UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
TELEBRANDS CORP.,	)	
a corporation,	)	
	)	
TV SAVINGS, LLC,	)	
A limited liability company, and	)	**Docket No. 9313**
	)	
AJIT KHUBANI,	)	
Individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
_____	)	

RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO RECONSIDER ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL, OR TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Preliminary Statement

Respondents Telebrands Corporation, TV Savings, LLC and Ajit Khubani submit the following memorandum in opposition to Complaint Counsel's motion for reconsideration of this Court's February 25, 2004 Order denying Complaint Counsel's motion to compel responses to certain discovery requests related exclusively to advertising disseminated in foreign countries to foreign consumers.

Having failed in its previously filed motion to compel, Complaint Counsel raises the same facts and the exact same arguments a second . Complaint Counsel's motion fails to meet the standard required for reconsideration because it fails to raise new issues of fact or law, fails to demonstrate that this Court failed to consider any material fact, and fails to demonstrate any manifest injustice or clear error. *In re Rambus*, Docket No. 9302

(March 26, 2003)(citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)). Indeed, Complaint Counsel's new motion simply revisits the facts previously cited and repackages the exact same arguments previously advanced in the first motion. Moreover, Complaint Counsel has provided this Court with no reason to find that clear error exists in the Court's Order, or that manifest injustice would result from the decision to deny Complaint Counsel's motion to compel. At bottom, the error cited is the Court's disagreement with Complaint Counsel's argument; the manifest injustice cited is the Court's refusal to see it Complaint Counsel's way. Because these are insufficient reasons for this Court to reverse its decision, the motion for reconsideration should be denied.

Complaint Counsel's alternative argument that the February 25, 2004 Order should be certified for interlocutory appeal should also be denied. The narrow, limited issue related to foreign advertising and foreign sales to foreign consumers is at heart a discovery issue, and the Commission has expressed its abiding skepticism that such issues are appropriate for interlocutory appeal. Complaint Counsel has also failed to show that the issue is one involving a controlling question that would determine a wide spectrum of cases, let alone this case. Moreover, because the Order raises no substantial grounds for differences of opinion, and because this matter may be addressed on final review, the standards for certifying an order for interlocutory appeal have simply not been met. Consequently, Complaint Counsel's alternative application for certification should be denied.

Argument

I. Complaint Counsel's Motion for Reconsideration Revisits the Same Facts and Legal Arguments Previously Raised in the Motion to Compel and Therefore Should be Denied.

Complaint Counsel's motion for reconsideration falls far short of the standard to be met for reconsidering this Court's decision denying Complaint Counsel's motion to compel. As Your Honor has stated:

> Motions for reconsideration should be granted only sparingly. *Karr v. Castle,* 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1 (D.D.C. 2002). Reconsideration motions are not intended to be opportunities "to take a second bite at the apple" and relitigate previously decided matters. *Greenwald v. Orb Communications & Marketing, Inc.*, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003).

In re Rambus, Docket No. 9302 (March 26, 2003 Order Denying Respondent's Applications for Review of February 26, 2003, Order, etc.)(McGuire, Ch. J.). *See also*, *In re Intel Corporation*, Docket No. 9288 (Order Denying Respondent Intel's Motion for Reconsideration of Orders Denying Motions to Compel, entered March 2, 1999) (Timony, J.). Complaint Counsel have failed to show that any of the standards for reconsidering the Court's February 25, 2003 Order have been met. There have been no changes in the law, no new evidence has been adduced, and the Court's decision does not present a clear error or manifest injustice.

A. *Complaint Counsel Does Not Cite Any Change in the Law to Justify Reconsideration*

Complaint Counsel has not cited any intervening changes in controlling law that would warrant reconsideration. Indeed, in its present motion Complaint Counsel simply

restates the jurisdictional arguments that were central to Complaint Counsel's motion to compel. Instead of citing any *new* controlling or even persuasive law, the FTC largely repeats its earlier arguments concerning *FTC v. Skybiz, FTC v. Magui Publishing, Branch v. FTC, Neiman v. Dryclean U.S.A. Franchise Co.,* and other previously cited cases.

