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,	)	**PUBLIC DOCUMENT**
individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

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

Complaint Counsel respectfully request that this Court reconsider its February 25, 2004 *Order Denying Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories*, and direct Respondents to produce the requested documents and information.

In the alternative, Complaint Counsel respectfully request that this Court determine that the aforementioned *Order* involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that subsequent review will be an inadequate remedy, and certify to the Commission, with justification, this application for appeal.

The grounds in support of this motion are set forth in the accompanying Memorandum.

Dated: March 3, 2004

Respectfully submitted,

Connie Vecellio (202) 326-2966
Walter Gross (202) 326-3319
Joshua S. Millard (202) 326-2454
Amy M. Lloyd (202) 326-2394
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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,	)	**PUBLIC DOCUMENT**
individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

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

Complaint Counsel respectfully asks this Court to reconsider its recent *Order Denying Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories*, or certify its decision for an interlocutory appeal to the Commission.[1] The requested materials are relevant to disputed allegations and this Court has the authority to compel their production. The Court's *Order*, Attachment 1 hereto, does not address all of the material facts and its legal conclusion conflicts with the weight of Commission precedent. We respectfully request that the Court reconsider its decision or certify its order for appeal pursuant to *Rule of Practice* 3.23(b).

BACKGROUND

As the Court will recall, the complaint in this case alleges that Respondents employed

---

[1] The Commission's *Rule of Practice* governing requests for interlocutory appeal requires the movant to "to attach the ruling . . . from which appeal is being taken and any other [relevant] portions of the record." 16 C.F.R. § 3.23(b). The Court's *Order*, Complaint Counsel's Motion to Compel, and Respondents' Opposition are appended as Attachments 1, 2, and 3. This Motion will refer to the exhibits to those documents by their original letter designations.

deceptive and unfair practices to sell the "Ab Force" electronic muscle stimulation ("EMS") device in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. Respondents' advertisements contained carefully-selected statements and depictions that recalled, expressly or by implication, deceptive program-length television commercials ("infomercials") for strikingly similar EMS belts widely marketed by others at the time. *See* Compl., ¶¶ 10-11 ("I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. . . . The Ab Force is just as powerful and effective as those expensive ab belts sold by others."); *see also id.* ¶¶ 15-16 (summarizing false "fitness" benefits touted in contemporaneous infomercials, such as claims of fat loss, weight loss, well-defined muscles, and an effective alternative to exercise).

Respondents have denied the Commission's allegations. They claim that they marketed Ab Force solely as a "massage" device. (*See* Resp't's Answer ¶ 19; *see also* Mot. to Compel, Jan. 29, 2004, [hereinafter "Attachment 2"], Ex. D, p. 5 (Resp't's Objections and Resps. to First Interrogs., Dec. 12, 2003.)) Shortly before this litigation commenced, Respondents' counsel met with Commissioners and volunteered copies of a script for an Ab Force television advertisement shown in the United Kingdom. (*See* Attachment 2, Ex. G [hereinafter "Ex. G"].) This script refers to images and contains statements almost identical to those used in the United States. (*Compare id. with* Compl. ¶¶ 10.) For example, the script calls for an image of a "[m]ale and female using gym equipment." Unlike the U.S. commercials, however, the script also states that Ab Force is intended "[f]or use with regular exercise and a sensible diet." (*Id.* at 2.) We contend that this script belies the "massage" defense, and supports our allegations that Ab Force was marketed, expressly or by implication, as a device that causes the "fitness" benefits touted in deceptive infomercials.

