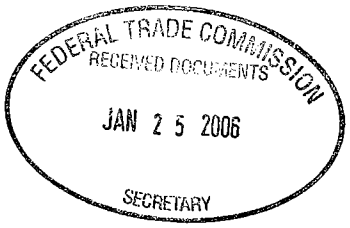
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	**Docket No. 9318**
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	



COMPLAINT COUNSEL'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR RECONSIDERATION OR CERTIFICATION OF JANUARY 10TH ORDER ON COMPLAINT COUNSEL'S MOTION *IN LIMINE*

Complaint Counsel hereby oppose Respondents' January 18th motions for reconsideration or certification, styled as an "Application for Review" of one aspect of the Court's January 10th *Order* on Complaint Counsel's Motion *in Limine*.[1] In these latest motions for reconsideration and interlocutory review, Respondents persist in arguing issues previously addressed in this litigation. Respondents' motion contends, in essence, that the Court has consistently erred in declaring that the issue to be litigated here is "whether Respondents disseminated false and misleading

[1] Respondents originally marked their "Application for Review" as a public document and transmitted it via email to the Secretary's Office. Attached to that filing were numerous documents, some of which were marked as confidential. Complaint Counsel brought this fact to the attention of the Secretary and opposing counsel.

We have filed this *Opposition* as a public document because it does not divulge the specific information contained in the documents that Respondents designated as confidential and filed with their motion.

advertising, not the Commission's decision to file the Complaint." Order, Jan. 10, 2006, at 8 (citing Orders, Nov. 4, 2004). Respondents assert that their defenses permit them to challenge the FTC's substantiation policy and the consequences of the FTC's pre-*Complaint* investigation in this adjudicative proceeding. *See* Resp'ts' "Appl. for Rev." at 2 (hereinafter "Resp'ts' Mot."). This assertion flies in the face of repeated admonitions that "the issue to be litigated . . . is whether Respondents violated the FTC Act's prohibition against false and misleading advertising. The FTC's policy statement therefore does not control the outcome of the case . . . except insofar as the policy has been adopted by relevant laws and controlling cases." Order, Nov. 4, 2004, at 2.

Respondents' motions identify no newly-discovered evidence, no new legal authority, and no manifest error of fact or law. They propose delaying these proceedings for an unnecessary interlocutory review that will not resolve this case, much less others. Respondents' motions fail to satisfy the stringent requirements for the extraordinary measures demanded. The Court should deny Respondents' latest motions for reconsideration and interlocutory review.

BACKGROUND

To assist the Court in reviewing Respondents' motions, we summarize below the pertinent procedural history and the law of this case. On June 15, 2004, the Commission filed a *Complaint* alleging, *inter alia*, that Basic Research, L.L.C. and other related individuals and companies (collectively "Respondents") marketed certain products with unsubstantiated claims for fat loss and/or weight loss, and falsely represented that some of those products were clinically proven to be effective, thereby engaging in deceptive acts and practices, and the making of false advertisements, all in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"). Accompanying the *Complaint* was a notice advising Respondents of their

opportunity to contest these allegations, and of a notice order that may be issued, in the discretion of the Administrative Law Judge and the Commission, if the facts are found to be as alleged in the *Complaint*. This notice order contains provisions that would, if entered, require Respondents to cease and desist the law violations charged in the *Complaint*. As stated in the notice order, if the Commission should determine upon review of the record that such an order might be inadequate to fully protect consumers, the Commission may order other relief as appropriate, including corrective advertising or other affirmative disclosures.

After Respondents raised numerous alleged defenses to the *Complaint* and Complaint Counsel moved to strike those defenses, the Court issued an *Order* on November 4, 2004, striking several defenses and clarifying the scope of the cognizable defenses in this matter. Early in this *Order*, the Court declared:

> Respondents' defenses primarily challenge the [FTC's] substantiation policy for dietary supplement and weight-loss claims. However, the issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act's prohibition against false and misleading advertising. The FTC's policy statement therefore does not control the outcome of the case and is not the standard against which Respondents' claims will be judged, except insofar as the policy has been adopted by relevant laws and controlling cases.

Order, Nov. 4, 2004, at 2. The Court then analyzed Respondents' alleged defenses and clarified that the defenses available in this matter were those relating to the facts alleged in the *Complaint* and this adjudication, not general policy arguments directed at the wisdom of the FTC's substantiation policy or the consequences of that policy for Respondents.

First, with respect to Respondents' alleged due process defense, the Court declined to strike the alleged defense, but clarified that the cognizable issue was "whether *this adjudicative proceeding* violates Respondents' due process rights." *Id.* at 2 (emphasis added). The Court did

not state that Respondents were entitled to raise, as a defense, that the FTC's substantiation policy somehow infringed on their due process rights at some point in the past.

Next, with respect to Respondents' alleged *First Amendment* defense, the Court again declined to strike the alleged defense, but emphasized that the cognizable defense had to bear on the allegations of the *Complaint*. The Court acknowledged that deceptive speech is not entitled to *First Amendment* protection, and concluded that the question of whether Respondents' advertising was, in fact, deceptive could not be determined without a factual record. *See id.* at 4. As before, the Court emphasized that the defenses available in this matter were those bearing on the issues raised in the *Complaint*—the allegedly deceptive nature of Respondents' commercial speech. *See id.* (noting that alleged defense was not "unmistakably unrelated or so immaterial as to have no bearing on the issues").