The only thing "new" in Complaint Counsel's discussion of the law concerning the FTC's jurisdiction over foreign commerce is its citation of the *Prepared Statement of the Federal Trade Commission on Cross-Border Fraud Before the Subcmte. on Investigations of the Cmte. on Gov't Affairs, U.S. Senate* (June 15, 2001) and a Letter from Chairman Pitofsky to John Mogg, Director, European Commission (July 14, 2000). These statements hardly constitute intervening changes in the law. More importantly, the thrust of those statements are that the Federal Trade Commission's jurisdiction to enforce the FTC Act is limited to the jurisdictional reach of the Act itself.[1]

These "new" citations of Commission statements (addressing the Telemarketing Sales Rule and online privacy) do nothing to bolster Complaint Counsel's argument—which was raised in its motion to compel and is raised again in almost identical form in the present motion—regarding the issue at hand: the jurisdictional reach of the FTC Act itself. Complaint Counsel's arguments on this issue are the same as those it advanced the

[1] For example, the *Prepared Statement* acknowledges that the Commission may enforce the Telemarketing Sales Rule "in the same manner, by the same means, *and with the same jurisdiction*…it has under the FTC Act." *Prepared Statement*, Attachment 4 to Complaint Counsel's Motion, p. 2 (emphasis added). Complaint Counsel ignores the fact that the *Prepared Statement* then goes on to acknowledge that there are significant jurisdictional barriers to enforcing the Telemarketing Sales Rule as it relates to foreign activities because of the limits of jurisdiction granted by Congress under the FTC Act itself. *Prepared Statement*, Attachment 4, pp. 5 – 7. The statement by Chairman Pitofsky cited by Complaint Counsel similarly recognizes the unremarkable point that that the Commission's reach under the FTC Act is "co-extensive with the constitutional power of Congress under the Commerce Clause…" *Letter*, Attachment 5 to Complaint Counsel's Motion, p. 8, n. 12.

first time around: that the Court should be bound by *FTC v. Skybiz* and *FTC v. Magui Publishing* (two cases that were not selected for publication by the courts that decided them, thus limiting their authoritative or persuasive effect), among others, and should ignore the decision of *Neiman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999). Complaint Counsel was incorrect then and is incorrect now that *Neiman* was limited solely to the enforceability of the Franchise Rule. Complaint Counsel continues to argue – incorrectly – that the central *Neiman* holding—that the FTC Act does not apply extraterritorially—is merely *dicta*. This Court engaged in a lengthy discussion of *Neiman* and each of the other cases cited by Complaint Counsel, and rejected the arguments Complaint Counsel now advances -- again. (February 25, 2004 Order, pp. 2 – 3). Complaint Counsel's repackaged arguments concerning the state of the law on this issue provide no basis for reconsideration.

B. *Complaint Counsel Presents No New Evidence to Justify Reconsideration*

Just as it has provided this Court with no intervening change in controlling law, Complaint Counsel also fails to identify any new evidence that would justify reconsideration. Instead, Complaint Counsel raises this Court's so-called "failure" to address each and every fact raised by Complaint Counsel in its motion to compel, and implies that this must mean that the Court failed to consider those facts in reaching its decision.

It is important to note at the outset that Complaint Counsel's motion for reconsideration raises absolutely no new factual evidence. Complaint Counsel claims that it has "adduced evidence" concerning Respondents' advertising in the United Kingdom. But this is not "new" evidence at all. As demonstrated by Complaint

Counsel's own motion to compel, Complaint Counsel was well-aware of the United Kingdom advertising when it filed its motion to compel, and Complaint Counsel brought the fact of such advertising to the attention of this Court in its motion to compel, provided evidence of the advertising to the Court in the form of exhibits, and relied on that advertising (which was directed to United Kingdom citizens to generate sales in the United Kingdom) as the central factual point around which Complaint Counsel's relevancy arguments were built. (Motion to Compel, filed as Attachment 2 to Motion for Reconsideration, p. 3 and Exhibits G and H thereto). Consequently, the facts discussed in Complaint Counsel's motion to reconsider are hardly "new evidence."