Confronted with this material discrepancy in Ab Force scripts, Complaint Counsel propounded discovery requests relating to Respondents' marketing of Ab Force outside the United States.[2] Respondents refused to provide this information. Even though they initially called the Commission's attention to their foreign advertisements for Ab Force, Respondents claimed that our requests for foreign Ab Force advertising and related materials were irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Respondents also claimed that this Court lacked jurisdiction to compel the production of the requested information. This Court denied our *Motion to Compel* on February 25, 2004, and this Motion followed.[3]

ARGUMENT

I. The Requested Documents and Information Are Relevant, Or Are Reasonably Likely to Yield Relevant Information

The challenged discovery requests rest on a very basic tenet—that Respondents' conduct toward Ab Force consumers abroad may well reflect on their conduct at home. If Respondents' foreign advertisements for Ab Force are inconsistent with what they advertised in America, those facts are particularly important and should be made known.

---

[2] We asked, in pertinent part, for: (1) a description of the circumstances that led to the use of the phrase "[f]or use with regular exercise and a sensible diet" in the U.K. TV spot (Attachment 2, Ex. E, Interrog. 24 (Second Interrogs., Dec. 16, 2003)); (2) promotional materials disseminated in the United States or elsewhere, and documents relating to why some materials were not disseminated here (Attachment 2, Ex. A., Reqs. 7 & 10.d (First Set of Reqs. for Production of Doc. Materials, Nov. 21, 2003)); (3) the nations and years in which Ab Force was sold, and the number of customers by country (Attachment 2, Ex. B, Interrog. 13 (First Interrogs., Nov. 21, 2003)); (4) Ab Force packages, including contents, and product labels, distributed in the United States or elsewhere (Attachment 2, Ex. A., Reqs. 6 & 20); and (5) documents showing specifications for Ab Force sold in the United States or elsewhere, including documents relating to specification changes. (*Id.*, Reqs. 15 & 16.)

[3] Complaint counsel has conferred with Respondents regarding this Motion, but Respondents do not have authority to modify the Court's *Order*.

Complaint Counsel have requested documents and information relevant to the vital issue of this case, *i.e.*, whether Respondents marketed Ab Force, expressly or by implication, as a device that causes the "fitness" benefits widely touted in deceptive infomercials, or merely for "massage." Respondents have put the purpose of Ab Force, and the message behind their advertising, at issue by denying Complaint Counsel's allegations and offering their own.

We have adduced evidence, in the form of Respondents' U.K. television script, to show that Respondents' overseas advertising for Ab Force used "diet" and "exercise" representations and depictions consistent with weight loss and exercise claims, not "massage" claims. Our discovery requests seek related documents and information that may prove even more probative. For example, other foreign promotional materials may describe Ab Force's purpose or benefits more candidly. Foreign advertisements, packaging or product labels, internal documents discussing why such materials were not used in the United States, or even a basic description of the facts surrounding the reference to "regular exercise and sensible diet" may shed light on: (1) the purpose of Ab Force; (2) the product category for Ab Force; (3) the claims in Respondents' advertising; (4) the persons responsible for developing Ab Force advertising;[4] (5) Respondents' awareness of the claims actually conveyed in Ab Force or other ab belt advertisements; or (6) the likelihood that buyers would be misled. Respondents opened the door and volunteered a foreign Ab Force advertisement in meetings with Commissioners relating to this matter. They are unjustified in complaining that foreign advertising is irrelevant to this matter.

The Court did not address these facts and issues of fact in ruling that foreign Ab Force

---

[4] Respondents identified Ajit Khubani as the "primary" person who created and developed promotional materials, not the *only* person who did so. (*See* Attachment 2, Ex. D, at 8 (Resp't's Objections and Resps. First Interrogs., Dec. 12, 2003).)

advertisements and other related documents "have no bearing" on disputed issues in this case. (Attachment 1, p. 3.) Without an *in camera* submission of the requested material, the Court has an inadequate factual basis upon which to conclude that the material is irrelevant to this case. Commission *Rule* 3.31(c)(1) provides for "discovery to the extent that it may be reasonably expected to yield [relevant] information . . . . Information may not be withheld from discovery . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1). This rule "adopt[s] a liberal approach to discovery." *Chain Pharmacy Ass'n*, Docket No. 9227, 1990 WL 606400 (June 20, 1990). The Court should revisit its previous conclusion, which forbids discovery of potentially significant documents, and acknowledge that Respondents' overseas marketing may be probative of their marketing here.