The Court then turned to other defenses focused solely on discrete issues unrelated to the merits of the *Complaint*, and struck those defenses in their entirety. For example, the Court struck Respondents' alleged defenses challenging the FTC's "reason to believe" and "public interest" determination as legally insufficient because those alleged defenses consisted of objections to the FTC's substantiation policy. *See id.* at 5 ("Respondents have not presented facts sufficient to even suggest the extraordinary circumstances necessary to review the Commission's . . . determinations, but merely reiterate their objections to the FTC policy."). The Court also noted that Respondents' efforts to controvert the Commission pre-*Complaint* determinations "prejudices Complaint Counsel by unduly broadening discovery into improper areas such as the mental processes of the Commission." *Id.* (citation omitted). The Court also struck one of Respondents' APA defenses, and limited the other. The Court struck Respondents' alleged APA "delay"

defense because it clearly threatened to broaden discovery into improper areas such as the mental process of the Commission. *See id.* at 6. More significantly for present purposes, however, the Court limited Respondents' policy argument-laden APA defense as follows:

> Respondents indicate that the "gravamen" of their APA defenses "challenge the Commission's regulatory scheme governing dietary supplement[] and weight-loss claims. However, the issue in this proceeding is Respondents' allegedly false and misleading advertising, not Complaint Counsel's policy statements. Respondents will be permitted to argue an APA violation as it is relevant to the allegations of the Complaint and the proposed remedy.

Id. at 5. Once again, the Court emphasized that the defenses available in this matter were those bearing on the issues actually raised in the *Complaint*. *See id.*

After the Court struck and otherwise clarified the nature of the available defenses, Respondents filed witness lists signaling their renewed intention to present testimony and evidence unrelated to the relevant issues in this proceeding. Respondents' *Final Witness List* indicated that the intended testimony for Respondent Dennis Gay, Carla Fobbs, and Respondent Mitchell Friedlander included "the investigation by the Federal Trade Commission . . . and the impact of the investigation and proceedings." Resp'ts' Final Witness List at 2.[2] Thereafter, Complaint Counsel filed a motion *in limine* requesting, among other things, that this Court exclude any testimony from Respondents' witnesses concerning the FTC's investigation and the impact thereof because such testimony would be irrelevant to the issues to be tried. As we stated in our motion, "[f]rom the beginning of this case, Respondents have unsuccessfully attempted to

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[2] From the description of the proposed testimony, it is clear that Respondents' proffered evidence related not to the merits of the *Complaint*, but to the Commission's pre-*Complaint* investigation and determinations—and more generally, the consequences of the agency's decision to proceed with an adjudicative proceeding instead of adopting rulemaking procedures or rules such as those previously advanced by Corporate Respondents' counsel several years ago, prior to his appearance in these proceedings. *See* Resp'ts' Witness List at 2.

challenge the Commission's determinations, framework, and choice of regulatory approaches. . . . [T]he Court has already ruled that a line of defense that challenges such processes is inappropriate." Compl. Counsel's Mot. In Limine at 20.

Respondents defended the proposed testimony on the grounds that it was "relevant to Complaint Counsel's pre-Complaint protocol; Respondents' good faith voluntary submission of materials in support of their claims; Complaint Counsel's reasonable basis for issuing the Complaint; and the costly and time-consuming efforts undertaken by Respondents to comply with the pre-Complaint investigation and post-Complaint defense of the charges brought by the Commission." Order, Jan. 10, 2006, at 8 (citing Opp'n to Mot. In Limine at 15-16).

In its January 10th *Order*, this Court granted the portion of Complaint Counsel's *Motion In Limine* that is pertinent here and excluded Respondents' proposed evidence "on Complaint Counsel's pre-Complaint protocol, Complaint Counsel's reasonable basis for issuing the Complaint, or the costs to Respondents to comply with the pre-Complaint investigation and post-complaint defenses." Order, Jan. 10, 2006, at 9. The Court applied the controlling Commission caselaw and concluded that Respondents' proposed testimony and material was "irrelevant and should be excluded." *Id.* at 8-9 (citing *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974), and quoting the Commission's decision: "Once the Commission has . . . issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-Complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred."). In its *Order*, the Court recognized that the proposed testimony was directed at issues other than those to be litigated in the trial in this matter. *See id.* at 8.

DISCUSSION

Respondents' "Application for Review" contends, in essence, that the Court has consistently erred in declaring that the issue to be litigated here is "whether Respondents disseminated false and misleading advertising, not the Commission's decision to file the Complaint." Order, Jan. 10, 2006, at 8 (citing Orders, Nov. 4, 2004). Respondents have advanced a motion for reconsideration of the Court's January 10th *Order* and a motion for certification of that *Order* for interlocutory appeal. We address each of these motions in turn.

I. Respondents' Motion for Reconsideration of the January 10th Order Must Be Denied

A. Legal Standards for Reconsideration

This Court has recognized that motions for reconsideration should be granted only sparingly. *See In re Rambus Inc.*, Docket No. 9302, 2003 FTC LEXIS 49, at *11 (Mar. 26, 2003) (citing *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991)). "Reconsideration motions are not intended to be opportunities 'to take a second bite of the apple' and relitigate previously decided matters." Order Denying Resp't Gay's Mot. for Recons., Aug. 9, 2005, at 2 (citing *Greenwald v. Orb Communications & Mkt'g*, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003).