Because it has no new evidence to justify consideration, Complaint Counsel instead argues that the Court "did not address these facts and issues of fact" in writing its Order and Opinion. (Motion for Reconsideration, p. 4). Complaint Counsel's implication, of course, is that Court did not *consider* the facts presented because it did not *address* each fact and issue of fact presented in its Opinion. This argument is flawed for several reasons.

First, the facts cited by Complaint Counsel in its motion for reconsideration were put prominently before the Court by Complaint Counsel in its original motion to compel. Indeed, the brunt of Complaint Counsel's relevancy arguments on page three of its motion to compel was concerned with the advertising in the United Kingdom, and the fact that it had been presented by Respondents to the Commissioners during meetings. Complaint Counsel's implication that the Court somehow ignored these facts in reaching its decision defies the reality that such facts were put front and center before the Court by Complaint Counsel when it made the relevancy arguments.

Second, Complaint Counsel has cited absolutely no authority for the notion that each and every fact considered by the Court must be described in the Opinion. Even if Complaint Counsel were to identify case law to suggest that the facts considered by the Court must be specifically identified, the plain reading of the Order indicates that the Court considered evidence of the "[a]dvertisements disseminated abroad which were never broadcast in the United States." (February 25, 2004 Order, p. 3). Indeed, the entire weight of the Opinion on the issue of relevancy of the material sought indicates that the Court considered the type of information sought by the discovery and the type of information that would be obtained. The Opinion clearly reflects that the Court, after considering such facts, correctly determined that such discovery—which sought information concerning advertisements in foreign countries to foreign consumers and information related solely to the generation of foreign sales—was outside the scope of permissible discovery.

Complaint Counsel's argument that the Court erred in identifying each and every fact it considered has no basis in authority and defies the plain fact that the Court was presented with, and considered, the facts identified by Complaint Counsel. Consequently, Complaint Counsel provides no basis for reconsideration based on any "evidentiary" issue.

C. *Complaint Counsel Has Failed to Demonstrate any Clear Error or Manifest Injustice in the Court's Order Denying Complaint Counsel's Motion to Compel*

Finally, Complaint Counsel has failed to identify any clear error in the Court's Order, or show how the Court's Order results in a manifest injustice against Complaint Counsel.

Complaint Counsel has previously recognized that the standard for clear error to warrant reconsideration of an earlier decision is "stringent." (Opposition to Motion for Reconsideration filed by Complaint Counsel in *In re Rambus*, Docket No. 9302 (May 27, 2003)(citing *Gindes v. United States*, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984)). As described by one court, "[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must . . . strike [it] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Id.* (citing *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc*., 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989)). "To grant motions for reconsideration for lesser causes not only wastes judicial resources, but is also unjust to the parties that have invested the time and effort arguing on the original papers." *First Options of Chicago, Inc. v. Kaplan*, 198 B.R. 91, 92 (E.D. Pa. 1996).

Complaint Counsel cites no manifest example of clear error on the part of this Court in denying Complaint Counsel's motion to compel. Complaint Counsel's argument that error occurred is limited to a revisitation of its original arguments concerning *Skybiz*, *Magui Publishing*, *Neiman* and other previously cited cases. At bottom, Complaint Counsel's argument that error exists relies on the view that the Court misinterpreted *Neiman*. For reasons discussed in the Order, and in Respondents' opposition to the motion to compel, Complaint Counsel's reliance on *Skybiz* and *Magui Publishing* was misplaced, and its reading of *Neiman* as having *only* addressed the enforceability of the Franchise Rule was seriously misguided. A reading of the cases cited by Complaint Counsel indicates that the weight of law coincided with this Court's view of the jurisdictional reach of the FTC Act as set forth by the Eleventh Circuit and by the

Supreme Court of the United States in several opinions. If there is manifest error here, Complaint Counsel has not identified it.

With regard to "manifest injustice," Complaint Counsel makes much hay over the fact that Respondents raised the United Kingdom advertising in meetings with Commissioners during the investigation of Respondents by Complaint Counsel, and argues that this "opened the door" to foreign advertising, thus transforming it into a relevant area of inquiry. (Motion for Reconsideration, p. 4). Complaint Counsel conveniently ignores that the Commissioners themselves, in those meetings with Respondents attended by Complaint Counsel, dismissed the United Kingdom advertising as being *irrelevant* to the Commission's investigation leading up to this action and the decision whether to issue the Complaint.