II. The Requested Documents and Information are Within the Jurisdiction of the Federal Trade Commission

The Court's conclusion that the requested materials are not "within the jurisdiction of the Commission," (Attachment 1, p. 3), is contrary to the text of the Federal Trade Commission Act, the expressed view of the Commission, the majority view among federal courts that have touched on the subject, and the legislative history of enactments affecting the FTC Act. Moreover, the *Order* adopts another decision's flawed *dictum* and does not consider the possibility that the documents can be compelled without the exercise of extraterritorial jurisdiction. We therefore respectfully request that the Court reconsider its initial decision.

Our analysis begins where the Court properly began, with the statute. "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and

the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45. The FTC Act further defines "commerce" as "commerce among the several States or with foreign nations." 15 U.S.C. § 44. This phrase is not ambiguous. It denotes two kinds of commerce; one between persons in different states, and one between a person in a state and a person in a foreign nation. Section 4 uses the word "or" to join these two concepts and define them both as "commerce." If this is not the plain meaning of the statute, no party to these proceedings has suggested a different meaning. Section 4 is not ambiguous, and it covers American commerce abroad unless one disregards the phrase "or with foreign nations."

Significantly, it is the expressed view of the Commission that the FTC Act authorizes the Commission to exercise authority over deceptive sales made by domestic entities in other nations:

> The FTC Act also gives the agency jurisdiction over cross-border consumer transactions. . . . Section 4 of the FTC Act defines 'commerce' to include that 'among the several States or with foreign nations.' The Commission's jurisdiction for FTC Act violations extends to the [*Telemarketing Sales Rule*, 16 C.F.R. Part 310], which the Commission can enforce 'in the same manner, by the same means, and with the same jurisdiction, powers, and duties' it has under the FTC Act. . . . Of course, cross-border fraud is not a one-way problem. . . . In the past ten years, FTC legal actions have resulted in the return of more than $730,000 in redress to more than 2,700 Canadian consumers.[5]

---

[5] *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), available at http://www.ftc.gov/os/2001/06/cbftest.htm (appended hereto as Attachment 4); *see also* Letter from Chairman Robert Pitofsky to John Mogg, Director, European Commission (July 14, 2000), available at http://www.export.gov/safeharbor/ftcletterfinal.htm (appended hereto as Attachment 5) ("Except as specifically excluded by the FTC's authorizing statute, the FTC's jurisdiction under the FTC Act over practices 'in or affecting commerce' is coextensive with the constitutional power of Congress under the Commerce Clause . . . . FTC's jurisdiction would thus encompass employment-related practices in firms and industries in international commerce.").

Moreover, Section 4 of the FTC Act has been consistently read to regulate the extraterritorial acts of U.S. citizens. The commanding majority of U.S. Courts of Appeals and U.S. District Courts have drawn this conclusion. *See, e.g., FTC v. Skybiz.com, Inc.*, No. 01-5166, 2003 WL 202438 (10th Cir. Jan. 30, 2003) (affirming litigated injunction and rejecting bid to avoid extraterritorial application of injunction); *FTC v. Magui Publishers, Inc.*, 9 F.3d 1551, 1993 WL 430102 (9th Cir. Oct. 22, 1993) (ruling that "[t]he FTC Act confers jurisdiction over foreign sales" in consumer protection case alleging deceptive conduct); *Branch v. FTC*, 141 F.2d 31, 34 (7th Cir. 1944) ("[B]usiness dealings . . . with customers in foreign countries is foreign commerce within the meaning of the Constitution and the Act"); *see also FTC v. Commonwealth Mktg. Group, Inc.*, 72 F. Supp. 2d 530, 545 (W.D. Pa. 1999).[6]

The Court's *Order* broke with these decisions and found that the Commission had no jurisdiction over the extraterritorial acts of U.S. citizens. Despite the plain text of the FTC Act, the Court's *Order* adopted the flawed reasoning of *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1129 (11th Cir. 1999), and strictly applied a presumption against extraterritorial jurisdiction against the weight of Commission authority.