The standards for granting reconsideration are stringent. Motions demanding such relief are only granted where: 1) new evidence is available; (2) there has been an intervening change in controlling law; or 3) there is a need to correct clear error or manifest injustice. *See In re Rambus Inc.*, 2003 FTC LEXIS 49, at *11 (citing *Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)); *see also In re Intel Corp.*, Docket No. 9288, 1999 FTC LEXIS 231, at *1 (Mar. 2, 1999). None of these circumstances is present here.

B. Respondents' Motion for Reconsideration Does Not Present New Evidence

Respondents' motion for reconsideration does not present new evidence. Rather, it relies on allegations and circumstances that were known to Respondents' counsel before the filing of our Motion *in Limine*, and, indeed, before the filing of the *Complaint* itself. Respondents allege, in general, that the Commission staff did not satisfy their voluntary requests for information concerning the FTC's pre-*Complaint* protocol or the basis of the Commission's ultimate determination to institute this adjudicatory proceeding challenging Respondents' deceptive acts or practices. Leaving aside the question of whether Respondents' allegations are accurate, these allegations (and the correspondence of counsel attached to Respondents' motion in support thereof) are not "new evidence." Respondents are not entitled to demand reconsideration by relying on these old allegations and documents. *See, e.g.*, Order, Aug. 9, 2005, at 2 (denying motion for reconsideration, in part, because Respondent failed to demonstrate that new, material evidence was available).

Respondents concluded the "fact" section of their motion with the overarching contention that "the Commission has proceeded in secret . . . leaving Respondents to engage in a guessing game with no real way of ever knowing what the FTC expects from them." Resp'ts' Mot. at 6. Whatever the nature of Respondents' subjective impressions, the objective facts do not support this contention. Long before the *Complaint* issued, the Commission provided notice and/or guidance to advertisers, including Respondents, in a variety of ways, including through the issuance of the *Policy Statement Regarding Advertising Substantiation* appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839-42 (1984), and other publicly-available Commission opinions, cease and desist orders, consent decrees, complaints, and publications regarding the appropriate

type and level of substantiation for advertising claims such as those challenged in the *Complaint*. Before the issuance of the *Complaint*, Complaint Counsel personally provided Respondents' counsel with some of this publicly-available information, and Respondents' attachments contain other materials furnished by Complaint Counsel. The Commission issued a *Complaint* that clearly sets forth the allegations at issue, see Order Denying Mots. for More Def. Statement, July 20, 2004, at 2-4, and the notice order plainly sets forth the remedies that the Commission has found reason to believe should issue, if the allegations set forth in the *Complaint* are found to be supported by sufficient evidence. Since the issuance of the *Complaint*, Respondents have had a full and fair opportunity to conduct discovery, propounding literally hundreds of document requests, interrogatories, and requests for admissions upon Complaint Counsel. Respondents have also received detailed reports, and in some cases, additional rebuttal reports, disclosing the opinions of experts retained by opposing counsel with respect to Respondents' advertisements and purported substantiation. Respondents have conducted depositions of each of these experts. Respondents have also had the opportunity to obtain and examine all of this evidence with the assistance of their own experts and counsel, including a former FTC attorney. Consequently, Respondents' contentions of secrecy and their protestations of ignorance are not facts, they are not new evidence, and they provide no grounds for reconsideration. "The moving party must show more than . . . disappointment or pique with the Court's ruling in order for reconsideration to be granted." *Helfrich v. Lehigh Valley Hosp.*, Civ. No. 03-5793 2005 WL 1715689, at *3 (E.D. Pa. July 21, 2005) (citations omitted).

C. Respondents' Motion for Reconsideration Fails to Establish Any Intervening Change in Controlling Law

Far from pointing to new controlling law, Respondents have again advanced old Constitutional arguments in a motion for reconsideration, contending that the Court's January 10th *Order* somehow amounts to a Constitutional deprivation of the rights of free speech and due process. As discussed in Section D, below, there are no Constitutional grounds to revisit the Court's relevancy determinations in the January 10th *Order*. Here, however, it is sufficient to note that the cited Constitutional provisions were introduced long before the January 10th *Order*. Respondents' *Motion* does not rely on an intervening change in controlling law, and cannot be granted on that basis. *See Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, Civ. No. 99-7428, 2001 WL 197631 (N.D. Ill. Feb. 27, 2001) ("Motions to reconsider 'should not be a Pavlovian Response to an adverse ruling,' nor are they a vehicle for raising new arguments or evidence that previously could have been offered.") (quoting *Jefferson v. Security Pac.-Fin. Servs., Inc.*, 162 F.R.D. 123, 125 (N.D. Ill. 1995); citing *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996)).