Finally, Complaint Counsel is incorrect in stating that Respondents would "suffer no prejudice" if the motion to compel was reconsidered and granted. (Motion for Reconsideration, p. 12). Discovery in this matter closed on March 5, 2004. All of the depositions have been taken by the parties and written discovery served and answered. Dispositive motions are due on March 16, 2004 and motions *in limine* are due three weeks later. This matter is set for final hearing beginning May 4, 2004. If the motion to compel was reconsidered and granted, Respondents would be prejudiced in a variety of ways. A whole new area of inquiry would be opened up. More importantly, the dates scheduled for motions practice likely would be pushed off, as would the date for hearing. Respondents note that all of this could have been avoided if Complaint Counsel had filed their motion to compel earlier. Objections and responses to the first set of written discovery were served on Complaint Counsel on December 12, 2003, six weeks before

Complaint Counsel sought a meeting on these issues and long before the motion to compel was filed. Complaint Counsel's statement that Respondents would suffer no prejudice is flatly wrong.

II. The Court Should Not Certify this Discovery Matter for Interlocutory Appeal to the Commission because the Standards for Certifying an Order for Interlocutory Appeal Have Not Been Met.

As an alternative to its motion for reconsideration, Complaint Counsel requests that his Court certify its discovery order for interlocutory review by the Commission pursuant to Commission Rule 3.23(b), 16 C.F.R. § 3.23(b). Complaint Counsel's application for interlocutory review of the Court's ruling may be made *only* if the applicant meets both prongs of a two-prong test. *In re Rambus*, Docket No. 9302 (Order Denying Respondent's Application, March 26, 2003)(McGuire, J.). The first prong is that the ruling must involve "a controlling question of law or policy as to which there is a substantial ground for difference of opinion." *Id.* (citing 16 C.F.R. § 3.23(b)). Controlling questions are "not equivalent to merely a question of law which is determinative of a case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *Id.* (citing *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478 at *1 (Nov. 5, 1996)). *See also, In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *2 (Nov. 20, 1979)(citations omitted)("The question is not whether interlocutory review would resolve an 'intellectually intriguing' issue, the early determination of which 'would save ... considerable trouble and expense.'").

The second prong is that the Court must determine "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* [that]

subsequent review will be an inadequate remedy." *In re Rambus*, Docket No. 9302 (Ordering Denying Respondent's Application, March 26, 2003)(McGuire, Ch. J.)(citing 16 C.F.R. § 3.23(b)). In addition, for discovery orders such as the Court's February 25, 2004 Order, the Commission "generally disfavor[s] interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings." *Id.* (citing *In re Gillette Co.*, 98 F.T.C. 875, 875 1981 LEXIS 2, *1 (Dec. 1, 1981)). "Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay." *Id.* (citing *In re Bristol-Myers Co.*, 90 F.T.C. 273, 273, 1977 FTC LEXIS 83, *1 (Oct. 7, 1977); *In re Gillette Co.*, 98 F.T.C. at 875 ("resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ.")).

The February 25, 2004 Order does not involve a "controlling question of law or policy." Complaint Counsel argues that the Order prevents Complaint Counsel from reviewing foreign promotional materials and foreign sales information, and from obtaining the names of foreign consumers. (Motion for Reconsideration, p. 14). Even if Complaint Counsel is correct in its dramatic assertion that such information is "probative of hotly disputed issues," (Motion for Reconsideration at 14) the issues to which such information relates (foreign sales and foreign advertising to foreign consumers) are not central to <u>any</u> of the claims raised by Complaint Counsel in its Complaint. Determining one way or the other the issue of whether Complaint Counsel is entitled to discover information limited to the narrow areas of foreign sales and foreign advertising will not

"contribute to the determination, at an early stage, of a wide spectrum of cases."[2] Indeed, it would not even contribute to the determination of this case. The discovery question at issue is therefore

not "controlling," and the Order should not be certified for interlocutory appeal.[3]

Because the first prong of the standard for determining when an order should be certified has not been met, consideration of the second prong is unnecessary. However, an examination of the Order in light of the second prong reveals no basis for an interlocutory appeal of this discovery matter.