Nieman involved a private lawsuit brought by an Argentine citizen under the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. §§ 501.201-501.211 ("DUPTA"), alleging that the defendant failed to make disclosures required by DUPTA as well as the FTC's *Franchise Rule*, 16 C.F.R. § 436.1. The plaintiff was a disappointed foreign franchisee whose franchise was to be entirely outside the United States. The *Nieman* court observed that the language and history of the Franchise Rule made it clear that FTC never intended the Rule to

---

[6] The Court's treatment of these federal court cases is discussed *infra* page 10.

"protect franchisees in foreign countries." *Nieman*, 178 F.3d at 1131. The Commission was not a party and played no role in the case. Any question as to the Commission's own authority under the FTC Act is not an issue in the holding in *Nieman*, and the court's discussion of it is *dictum*.

Further, the reasoning behind *Nieman*'s review of the FTC Act is flawed. The *Nieman* court analogized the FTC Act to Title VII of the Civil Rights Act of 1964, which the Supreme Court had held not to apply extraterritorially. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249-51 (1991). However, Title VII did *not* explicitly cover commerce with "foreign nations," as the FTC Act does.[7] Therefore, Title VII is not analogous to the FTC Act. More analogous to the FTC Act is the Securities and Exchange Act of 1934, which defines "commerce" as "commerce among the several States, or between any foreign country and any State." 15 U.S.C. § 78c(a)(17). Cases interpreting the Securities and Exchange Act have held that statute to have extraterritorial reach. *See Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) (applying analysis to Commodities Exchange Act, 7 U.S.C. § 1).

Additionally, the *Nieman* opinion makes no reference to the relevant legislative history of the FTC Act, which is not surprising given that the Commission was not a party to the case. Moreover, even if *Nieman*'s reasoning was correct, the facts are plainly distinguishable. *Nieman* involved an international dispute brought by a foreign party, where the bulk of the conduct (*i.e.*, the franchise negotiations) and all of the effects (financial loss to the prospective franchisee)

---

[7] Title VII defined "commerce" as "trade . . . among the several States; or between a State and any place outside thereof." *Nieman*, 178 F.3d at 1130. This provision is susceptible to varying interpretations as it is unclear whether "any place" would include or exclude unincorporated American possessions and territories as well as foreign nations. Title VII does *not* explicitly cover "foreign nations" as the FTC Act does. Respondents pointedly overlooked this inconvenient fact in characterizing Complaint Counsel's argument as "flatly wrong." (Attachment 3, p. 4.)

were outside the United States. The present case involves a dispute between the federal government and U.S.-based Respondents concerning transactions that arise from the American business activities at the core of this litigation—the deceptive marketing of Ab Force that caused injury to consumers here and abroad.

Both the Court's Order and the *Nieman* decision rely on the Supreme Court's treatment of the Title VII of the Civil Rights Act of 1964 in *EEOC v. Arabian American Oil Co.,* which is not the latest statement of the Supreme Court on the presumption against extraterritoriality. In more recent cases, the Supreme Court has moved away from applying a rigid presumption against extraterritoriality and has instead looked at all available evidence to determine whether Congress intended a statute to apply extraterritorially. *See, e.g., Smith v. United States*, 507 U.S. 197, 203-05 (1992) (reviewing the language and legislative purpose of the statute); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 171-87 (1993) (analyzing the language and structure of the statute, the history of the Act, and potential conflict with international law).