D. Respondents' Motion Does Not Establish Any Clear Error or Manifest Injustice in the Court's *Order* Excluding Irrelevant Evidence

Respondents erroneously contend that the Court committed a manifest error of law in excluding their proffered testimony. As discussed below, the Court correctly concluded that testimony on Complaint Counsel's pre-*Complaint* protocols, the basis for issuing the *Complaint*, or Respondents' costs of answering the FTC's investigation or *Complaint*, is clearly irrelevant to the issues to be tried. Respondents' assertion that the excluded testimony is "wholly relevant" to their alleged defenses and "goes to a standard that [the Court] will apply later in the case," Resp'ts' Mot. at 2, reflects an abiding reluctance to acknowledge the scope of the cognizable

alleged defenses in this matter.

1. The Excluded Testimony Is Irrelevant to the Issues to Be Tried in this Adjudication

The defenses permitted in this matter relate, quite simply, to the allegations of the *Complaint* and the adjudication of this matter. Respondents' *First Amendment* defense cannot succeed unless the Court concludes that the allegations of the *Complaint* are inaccurate and that Respondents' commercial speech was not deceptive. *See* Order, Nov. 4, 2004, at 4 (recognizing that *First Amendment* does not protect deceptive speech). And Respondents cannot prevail on their due process defense unless this adjudicative proceeding, not the FTC's pre-*Complaint* investigation or substantiation policy, occasions a violation of due process rights. *See id.* at 2 (clarifying that cognizable issue was "whether this adjudicative proceeding violates Respondents' due process rights"). Similarly, with Respondents' APA defense, "the issue in this proceeding is Respondents' allegedly false and misleading advertising, not Complaint Counsel's policy statements." *See id.* at 5 (stating that APA defense relating "to the allegations of the Complaint and the proposed remedy" would be permitted). The defenses available in this matter are those relating to the facts alleged in the *Complaint* and its adjudication, not policy arguments directed at the wisdom of FTC policies or investigations.

As the Court correctly concluded in its January 10th *Order*, the excluded testimony is not relevant to the issues in this matter. Proposed testimony or evidence on "Complaint Counsel's pre-Complaint protocol, Complaint Counsel's reasonable basis for issuing the Complaint, or the costs to Respondents to comply with the pre-Complaint investigation and post-complaint defenses" is *not* relevant to Respondents' deceptive acts or practices and the

adjudication of the *Complaint*. The proffered testimony plainly relates to the pre-*Complaint* processes of the Commission and/or business activities of Respondents other than those alleged in the *Complaint*. These topics simply are not relevant to this case. *See* Order, Jan. 10, 2006, at 8-9 (assessing parties' arguments and rendering relevancy determination); *id.* at 8 (citing *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974)).

Respondents contend that the Court erred in excluding their evidence and applying *Exxon* because their goals are not proscribed by the Commission's decision in *Exxon*. *See* Mot. at 2 (asserting "Respondents do not seek evidence . . . to question 'the adequacy' of the information . . . . [or] 'the diligence' the Commission applied . . . . *Exxon* is not on point."). Yet elsewhere in their *Motion*, Respondents abandon the pretense of distinguishing *Exxon* and revert to criticizing the Commission's staff's evaluation of information and its decision to proceed with an adjudicatory proceeding. *See id.* at 5-6. They again argue that the alleged "failure [of] the Commission to define . . . what the 'competent and reliable scientific evidence' standard requires . . . . [and] what disclaimers and qualifications will suffice to cure any perceived misleadingness" must be the subject of evidence at trial. *Id.* at 6-7. They demand the right to introduce evidence on these topics consisting of testimony relating to Complaint Counsel's pre-*Complaint* protocol, the basis for the *Complaint*, the costs attendant to the investigation and filing of the *Complaint*, and so forth. These are precisely the sort of pre-decisional matters, relating to the mental processes of the Commission and other extrinsic matters, that *Exxon* and other cases declared irrelevant and out of bounds. *See* Order, Jan. 10, 2006, at 8 ("Once the Commission has . . . issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-Complaint information or the diligence of its study of the material in question but whether the

alleged violation has in fact occurred."); *see also In re General Motors Corp.*, 99 F.T.C. 464, 550 (1982) (citing *Exxon Corp.*); *In re Boise Cascade Corp.*, 97 F.T.C. at 246-47 (same). The Court's January 10th *Order* correctly excluded Respondents' irrelevant evidence relating to pre-decisional matters, the mental processes of the Commission, and the costs attendant to the FTC's law enforcement activities, including the investigation and the filing of the *Complaint*.

2. Respondents' Arguments Fail to Demonstrate Any Manifest Error

Respondents erroneously contend that the excluded testimony is relevant to their alleged *First Amendment* and due process defenses. Respondents' arguments is incorrect, their evidence is irrelevant, and there is no manifest error in the Court's January 10th *Order*.