The "phrase 'substantial ground for difference of opinion' requires a finding that the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a 'substantial ground for difference of opinion' and triggers certification." *In re Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995). As discussed in the February 25, 2004 Order, this Court relied on settled precedent backed by decisions of the Eleventh Circuit and the Supreme Court, not on a novel theory. The fact that the Court's Order found a basis in federal court decisions tilts toward a finding that there is no substantial ground for difference of opinion. *In re Schering-Plough*

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[2] Complaint Counsel's statement that Respondents' "refusal to turn over those documents invites the inference that the withheld material is not irrelevant" defies logic. Under Complaint Counsel's reasoning, a patently irrelevant document request is deemed relevant merely by the answering party's refusal to provide responsive documents. By Complaint Counsel's reasoning, no document request—no matter how unrelated to the claims or defenses of a party—is objectionable as irrelevant. This makes no sense.

[3] The argument that this discovery matter should be certified for interlocutory appeal because it is a "case of first impression," even if true, is beside the point because the underlying issue is not a "controlling question." If this was the standard, then every discovery matter of first impression—whether controlling or not—would be subject to interlocutory appeal.

Corporation, Docket No. 9297, 2002 WL 31433937, *4 (Order Denying Motion for Certification, Feb. 12, 2002).

Finally, there is no evidence that subsequent review by the full Commission of the Court's decision will be an inadequate remedy. Complaint Counsel asserts that by denying it access to the documents requested, the Court is denying an opportunity to preserve evidentiary questions for appeal. Complaint Counsel cites no legal authority for its proposition, and ignores the fact that the Court's February 25, 2004 Order provides Complaint Counsel with a basis for appeal, if it comes to that stage. Complaint Counsel's fear that "[t]here is a risk" that the issue would "evade review" (Motion for Reconsideration, p. 15) is unsubstantiated.

Conclusion

For the foregoing reasons, Respondents respectfully request that the Court deny Complaint Counsel's motion for reconsideration of the Court's February 25, 2004 Order, and deny Complaint Counsel's alternative request that the Order be certified for interlocutory appeal by the Commission.

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Dated: March __, 2004

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	**)**
	)
TELEBRANDS CORP.,	**) Docket No. 9313**
a corporation, *et al.*	**)**
_____	**)**

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO COMPEL, AND DENYING APPLICATION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL

WHEREAS, Complaint Counsel has filed its Motion to Reconsider Order Denying Complaint Counsel's Motion to Compel, or to Certify Order for Interlocutory Appeal ("Motion for Reconsideration and Application for Certification");

WHEREAS, I have considered both the Motion for Reconsideration and Application for Certification and Respondents' Opposition to that motion;

WHEREAS, I find that Complaint Counsel failed to raise new issues of fact or law or to show that this Court failed to consider any material fact;

WHEREAS, I find that Complaint Counsel failed to show that the February 25, 2004 Order denying Complaint Counsel's Motion to Compel contains any error or results in manifest justice; and

WHEREAS, I find that the Order does not present a controlling question of law or fact and does not present an issue about which there is a substantial difference of opinion; and

WHEREAS, I find that Complaint Counsel has an adequate remedy available on appeal after decision in this matter, it is hereby

ORDERED that Complaint Counsel's Motion for Reconsideration and Application for Certification is hereby DENIED.

ORDERED:

Date: _____

_____
Stephen J. McGuire
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on March __, 2004, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing Opposition to Motion to Compel to be filed and served as follows:

(1) an original and one (1) paper copy filed by hand delivery and an electronic copy in Microsoft Word format filed by e-mail to:

Donald S. Clark, Secretary
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E-mail: secretary@ftc.gov

(2) one (1) paper copy served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
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(3) one (1) paper copy by first-class mail and by e-mail to:

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I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

_____
Theodore W. Atkinson, Esq.