The Court's Order does not address the legislative history of the FTC Act, which strongly supports the assertion of extraterritorial jurisdiction. In 1982, Congress amended Section 5 of the FTC Act in order to limit, but not completely prohibit, the extraterritorial enforcement of the law with respect to unfair methods of competition. 15 U.S.C. § 45(a); Pub. L. No. 97-290. This change would not have been necessary if the Commission had not already possessed jurisdiction to enforce Section 5 of the FTC Act extraterritorially. Although Congress limited the exercise of the Commission's authority with respect to this aspect of its antitrust mission, it left untouched the Commission's authority to pursue extraterritorial enforcement with respect to the consumer protection mission, *i.e.*, unfair or deceptive acts or practices. *See* 15 U.S.C. § 45(a); *see also*

Magui Publishers, Inc., 9 F.3d 1551, 1993 WL 430102, at *5 ("the 1982 amendment to § 5 of the Act upon which Magui relies to argue that this jurisdiction is limited applies to antitrust enforcement . . . not to the FTC's consumer protection mission").[8]

The Court's *Order* wrongly dismisses the weight of Commission precedent. For example, the Court acknowledges that the Tenth Circuit's recent decision in *FTC v. Skybiz.com, Inc.*, conflicts with its own decision as well as *Nieman*, but merely asserts that the *Skybiz.com* decision is "not persuasive." The Court's *Order* distinguishes *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944) by stating that "Complaint Counsel have not asserted an attempt to protect domestic competition," but the Complaint clearly targets deception in the domestic market for EMS devices, and we have explained how foreign advertising may be relevant to advertising here. The Court's *Order* does not comport with the *Branch* Court's statement that "business dealings . . . with customers in foreign countries is foreign commerce within the meaning of the Constitution and the [FTC] Act." *Branch*, 141 F.2d at 34. Also, the Court acknowledged the legislative history discussed in *FTC v. Magui Publishers, Inc.* without addressing the legislative history argument raised by Complaint Counsel. (*See* Attachment 1, p. 3; Attachment 2, pp. 6-7.)

All of the available evidence regarding the application of the FTC Act's proscription

---

[8] Respondents claimed that Complaint Counsel were "misguided" in looking to the enacted history of the FTC Act. (Resp't's Mem. in Opp'n to Mot. to Compel, Feb. 9, 2004, at 4.) Instead of explaining why this was so, they hastened to call the Court's attention to bills recently offered in Congress that are specifically intended to further *clarify* the agency's extraterritorial authority, not create it. *See Prepared Statement of the Federal Trade Commission Before the Subcmte. on Commerce, Trade and Consumer Protection of the Cmte. on Energy and Commerce, U.S. House*, p. 12 (June 11, 2003), http://www.ftc.gov/os/2003/06/030611reauthhr.htm (appended hereto as Attachment 6). These bills will remedy the *Nieman* court's error of statutory construction (and lack of legislative history review). Respondents' effort to turn these bills to their advantage is the quintessence of overreaching.

against unfair or deceptive acts or practice in commerce shows that the presumption against extraterritoriality is inapplicable in this matter. All of Respondents' deceptive practices relating to the marketing and sale of Ab Force are within the jurisdiction of the FTC Act and this tribunal. If the Court is not inclined to reconsider the jurisdictional issue, however, it may still order the production of the requested document without exercising jurisdiction over acts and practices in foreign countries. To the extent that the requested promotional materials, documents, tangible goods, and information were created, developed, revised, received, or approved in the United States prior to dissemination elsewhere, those materials are within the undisputed jurisdiction of the Commission. Just as no client can shield an otherwise-discoverable document from disclosure by simply handing it to his or her attorney, Respondents cannot hide their documents simply by maintaining that they were ultimately transmitted abroad for use in foreign commerce. They generated and received those documents in the course of doing business in the United States; their conduct is not immune from this Court's jurisdiction.[9]

III. This Court Should Reconsider Its Decision or Certify the Dispute for Appeal

A. Grounds for Reconsideration

A motion for reconsideration may be granted where "there is a need to correct clear error or manifest injustice." *In re Rambus Inc.*, Docket No. 9303, 2003 FTC LEXIS 49 (Mar. 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002). Based on the preceding discussion, this section summarizes how manifest injustice and clear error is inherent in the Court's February 25th *Order Denying Complaint*

---

[9] Similarly, the Court does not have to address the jurisdictional issue, which could have precedential effect, if it determines that the requested material is not reasonably calculated to lead to the discovery of admissible evidence.