With respect to the alleged *First Amendment* defense, Respondents argue that the excluded testimony is necessary to show how the FTC has allegedly failed to provide adequate guidance to advertisers, purportedly in violation of the *First Amendment*. *See* Mot. at 7-9. This argument fails for several reasons. First, as a threshold issue, Respondents have not shown how testimony relating to Complaint Counsel's pre-*Complaint* protocol, the basis for the *Complaint*, or the costs attendant to the investigation and filing of the *Complaint*, actually supports the contention that FTC has allegedly failed to provide adequate guidance to advertisers. Second, Respondents have not explained how this contention satisfies any element of their alleged defense. Third, and most significant, the excluded testimony has nothing to do with the merits of the allegations in the *Complaint*. Testimony on Complaint Counsel's pre-*Complaint* protocols, the basis for issuing the *Complaint*, and Respondents' costs of defending the FTC's investigation or *Complaint* simply cannot shed any light on whether Respondents' claims for the challenged products were truthful and entitled to protection under the *First Amendment*. Contrary to

Respondents' own argument, the proffered testimony does *not* "bear upon the judgment that the Commission is called upon to render." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1112 (D.C. Cir. 1988). The excluded testimony simply does not, to use Respondents' phrase, "go[] to a standard that your Honor will apply later in the case." Resp'ts' Mot. at 2.[3]

Respondents cite decisions relating to the Constitutional right of criminal defendants to present a defense, see Mot. at 3, but they have not shown in this case that their excluded evidence

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[3] Respondents' *First Amendment* argument candidly reveals what they think the law really says. According to Respondents, "[t]he First Amendment doest [sic] not allow suppression or punishment of parties who communicate impliedly deceptive but not fraudulent claims." Mot. at 8 (emphasis added). Respondents are mistaken. *See, e.g., Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 68 (1983) (noting that commercial speech "must concern lawful activity and not be misleading" to be Constitutionally protected), *cited in* Resp'ts' Mot. at 7.

Impliedly deceptive claims are still deceptive claims. The Commission can regulate deceptive and misleading commercial speech regardless of whether consumers are expressly misled, or misled by implied claims. *See, e.g., Removatron Int'l Corp.*, 111 F.T.C. 206 (1988), *aff'd*, 884 F.2d 1489, 1492 (1st Cir. 1989); *see also Peel v. Attorney Reg. & Discip. Comm'n*, 496 U.S. 91, 100 (1990) ("Misleading advertising may be prohibited entirely."); *Kraft, Inc. v. FTC*, 970 F.2d 311, 324-25 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) (citing numerous decisions in which FTC orders requiring defendants to possess a reasonable basis to substantiate claims, including competent scientific evidence where appropriate, have been upheld against Constitutional challenges, and stating: "[T]he Commission determined that the ads were actually misleading, not potentially misleading, thus justifying a total ban on the challenged ads. . . . Moreover, even if we were to assume the order bans some potentially misleading speech, it is only constitutionally defective if it is no 'broader than reasonably necessary to prevent the [deception].'") (quoting *Peel*, 496 U.S. at 100) (word substitution in original).

The *First Amendment* extends no solicitude to deceptive commercial speech. The U.S. Supreme Court has recognized that "[t]he government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-66 (1980); *see also Virginia State Bd. of Pharm. v. Virginia Citizens Cons. Council, Inc.*, 425 U.S. 748, 771-72 (1976). Deceptive commercial speech disserves society and consumers' interests "in the free flow of commercial information," which ensures the sharing of information essential to the "proper allocation of resources" in the economy. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985).

Respondents may lead the parade for "impliedly deceptive" commercial speech in these proceedings if they wish, but if they are found to have engaged in such deceptive speech, the *First Amendment* does not bar entering a cease-and-desist order at the parade's end.

is relevant, much less exculpatory. There is no Constitutional right to present irrelevant evidence. "Without question, the Government has a legitimate interest in excluding evidence which is not relevant or is confusing." *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996) (stating, in context of dispute concerning scope of permissible testimony in defense, that "[t]he Constitutional right to testify is not absolute," and recognizing that U.S. Supreme Court has described this guarantee as the right to present *relevant* testimony). The Court's January 10th *Order* reflects the ordinary exercise of the Chief Administrative Law Judge's authority to rule on motions and regulate these proceedings under the RULES OF PRACTICE, not a deprivation of Constitutional rights.

Respondents also appear to contend, erroneously, that the excluded testimony is relevant to their alleged due process defense. This contention is erroneous because testimony on Complaint Counsel's pre-*Complaint* protocols, the basis for issuing the *Complaint*, and Respondents' costs of answering the FTC's investigation or *Complaint* does not shed any light on the alleged due process issue arising in this matter, *i.e.*, whether this adjudication actually results in a violation of Respondents' due process rights. *See* Order, Nov. 4, 2004, at 2.

Although Respondents do not explain how the excluded evidence would support their desired line of defense, they make clear that their desired due process defense is extraordinarily broad, far broader than the allegations of the *Complaint*. They summarize their defense as follows: "The absence of defined criteria is a constitutional violation." Resp'ts' Mot. at 12. From their motion, it is plain that Respondents wish to challenge the FTC's substantiation policy in this adjudication. Leaving aside the merits of their challenge, the law of the case is clear that this is not a relevant subject for trial. *See* Order, Nov. 4, 2004, at 2. The Court has stated that the

policy statement "does not control the outcome of the case and is not the standard against which Respondents' claims will be judged, except insofar as the policy has been adopted by relevant laws and controlling cases." *Id.* Respondents are not entitled to an adjudicatory proceeding in which alternate forms of regulation are weighed, examined, or found to be superior. As this Court has consistently articulated, that is not the purpose of these proceedings or the question to be resolved in this matter.[4] Respondents' proffered testimony is clearly irrelevant, and the Court's January 10th *Order* saying so was not in error.

