Responses to Petitions to Quash

This Challenge to the FTC's Jurisdiction Is Premature.

"With rare exceptions . . . , a subpoena enforcement action is 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." *Fed. Trade Comm'n v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001). "[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996). Investigations should not be bogged down prematurely with jurisdictional challenges. *Fed. Trade Comm'n v. Monahan*, 832 F. 2d 688, 690 (1st Cir. 1987) (Breyer).[2] Petitioners do not claim that the FTC Act excludes their companies or their activities on behalf of those companies from its coverage; rather, they erroneously claim that the so-called state action doctrine is an immunity that excludes them from the Commission's investigatory reach. Petition at 3-4. Petitioners misapprehend the nature and effect of the state action doctrine.

The State Action Doctrine Is Only An Affirmative Defense Assertable In Litigation.

The Petition correctly notes that the Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. This so called "state action

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timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

[2] *Monahan* relied on *Fed. Trade Comm'n v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious."). The parties in *Swanson* were tour operators who claimed to be subject only to regulation by the Civil Aeronautics Board.

doctrine" creates a potential affirmative defense to be asserted in litigation – it does not create an immunity from law enforcement proceedings. *South Carolina Bd. of Dentistry v. Fed. Trade Comm'n*, 455 F.3d 436, 444 (4th Cir. 2006).

Assuming, *arguendo*, that Empire Gas, Inc., Liquilux Gas Corp. or others may have some basis for asserting a state action doctrine defense in the event of a Commission law enforcement action against them, that still does not excuse them from responding to valid FTC investigatory compulsory process. To do so would improperly limit the Commission's ability to evaluate the facts that might form the basis for such a defense and whether the Commission has a basis for pursuing a law enforcement action. *Monahan*, 832 F.2d at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a 'clearly articulated and affirmatively expressed' state policy. . . . Again, we cannot now say, without knowing more facts, whether or not this additional 'state supervision' condition will apply.").[3] Unlike Petitioners' employers, the party seeking state action protection from an FTC investigation in *Monahan* was an agency of the Commonwealth of Massachusetts itself. Petitioners have offered no plausible justification for why the Commission should accord a private party's claims for protection under the state action doctrine from an FTC investigation any greater weight than was accorded to the Massachusetts Board of Registration in Pharmacy by the First Circuit Court of Appeals in *Monahan*. Petitioners are not entitled to have their CIDs or subpoenas quashed or modified by reason of the state action doctrine.[4]

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[3] *Fed. Trade Comm'n v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) ("But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency's adjudication.); *South Carolina Bd. of Dentistry*, 455 F.3d at 444 (holding that the Board's state action defense did not qualify for interlocutory appeal because the state action issue would not be "effectively unreviewable" on appeal from the FTC's final decision).

[4] Petitioners' claim that the subpoenas should be made returnable in Puerto Rico is without merit. Petitioner's citation to provisions regarding the taking of testimony pursuant to a CID issued under 15 U.S.C. § 57b-1,

CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply with the CIDs on December 11, 2009. Commission staff may reschedule the investigational hearings for Petitioners pursuant to the subpoenas at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

Petition at 13, is unavailing in this case. The subpoenas at issue in this matter were issued under 15 U.S.C. § 49; this latter provision of the FTC Act permits the taking of testimony "at any designated place of hearing."

Responses to Petitions to Quash

CHURCH & DWIGHT CO., INC.

FTC File No. 091-0037, Decision, December 23, 2009

RESPONSE TO PETITION TO QUASH OR LIMIT SUBPOENA *DUCES TECUM* AND CIVIL INVESTIGATIVE DEMAND ISSUED TO CHURCH & DWIGHT, INC.

Dear Mr. Hittinger:

The Commission is investigating whether Church & Dwight ("C&D") has used exclusionary practices to monopolize or attempt to monopolize the domestic distribution and sales of condoms or other C&D products in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[1] On November 13, 2009, C&D filed, out of time, its Petition to Quash or Limit Subpoena Duces Tecum and Civil Investigative Demand Issued to Church & Dwight, Inc. on June 29, 2009 ("Petition") on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents,[2] and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. *Id.*[3] By letter dated October 30, 2009, C&D's counsel for the first time sought an "extension" in time to file a petition to quash or modify the subpoena and CID. Staff responded to this request on November 4, 2009, and indicated that they were "willing to grant a short extension of time to file a petition to quash on that issue alone . . . until c.o.b. Friday, November 13."

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[1] The Petition at 1.

[2] The Petition's suggestion on page 1 that the investigation is further limited to C&D's marketing practices through retail chains is incorrect. The scope of the investigation is defined by the resolution authorizing the use of compulsory process. *Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (". . . we have previously made clear that 'the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.' [*Fed. Trade Comm'n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)]."). The Petition's reliance on particular specifications of the subpoena or CID for this claimed limitation is, therefore, unavailing.

[3] The subpoena and CID were served on C&D on July 2, 2009, and were returnable on July 30, 2009.

Petition, Exhibit C at 1 (Letter from Assistant Regional Director Graybill to Lesli Esposito and Carl Hittinger dated Nov. 4, 2009).

On December 7, 2009, C&D filed a Request for Leave to File Out of Time ("Request") a further petition to quash or modify the subpoena because staff refused to accede to C&D's request to be allowed to redact "irrelevant" information from responsive documents that relate to C&D's non-condom products. C&D claims it should be allowed to redact such information because: (1) non-condom information is irrelevant to the investigation; and (2) press reports about the investigation (based on non-FTC sources) indicate that there may be a potential FTC data security problem that entitles C&D to redact such information, Request, Exhibit 1 at 9.

The FTC cannot prevent private party-witnesses or complainants from providing the media with information about an FTC investigation. In any event, there is nothing in the media reports cited by C&D, Request, Exhibits 1 (F & G), that shows the existence of a data security problem at the FTC. Further, C&D has provided no evidence that its legitimate concerns with the security of its confidential business information in the hands of the FTC will not be adequately protected by the provisions of 15 U.S.C. §§ 46(f) and 57b-2.

The Petition and Request are both time barred and otherwise wholly without merit; and must, therefore, be denied. C&D shall comply with the subpoena and CID on January 26, 2010.

This letter advises you of the Commission's disposition of the Petition and Request. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[4]

[4] This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the