Counsel's Motion to Compel.

Manifest injustice arises when Respondents give advertisements to Commissioners and later claim that similar advertisements, and related documents and information, are wholly irrelevant to this case and exempt from production. It is particularly unjust when Respondents will suffer no prejudice from the disclosure, and the documents may well pertain to vital issues.

Clear error occurs when the Court declines to follow the plain and unambiguous meaning of Section 4 of the FTC Act as well as the Commission's own pronouncements, and adopts flawed *dictum* produced by the only court known to have ruled against the weight of precedent on the subject. These errors are compounded by the Court's reluctance to address the legislative history of extraterritorial jurisdiction under Section 5 (which was limited only with respect to unfair methods of competition), or to assess whether the documents may be disclosed independent of the extraterritorial jurisdictional question. The error is particularly significant when it affects the jurisdiction of the Commission to fight cross-border fraud.

We respectfully request that the Court revisit its Order of February 25, 2004 and compel the production of the requested documents and information. In the alternative, Complaint Counsel requests that this Court certify this matter for interlocutory appeal to the Commission.

B. Grounds for Certifying the February 25, 2004 Order for Appeal

Should the Court decide not to reconsider its February 25th *Order*, Complaint Counsel requests that the Court certify its *Order* for interlocutory appeal to the Commission pursuant to *Rule of Practice* 3.23(b). This request is timely made within 5 days of notice of the Court's *Order*.

The Commission's *Rules of Practice* provide that Administrative Law Judge orders may be appealed to the Commission if the Judge certifies that an appeal is appropriate and if the

Commission agrees to hear the appeal. To certify the order, the Court must make a written determination "that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). The Court's February 25th *Order* raises a significant question of law or policy and an interlocutory appeal is particularly appropriate to resolve this question. Although this jurisdictional question arises in the context of a discovery dispute, the jurisdiction of the Commission is a very significant issue. Drawing upon the preceding discussion, this section explains our position on the criteria set forth in *Rule of Practice* 3.23(b).[10]

1. The Court's Order Involves a Controlling Question of Law or Policy

Rule of Practice 3.23(b) requires that the Court first determine that its *Order* involves a "controlling question" of law or policy. The *Rules of Practice* do not define this phrase, but an influential federal court decision defined the term to include "difficult central question[s] . . . which [are] not settled by controlling authority." *In re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959). A legal question does not have to be dispositive of the case in order to be "controlling," but the resolution of the question must relate to issues that "seriously affect" the litigation. *See United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982). As defined in previous administrative decisions, "[a] question of law or policy is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *In re Automotive Breakthrough Sciences, Inc.*,

---

[10] Complaint counsel's discussion is somewhat truncated by the *Rule*, which limits motions requesting interlocutory appeal to fifteen pages. *See* 16 C.F.R. § 3.23(b).

Docket Nos. 9275, 9277, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996). Such is the case here.

The February 25th *Order* raises a significant "controlling question" of law or policy for two reasons. First, as discussed *supra*, the Order precludes Complaint Counsel from reviewing promotional materials, documents, and information that may well be probative of hotly disputed issues. Indeed, Respondents' refusal to turn over those documents invites the inference that the withheld material is not irrelevant. Second, this is the first administrative decision in which a Judge has ruled that the FTC Act does not confer jurisdiction over false advertising claims made by U.S.-based businesses outside the United States. Certification is particularly appropriate when the issue for interlocutory appeal is one of first impression (in this instance, in administrative litigation) and may have precedential value for later cases. *See Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir. 1961); *see also In re Rambus, Inc.*, Docket No. 9302, 2003 WL 1866415 (Mar. 17, 2003) (concluding that no controlling question of law or policy existed because the question involved "well-settled doctrines of law"). Under the present circumstances, we submit that the Court's *Order* raises a "controlling question" that merits an interlocutory appeal.