Federal courts may grant reconsideration to "correct manifest errors of law or fact upon which the judgment is based." 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE Civil 2d § 2810.1 (2005) (discussing FED. R. CIV. P. 59 and citing cases); *see also* Order Denying Resp'ts' Mot. for Recons., Jan. 10, 1006, at 3. Respondents have failed to prove that the Court's relevancy determination was grounded on a manifest error of fact or law.

II. Respondents' Motion for Certification of the January 10th Order Must Be Denied

There are no grounds to certify the challenged portion of the January 10th *Order* for interlocutory appeal to the Commission. The challenged ruling is a relevancy determination that does not control the outcome of this case or others, and which may be reviewed as a matter of course after the Court issues its decision in this matter.

A. Legal Standards for Certification for Interlocutory Appeal

"Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process." *In re Bristol-Myers Co.*, 90 F.T.C. 273 (1977);

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[4] Respondents do not contend that the excluded evidence is relevant to their APA defense, so we therefore conclude our discussion of Respondents' arguments.

see In re Gillette Co., 98 F.T.C. 875 (1981). Hence, the "overwhelming majority of decisions by Administrative Law Judges deny requests for certification." *In re Schering-Plough Corp.*, No. 9297, 2002 WL 31433937 (Feb. 12, 2002).

Applications for immediate review of an Administrative Law Judge's ruling may be made only if the applicant meets both prongs of a two-prong test. First, the applicant must demonstrate that the challenged ruling involves "a controlling question of law or policy as to which there is substantial ground for difference of opinion." RULE 3.23(b). Second, the applicant must show that "an immediate appeal . . . may materially advance the ultimate termination of the litigation or [that] subsequent review will be an inadequate remedy." *Id.* These are stringent requirements, and Respondents' motion does not come close to satisfying them.

B. There Is No Controlling Question At Issue Here

Respondents' policy arguments do not represent a controlling question in this litigation. A question is deemed controlling "only if it may contribute to the determination, at an early stage, of a wide spectrum of cases" and not merely "a question of law which is determinative of a case at hand." *In re Rambus Inc.*, 2003 FTC LEXIS 49, at *9. Time and again, this Court has articulated the controlling question in this case. It is whether Respondents engaged in the acts or practices alleged in the *Complaint*. The controlling question is not whether Respondents' proffered evidence relating to pre-*Complaint* protocols, decisions, and the costs attendant to the FTC investigation or *Complaint* may be admitted at trial. Respondents' general policy arguments relating to the FTC's substantiation policy are not properly at issue here, and their arguments are not a controlling question whose determination will decide the outcome of this case or others. *See In re Telebrands Corp.*, Docket No. 9318, slip op. at 4 (Mar. 25, 2004) (rejecting motion for

certification where "[t]he issues involved . . . [were] not central to the claims raised in the Complaint and would not be determinative of this case") (appended hereto as Attachment 1).

Respondents contend that there is a controlling question because the Court held that Respondents' "pre-Complaint evidence" was irrelevant to this case. Resp'ts' Mot. at 13-14. The Court's relevancy determination, by its very nature, is confined the facts of this case. Hence, there is no basis for arguing that this determination may contribute to the determination, at an early stage, of a wide spectrum of cases.

Respondents also argue that there is a controlling question because "it is impossible to violate an unconstitutional law." Mot. at 14. This is not a logical syllogism. The "law" in question is FTC's substantiation policy, which, this Court has repeatedly emphasized, "is not the standard against which Respondents ' claims will be judged, except insofar as the policy has been adopted by relevant laws and controlling cases." Order, Nov. 4, 2004, at 2. Respondents' policy arguments are not determinative of this case, much less "a wide spectrum of cases." There is no controlling question presented.[5] Respondents' motion for certification must be denied.

C. Later Review will Not be an Inadequate Remedy and an Immediate Appeal Will Not Advance the Termination of this Litigation

The fallacy of Respondents' certification motion becomes most apparent when one examines their argument regarding subsequent review of the record and the propriety of an immediate appeal. Respondents cite no legal precedent supporting their views. Resp'ts' Mot. at 14. Respondents argue that a failure to admit the excluded testimony will deprive them of the

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[5] Moreover, the form of relief sought in the notice order has been upheld repeatedly in the face of Constitutional challenges. *See, e.g., Kraft, Inc. v. FTC*, 970 F.2d 311, 324-25 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) (citing numerous decisions).

opportunity for appellate review. *Id.* However, the nature of the excluded testimony has already been made known here. In the federal courts, an exclusion of evidence may be reviewed on appeal if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." FED. R. EVID. 103(a)(2). Under the circumstances, there is no need to receive the actual testimony or evidence, or to place it into a separate pile of "rejected exhibits," to preserve evidentiary rulings for appeal. *See Coursen v. A.H. Robins Co.*, 764 F.2d 1329, (9th Cir. 1985) (concluding that evidentiary ruling was reviewable even in absence of offer of proof, and citing other decisions reaching same conclusion). Accordingly, there are no grounds to conclude that later review would be inadequate.

An immediate appeal would not materially advance the ultimate termination of this litigation. It would only slow this litigation—a point that Respondents tacitly concede, as they failed to argue otherwise. *See* Mot. at 14.

