

Interlocutory Orders, Etc.

TOPS MARKETS LLC, MORGAN STANLEY CAPITAL
PARTNERS V U.S. HOLDCO LLC, AND THE PENN
TRAFFIC COMPANY

Docket No. C-4295. Order, June 30, 2011

Order approving respondent's application for Commission approval of proposed divestiture of assets to Hometown Markets, LLC, in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Ms. Goldstein:

This letter responds to the *Petition for Approval of Proposed Divestitures to Hometown Markets, LLC* ("Petition") filed by Tops Markets, LLC and Morgan Stanley Capital Partners V U.S. Holdco LLC (collectively, "Tops"), on May 4, 2011, pursuant to the Decision and Order in this matter. In the Petition, Tops requests that the Commission approve Tops' proposed divestiture to Hometown Markets LLC of the Penn Traffic Supermarket Business Assets at the following locations: No. 3095, 160 Clinton Avenue, Cortland, New York; No. 3107, 315 Pine Tree Road, Ithaca, New York; and No. 3195, 1730 Elmira Street, Sayre, Pennsylvania. The Petition was placed on the public record for comments until June 6, 2011, and no comments were received.

After consideration of the proposed divestiture as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Tops' Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

CHURCH & DWIGHT CO., INC.

FTC File No. 091 0037 Decision, January 31, 2011

RESPONSE TO CHURCH & DWIGHT CO., INC.'S PETITION TO QUASH,
LIMIT OR STAY SUBPOENAS AD TESTIFICANDUM

Dear Mr. Hittinger:

This letter advises you of the Commission's disposition of Church & Dwight Co., Inc.'s December 15, 2010 request that the full Commission review the denial of Church & Dwight's petition to quash, limit or stay four subpoenas *ad testificandum* directed to Church & Dwight employees. The Commission issued the subpoenas on October 15, 2010; Church & Dwight petitioned to quash them on November 4, 2010; and Commissioner Brill directed the issuance of a letter ruling denying the petition to quash on December 8, 2010. For the reasons set forth below and more fully in Commissioner Brill's letter ruling, the Commission affirms that ruling.

As highlighted in Church & Dwight's request for full Commission review and in the December 8 letter ruling, Church & Dwight's objections to the subpoenas *ad testificandum* are the same objections it has made to a subpoena *duces tecum* and a Civil Investigative Demand the Commission issued in June 2009. In particular, Church & Dwight has argued that information relating to (1) non-condom products and (2) the marketing of condoms in Canada is not reasonably relevant to the Commission's investigation. Both the full Commission, in a letter ruling dated February 16, 2010, and the United States District Court for the District of Columbia, *FTC v. Church & Dwight Co., Inc.*, No. 10-mc-149, 2010 WL 4283998 (D.D.C. Oct. 29, 2010), have rejected these arguments. Commissioner Brill's December 8 letter ruling on the subpoenas *ad testificandum* details why; there is no need to repeat the analysis here, other than to note that we agree with it.

Responses to Petitions to Quash

In the alternative, Church & Dwight asks the Commission to stay the investigational hearings at issue until the Court of Appeals can hear its arguments. On December 23, 2010, the federal district court denied the same request with respect to the June 2009 subpoena *duces tecum* and CID, holding that Church & Dwight must comply with them before its appeal is exhausted. *FTC v. Church & Dwight Co., Inc.*, No. 10-mc-149, 2010 WL 5209257 (D.D.C. Dec. 23, 2010). The court found that Church & Dwight had not satisfied applicable stay standards, including by failing to demonstrate a likelihood of success on the merits and irreparable harm from producing information relating to non-condom products. *Id.* In its January 27, 2011 *per curiam* order on Church & Dwight's emergency stay motion, the Court of Appeals for the D.C. Circuit similarly concluded that Church & Dwight had not met the stringent standards for a stay pending appeal.

We find the district court's reasoning persuasive and agree with both courts' results. In its request for full Commission review, Church & Dwight does not identify how it would be irreparably harmed by appearing at the investigational hearings as scheduled. Church & Dwight states that questioning on non-condom related information would "sacrifice the integrity of its right to appeal." Request for Review at 4. But as the district court found, "[i]t is not irreparable harm ... for the FTC to see information it would not be entitled to see [if Church & Dwight prevails on appeal]." *Id.* at *5. Other remedies would remain available to Church & Dwight, including exclusion from any enforcement proceeding of the disputed information. *See id.* On the other hand, requiring Commission staff to wait until the appeal is decided before asking relevant questions about non-condom products could delay the investigation substantially.¹

¹ By way of example, the Commission resolution authorizing the use of compulsory process in this investigation indicates that one potentially relevant line of questioning is whether Church & Dwight has employed its marketing of "other products" in attempting to acquire or maintain a monopoly in the sale of condoms. As another example, it is plausible that a document addressing

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For the foregoing reasons, **IT IS ORDERED THAT** the December 8, 2010, letter ruling is **AFFIRMED**.

By direction of the Commission.

marketing strategies for both condom and non-condom products would naturally elicit questions about non-condom products designed to help Commission staff understand the conduct at issue in the investigation.