## UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman

Orson Swindle Thomas B. Leary

**Pamela Jones Harbour** 

Jon Leibowitz

In the Matter of

TELEBRANDS CORP.,
a corporation,

TV SAVINGS, LLC,
a limited liability company, and

AJIT KHUBANI,
individually and as president of
Telebrands Corp. and sole member
of TV Savings, LLC.

## ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND REVISING BRIEFING SCHEDULE

On November 10, 2004, the National Association of Chain Drug Stores filed a motion for leave to file a brief *amicus curiae* in this matter ("NACDS Motion"), and attached a copy of the brief it proposed to file. NACDS states that it is a nonprofit trade association representing more than 200 chain community pharmacy companies, which operate more than 35,000 retail pharmacies; that "[r]etail chain drug stores sell large numbers of generic, nonprescription, private label pharmaceutical products . . .;" and that "health, efficacy and other claims" are made about "virtually all the name-brand equivalents of these generic products . . ." NACDS Motion at 1-2. NACDS further states that the foregoing generic or private label products are often advertised and sold to consumers under "so-called 'compare and save' advertisements," in which "the pharmacies emphasize that these products have the same physical properties as the name-brand product (such as pharmaceutical equivalence) but have substantial price benefits for the consumer." *Id.* at 2. NACDS expresses the concern that -- under *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) -- the decision of the Administrative Law Judge in this matter

might threaten them with liability if there were misleading statements in advertisements for products that were the basis of a "compare and save" marketing claim, even though the chain had no knowledge of the falsity.

*Id.* NACDS states that its proposed brief "would not support either party in this appeal...." but instead "request[s] that the Commission resolve [two specified] legal issues ..." arising from the foregoing liability concerns.<sup>1</sup>

On November 16, 2004, Complaint Counsel filed an Opposition to the NACDS Motion ("CC Opposition"), requesting that the Commission deny the NACDS Motion as untimely. Complaint Counsel argue that the proposed *amicus* brief "supports the position of the Appellants/Respondents in the above-entitled matter-*i.e.*, the reversal of the Initial Decision . . .," and therefore, pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j) (2004), should have been filed no later than the date by which Respondents had to file their Appeal Brief; that is, by November 3, 2004. Complaint Counsel further argue that the filing of the *amicus* brief at this time is "unduly prejudicial to Complaint Counsel because, in its answering brief, Complaint Counsel must respond to Respondents' brief *and* NACDS' brief. . . .;" because "NACDS introduces a second question presented, not addressed in Respondents' brief, . . .; and because the delay in filing the *amicus* brief gives Complaint Counsel one less week to respond to the issues raised by the brief. CC Opposition at 3 (emphasis in original). Complaint Counsel therefore ask the Commission -- if it grants the NACDS Motion -- to extend the deadline by which Complaint Counsel must file their Answering Brief to December 14, 2004, and to enlarge the word count limitation applicable to that brief by 1,000 words.

The Commission has determined to grant the NACDS Motion, because the public interest will benefit from Commission consideration of the perspectives enunciated in the accompanying brief.<sup>3</sup> As Complaint Counsel point out, if the NACDS brief supports the Respondent's position that the Initial Decision should be reversed, then it was not timely filed. NACDS states, however, that its brief does not support the position of either party. The Commission need not

Id. NACDS also states that it "learned only recently of the pendency of this appeal and the legal issues it presents;" that it has "prepared and submitted [its brief] as expeditiously as possible. . . .;" and that it believes that the timing of the filing "will not prejudice either of the parties to this appeal." *Id.* at 2-3.

<sup>&</sup>lt;sup>2</sup> CC Opposition at 1-2. Complaint Counsel also argue that NACDS should have moved for an extension of the November 3, 2004 deadline prior to that date, and that -- pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b) -- it should not now be permitted to request such an extension unless it can establish that "the untimely filing was the result of excusable neglect." *Id.* at 2.

<sup>&</sup>lt;sup>3</sup> See, e.g., Order Granting Motions for Leave to File Briefs Amici Curiae and Scheduling Oral Argument (April 30, 2004), and Order Granting Motions for Leave to File Briefs Amici Curiae (June 21, 2004), in *In the Matter of Rambus Incorporated, Docket No. 9302*.

resolve this issue, because it can prevent any prejudice to the parties to this proceeding by extending the deadlines by which future briefs must be filed, and by enlarging the word limits respectively applicable to the Answering and Cross-Appeal Brief of Complaint Counsel, and to the Answering and Reply Brief of Respondent.<sup>4</sup> Accordingly,

**IT IS ORDERED THAT** Complaint Counsel shall file their Answering and Cross-Appeal Brief on or before December 14, 2004, with said Brief not to exceed 27,250 words;

**IT IS FURTHER ORDERED THAT** Respondents shall file their Answering and Reply Brief on or before January 18, 2005, with said Brief not to exceed 19,750 words; and

**IT IS FURTHER ORDERED THAT** Complaint Counsel shall file their Rebuttal Brief on or before January 31, 2005.

By the Commission.

Donald S. Clark Secretary

ISSUED: December 1, 2004

The Commission is satisfied that Complaint Counsel have made the "strong showing that undue prejudice would result from complying with the existing limit. . . ." required by Commission Rule 3.52(k), 16 C.F.R. § 3.52(k).