CONCLUSION

The Court's January 10th *Order* excluded Respondents' proposed testimony "on Complaint Counsel's pre-Complaint protocol, Complaint Counsel's reasonable basis for issuing the Complaint, or the costs to Respondents to comply with the pre-Complaint investigation and post-complaint defenses," as clearly inadmissible. Respondents are not entitled to an *Order* revisiting the Court's relevancy determination or certifying that determination for interlocutory appeal. They have presented no new evidence, no new legal authority, and no manifest error of fact or law. They have not identified a controlling question for interlocutory appeal, and such an appeal would not advance this litigation. The proposed testimony is not relevant to the ultimate

issue to be tried in this matter. Based on the foregoing, Complaint Counsel respectfully request that the Court deny Respondents' motions for reconsideration and certification.

Respectfully submitted,

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Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Counsel Supporting the Complaint

Date: January 25, 2006

Attachment 1

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

In the Matter of	)	
TELEBRANDS CORP., TV SAVINGS, LLC, and AJIT KHUBANI, Respondents.	)	Docket No. 9313

ORDER DENYING MOTION TO RECONSIDER OR TO CERTIFY FOR INTERLOCUTORY APPEAL

I.

On February 25, 2004, an Order denying Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories ("February 25 Order") was issued. On March 3, 2004, Complaint Counsel filed a Motion to Reconsider the Order or to Certify the Order for Interlocutory Appeal. Respondents filed their Opposition on March 10, 2004.

For the reasons set forth below, Complaint Counsel's motion for reconsideration is **DENIED**. Complaint Counsel's motion for certification of an interlocutory appeal to the Commission is also **DENIED**.

II.

Complaint Counsel moves for reconsideration of the Court's February 25 Order or for an *in camera* review of the disputed discovery. In the alternative, Complaint Counsel moves to have the February 25 Order certified for interlocutory appeal to the Commission pursuant to Rule 3.23(b). Complaint Counsel argues that the documents and information subject to the February 25 Order are relevant or are reasonably likely to yield relevant information and that the requested documents and information are within the jurisdiction of the Federal Trade Commission.

Respondents argue that Complaint Counsel's motion fails to meet the standard for reconsideration because it does not raise new issues of fact or law, does not demonstrate that this Court failed to consider any material fact, and fails to demonstrate any manifest injustice or clear error. Similarly, Respondents assert that the Court should not certify this discovery matter for interlocutory appeal to the Commission because the Court's ruling does not involve a controlling question of law or policy as to which there is a substantial ground for difference of opinion; that an immediate appeal from the ruling would not materially advance the ultimate termination of

the litigation; and that subsequent review would not be an inadequate remedy.

III.

The Complaint in this case alleges that Respondents employed deceptive and unfair practices to sell the "Ab Force" electronic muscle stimulation device in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. Respondents deny the allegations.

Complaint Counsel sought an order compelling discovery of Respondents' marketing of Ab Force *outside* the United States, including (1) information regarding a United Kingdom television advertisement; (2) promotional materials disseminated outside the United States, and documents relating to why materials were not disseminated here; (3) information regarding the nations and years in which Ab Force was sold, and the number of customers by country; (4) Ab Force packages, including contents, and product labels, distributed outside the United States; and (5) documents showing specifications for Ab Force sold outside the United States, including documents relating to specification changes.

A.

Complaint Counsel now asks the Court to reconsider its February 25 Order, which denied Complaint Counsel's motion to compel on both jurisdictional and relevance grounds. The Court held *inter alia,* that "the discovery sought by Complaint Counsel is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of the Respondents, as required by Commission Rule 3.31(c)(1)." February 25 Order at 3.

In seeking reconsideration of the Court's Order, Complaint Counsel argues that "Respondents' conduct toward Ab Force consumers abroad may well reflect on their conduct at home [within the USA]." Motion to Reconsider at 3. Complaint Counsel contends that the requested discovery could lead to admissible evidence including: (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; (5) Respondents' awareness of claims actually conveyed in Ab Force ads about other ab belt advertisements; or (6) the likelihood that buyers would be misled.

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. *In re Rambus Inc.*, Docket No. 9302, 2003 FTC LEXIS 49, *11 (Mar. 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (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. *Goulding v. IRS*, 1997 WL 47450 at *1 (N.D. Ill. 1997) (citations omitted); *Sims v.*

Mme. Paulette Dry Cleaners, 1986 WL 12511 (S.D.N.Y. 1986).

Complaint Counsel has not cited any intervening changes in controlling law that would warrant reconsideration. In its present motion Complaint Counsel merely restates its earlier arguments with respect to previously cited cases. Its citations to 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 of Chairman Pitofsky to John Mogg, Director, European Commission (July 14, 2000) are of little precedential value and cannot be deemed to constitute changes in controlling law.

Similarly, Complaint Counsel fails to identify any new evidence that was unavailable at the time the original motion was filed that would justify reconsideration. Rather, Complaint Counsel argues that the Court "did not address [certain] facts and issues of fact" in issuing the February 25 Order. Motion to Reconsider at 4. Specifically, Complaint Counsel argues that the Court failed to address the fact that Respondents "opened the door" to a relevant area of inquiry by voluntarily offering a foreign AB Force advertisement in meetings with Commissioners prior to the issuance of the Complaint. This argument is without merit as the issue does not involve a waiver of privilege that might "open the door" for compelling disclosure of other relevant, but privileged, documents. Rather, the question was whether the documents are relevant to the allegations of the Complaint or the defenses in the answer.