2. Substantial Grounds May Exist for Differences of Opinion

The second criteria for determining whether an interlocutory appeal should be certified is whether or not there exists "substantial ground" for differences of opinion about the question at issue." 16 C.F.R. § 3.23(b). As previously discussed, there is extensive case authority holding that the Commission has jurisdiction to regulate the extraterritorial acts of U.S. citizens in furtherance of its consumer protection mission. *See* cases cited *supra* page 7. The Court's *Order* conflicts with these authorities and follows the *Nieman* decision. Although Complaint Counsel believes that *Nieman* was wrongly decided and demonstrably so, see *supra* pages 7-8, if the Court

declines to reconsider its decision it is reasonable to conclude that substantial grounds exist for differences of opinion. *See In re Rambus, Inc.*, 2003 WL 1866415 (concluding that no substantial grounds for dispute existed because the question involved "well-settled doctrines of law"). Hence, an interlocutory appeal should be permitted.

3. Subsequent Review Will Be an Inadequate Remedy

Subsequent review will not provide an adequate remedy for the Court's *Order Denying Complaint Counsel's Motion to Compel*. This *Order* precludes the discovery of relevant and potentially significant promotional materials, related documents, and information, and it does so on jurisdictional grounds. It forecloses the possibility that Complaint Counsel could make offers of proof with those materials to preserve evidentiary questions for appeal. There is a risk that the Court's extraterritorial jurisdiction discussion would evade review. If the Court does not reconsider its initial decision, an appeal under *Rule* 3.23(b) is appropriate.

CONCLUSION

We respectfully request that the Court revisit its *Order* of February 25, 2004 and require the production of the requested documents and information. In the alternative, Complaint Counsel requests that this Court certify this matter for interlocutory appeal to the Commission.

Respectfully submitted,

Connie Vecellio (202) 326-2966
Walter C. Gross (202) 326-3319
Joshua S. Millard (202) 326-2454
Amy M. Lloyd (202) 326-2394
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: March 3, 2004

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,	)	**PUBLIC DOCUMENT**
individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION

On March 3, 2004, Complaint Counsel moved for reconsideration of this Court's recent *Order Denying Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories*, dated February 25, 2004. Upon due consideration, it is hereby

ORDERED that Complaint Counsel's Motion to Reconsider is GRANTED. Respondents shall produce the documentary materials and information responsive to Requests 6, 7, 10.d, 15, 16, and 20 of Complaint Counsel's *First Set of Requests for Production of Documentary Materials and Tangible Things*, to Interrogatory 13 of Complaint Counsel's *First Interrogatories*, and to Interrogatory 24 of Complaint Counsel's *Second Set of Interrogatories*.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

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,	)	**PUBLIC DOCUMENT**
individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

On March 3, 2004, Complaint Counsel moved for reconsideration of this Court's recent *Order Denying Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories*, dated February 25, 2004, or in the alternative, for certification of the Court's *Order* for interlocutory appeal pursuant to *Rule of Practice* 3.23(b). Upon due consideration, and for the reasons stated in the attached document, the Court concludes that the aforementioned *Order* involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that subsequent review will be an inadequate remedy. It is therefore

ORDERED that Complaint Counsel's Motion to Certify Order for Interlocutory Appeal is GRANTED.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2004, I caused *Complaint Counsel's Motion to Reconsider Order Denying Complaint Counsel's Motion to Compel, or to Certify Order for Interlocutory Appeal*, including the supporting memorandum, attachments, and proposed order, to be filed and served as follows:

(1) the original and one (1) paper copy filed by hand delivery to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W. Room H-112
Washington, D.C. 20580

(3) one (1) paper copy by first class mail and one (1) electronic copy via email to:

Edward F. Glynn, Jr., Esq.
Theodore W. Atkinson, Esq.
VENABLE LLP
575 Seventh St., N.W.
Washington, D.C. 20004

JOSHUA S. MILLARD