need not, ever issue*.") (emphasis added).

[13] FED. R. CIV. P. 45 advisory committee's note (1937). *See also Maryland Cup*, 785 F.2d at 477-78.

[14] *See*, *e.g.*, *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it.") (citations omitted).

[15] FED. R. CIV. P. 1.

[16] *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (stating that the FTC can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."). Consistent with this broad authority, agencies are not required to tie their investigations to particular theories or specific violations. "[I]n the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case." *Texaco*, 555 F.2d at 874 (emphasis in

Applying the proper standards to this case, it is apparent that Gore has failed to meet them. Gore has the responsibility of establishing undue burden in complying with a Commission subpoena.[17] "[T]he presumption is that compliance [with Commission subpoenas] should be enforced to further the agency's legitimate inquiry into matters of public interest."[18] In order to overcome this presumption and establish undue burden, Gore must show that compliance "threatens to unduly disrupt or seriously hinder normal operations of a business."[19] The target of a subpoena must expect to incur some burden in responding to a subpoena and the evidence required to demonstrate an undue burden increases when the burden is in large part attributable to the magnitude of the recipient's business operations and the comprehensive nature of the investigation.[20]

In particular, in asserting claims of burden, subpoena recipients must consider first how technology may help reduce any burdens associated with review and production of electronically stored information ("ESI"). There are a myriad of "advanced analytical software applications and linguistic tools" available to help reduce any burden of reviewing and producing ESI.[21]

---

original); *see also Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) ("[T]he 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 a violation."). To require an agency to identify its specific needs for information before allowing the agency to obtain that information would run contrary to these principles.

[17] *In re Nat'l Claims Serv., Inc.,* 125 F.T.C. 1325, 1328-29 (1998).

[18] *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980).

[19] *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 8 (D.D.C. 2010) (quoting *Texaco*, 555 F.2d at 882).

[20] *See Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) ("There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one – and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations."); *In re FTC Corporate Patterns Report Litig.*, Nos. 76-0126, 76-0127, 1977 WL 1438, at * 16 (D.D.C. July 11, 1977) (concluding that "there is no doubt that the relative size and complexity of the corporate parties' business operations contribute to the compliance burden" and noting that "the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations.").

[21] FED. R. EVID. 502 advisory committee's note (Nov. 28, 2007). *See also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) ("Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made

Thus, a party who claims burden related to ESI should include in its petition a discussion of the tools or techniques considered and how these have affected or mitigated the burden alleged.

It is not enough for a party to simply say, without more, that a Commission subpoena is broad or unduly burdensome. To the extent a party wishes to reduce its burden, it is incumbent on that party to come forward and present staff with information about the company and how it stores its electronic information and with affirmative suggestions about how the scope of the subpoena might be narrowed in order to focus the inquiry. This responsibility is particularly necessary given the prevalence of ESI and the current realities of e-discovery. Such affirmative suggestions could include limiting the scope to key custodians, narrowing the applicable time periods, proposing search methodologies such as the use of keywords, predictive coding, or concept searches, or utilizing other search and review techniques.

Gore has done none of that in this case. For example, Gore has not demonstrated through concrete evidence or declaration that the costs imposed by this subpoena are outside of the normal costs to be expected in an investigation, that these costs are unduly burdensome in light of the company's normal operating costs, or that these costs would seriously hinder or threaten its normal operations.[22] To the extent that the subpoena requires Gore to review millions of documents collected from hundreds of workers, including laborers, that burden is "in large part attributable to the magnitude of [Petitioners'] business operations" and is not by itself undue.[23] Gore's complaints about searching large numbers of documents or hundreds of custodians, or paying millions of dollars, without more, is insufficient to support a claim of undue burden.[24]

Gore's claim of burden from the production of ESI includes only a token reference in one of its exhibits to the impact of advanced analytical techniques or tools. Gore has claimed that it potentially has a terabyte or more of data, even after de-duplication, but Gore has not demonstrated that it has explored avenues for otherwise meeting staff's investigative demands, or offered the types of affirmative suggestions for reducing its burden described above.

---

in electronic form obviating the need for mass photocopying."); John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, New York Times, Mar. 4, 2011, at A1, *available at*, http://www.nytimes.com/2011/03/05/science/05legal.html.

[22] *Maryland Cup*, 785 F.2d at 479.

[23] *Texaco*, 555 F.2d at 882.

[24] *Shaffner*, 626 F.2d at 38 (rejecting as insufficient "conclusory allegation that compliance . . .would 'severely interfere, disrupt and temporarily terminate'" recipient's business).

ii. The subpoena is not unreasonably broad

Gore argues that the subpoena is overly broad (with respect to both relevant time period and breadth of demanded documents) because it demands production of numerous broad categories of documents ranging across a broad portion of Gore's business, dating back more than ten years, to January 1, 2001. Gore also argues that the subpoena is not limited to information relevant to whether the business practices at issue violate Section 5 of the FTC Act, and seeks irrelevant information.

At the investigative stage, however, Commission subpoenas are necessarily broad in coverage, so as to aid the Commission in making a determination as to whether to file a complaint. The D.C. Circuit, among others, has favored such a broad approach, stating:

> At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint. The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally * * *. [25]

For these reasons, specifications in a subpoena also may be more general and may cover a wide breadth of material. Indeed, broad subpoenas are often necessary at the outset of an investigation as a practical matter because staff lacks information on how a subpoena recipient keeps or maintains documents in the normal course of its business. It is for this reason that staff is authorized to negotiate the scope of a subpoena in order to obtain those documents necessary and relevant to the investigation.

The scope of an investigation is necessarily determined by the nature of the conduct under investigation, and investigations into conduct that spans years of activities, or multiple participating entities may well require broadly-sweeping subpoenas. Here, the breadth of the subpoena is not unreasonable compared to subpoenas issued in similar investigations. For example, in the Church & Dwight matter, in June 2009 the FTC issued and in October 2010 the federal court enforced a subpoena that included 23 specifications, some of which dated back to 2001, and a Civil Investigative Demand that included 21 specifications, some of which dated

[25] *Invention Submission Corp.*, 965 F.2d at 1090 (citing *Texaco*; citations omitted, emphasis in original). Furthermore, district courts must defer to an agency's determination of the information relevant to an investigation, unless it is "obviously wrong." *Id.* at 1089 (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980)).

back to 1999.[26] Moreover, both the subpoena and CID called for documents and information kept in Canada by Church & Dwight's Canadian subsidiary. In light of these requests, the single subpoena issued to Gore, which included 15 specifications dating back to 2001, is not unreasonable.

Having failed to meet the standards demonstrating undue burden or unreasonable breadth, we deny Gore's petition and direct it to comply with the subpoena as issued. [27]

* * *

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** W.L. Gore & Associates, Inc.'s Petition to Limit or Quash is **DENIED**; and

IT IS FURTHER ORDERED THAT W.L. Gore & Associates, Inc. shall comply with the Commission's subpoena by June 7, 2011.

By direction of the Commission.

Donald S. Clark
Secretary

---

[26] *See* Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation, *FTC v. Church & Dwight Co., Inc.*, Case No. 1:10-mc-00149-EGS, at Dkt. No. 1, Exs. 3-4 (D.D.C. Feb. 26, 2010).

[27] Staff retains the discretion to modify the subpoena should Gore come forward with such acceptable proposals in the future.