The Complaint in this matter charges Respondents with acts and practices "in or affecting commerce, as 'commerce' is defined in Section 4 of the Federal Trade Commission Act." Complaint ¶ 5. "Commerce" as defined in Section 4 means "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." 15 U.S.C. § 44. Complaint Counsel has failed to show that the Complaint seeks to regulate conduct outside the United States or alleges consumer harm occurring outside of the United States.

As such, Complaint Counsel has not demonstrated how the requested discovery regarding advertisements in foreign countries to foreign consumers and information related solely to the generation of foreign sales is reasonably calculated to lead to the discovery of admissible evidence in this case. Specifically, Complaint Counsel has not demonstrated that Respondents' foreign advertising is relevant to the purpose of Ab Force, the product category, the advertising claims or the people responsible for developing the advertising shown in the United States. Complaint Counsel has also not demonstrated that the information sought is reasonably calculated to lead to the discovery of admissible evidence regarding Respondents' awareness of claims conveyed in the advertisements or the likelihood that American consumers would be misled by such foreign advertising. Finally, Complaint Counsel has failed to identify any clear error in the Court's interpretation of the relevant case law in its February 25 Order, or show how the Order results in any manifest injustice against Complaint Counsel.

Complaint Counsel further asks the Court to reconsider its findings in the February 25 Order relating to certain jurisdictional issues raised implicitly by the discovery request of Complaint Counsel in this case. Reviewing the above arguments and finding that the requested discovery is not relevant, or reasonably calculated to lead to the discovery of admissible evidence, it is not necessary to rule on the jurisdictional implications of Complaint Counsel's discovery motion. As Complaint Counsel recognizes, "the Court does not have to address the jurisdictional issue, if it determines that the requested material is not reasonably calculated to lead to the discovery of admissible evidence." Motion to Reconsider, at 9, n.11. Therefore, for purposes of clarification, to the extent that the February 25 Order can be interpreted as adjudicating jurisdictional issues, that portion of the Order is rendered moot by the findings on relevance in the instant Order and is hereby **VACATED**. Complaint Counsel's request for *in camera* review of the documents is **DENIED.**

B.

Complaint Counsel also seeks interlocutory review pursuant to Commission Rule 3.23(b), which allows review of a ruling by the Administrative Law Judge only upon a determination by the Administrative Law Judge that "the ruling involves a controlling question of law or policy as to which there is a 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 order for which appeal is sought is a discovery ruling. The Commission "'generally disfavor[s] interlocutory appeals, particularly those seeking review of an ALJ's discovery rulings.'" *In re Gillette Co.*, 98 F.T.C. 875, 875, 1981 FTC Lexis 2, *1 (Dec. 1, 1981).

The first prong of the test set forth in Rule 3.23(b) is not met. A "controlling question of law or policy has been defined in Commission cases as 'not equivalent to merely a question of law which is determinative of the 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.'" *In re Schering-Plough Corp.*, Docket 9297 (Feb. 12, 2002) at 4 (available at www.ftc.gov/os/adjpro/d9297) (quoting *In re Automotive Breakthrough Sci., Inc.*, 1996 FTC Lexis 478, *1 (Nov. 5, 1996)). Commission precedent also holds that to establish a "substantial ground" for difference of opinion under Rule 3.23(b), "a party seeking certification must make a showing of a likelihood of success on the merits." *Int'l Assoc. of Conf. Interp.*, 1995 FTC Lexis 452, *4-5 (Feb. 15, 1995); *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979).

The February 25 Order, as clarified by the instant Order, does not involve a controlling question of law or policy as to which there is a substantial ground for difference of opinion. The issues involved – discovery of information regarding foreign sales and foreign advertising to foreign consumers – are not central to the claims raised in the Complaint and would not be determinative of this case, much less of a wide spectrum of cases. Indeed, as discussed above, the requested discovery is not relevant to harm alleged to domestic consumers. Relevance will not be inferred from Respondents' refusal to provide the information.

The second prong of the test, that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy, is also not met. It is clear that an appeal of the discovery ruling at issue would not materially advance the ultimate termination of the litigation. Such a construction would make every ruling in every case appealable as to the relevance and propriety of any areas of discovery limited by an administrative law judge. "This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission." *In re Exxon Corp.*, 1978 FTC LEXIS 89, *12 (Nov. 24, 1978). As the instant Order and the February 25 Order are hereby limited to findings regarding relevance, the concern that the jurisdictional issue will evade review yet have precedential effect is obviated.

IV.

For the above-stated reasons, Complaint Counsel's motion for reconsideration is **DENIED.** The motion to certify for interlocutory appeal is, also, **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

March 25, 2004

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel'sConsolidated Opposition to Respondents' Motions for Reconsideration or Certification of January 10th Order on Complaint Counsel's Motion In Limine*, prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.

James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2006, I caused the attached *Complaint Counsel's Consolidated Opposition to Respondents' Motions for Reconsideration or Certification of January 10th Order on Complaint Counsel's Motion In Limine* to be served and filed as follows:

(1) the original, two (2) paper copies, and one (1) electronic copy via email, filed with:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-135
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-113
Washington, D.C. 20580

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

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