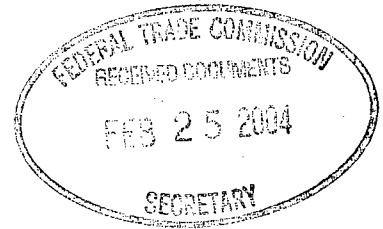


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

TELEBRANDS CORP.,)
TV SAVINGS, LLC, and)
AJIT KHUBANI,)
Respondents.)
)

Docket No. 9313

**ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND ANSWERS TO INTERROGATORIES**

I.

On January 29, 2004, Complaint Counsel filed a motion to compel Respondents to provide answers to interrogatories and production of documents related to the sale of its product, "Ab Force," outside the United States. Respondents filed their opposition on February 10, 2004. For the reasons set forth below, Complaint Counsel's motion is **DENIED**.

II.

Complaint Counsel move for an order compelling Respondents to provide information regarding diet and exercise disclaimers in Ab Force advertisements aired in the United Kingdom; documents and information regarding the promotion and sale of the Ab Force in countries other than the United States; information as to all countries where the Ab Force has been sold; information regarding all versions of the Ab Force device and its packaging, labels, and instructional manuals used in countries other than the United States; and, all documents constituting or referring to technical specifications for the Ab Force device marketed or sold in countries other than the United States. Complaint Counsel assert that its request is narrowly drafted to seek documents and information relevant to the allegations in the Complaint, the proposed relief, or Respondents' defenses, pursuant to Commission Rule 3.31(c)(1).

Respondents assert that because the Federal Trade Commission ("Commission") lacks jurisdiction with regard to foreign sales and marketing under the Federal Trade Commission Act ("FTC Act"), Complaint Counsel are not entitled to the requested information. Moreover, Respondents assert that information regarding foreign advertising and foreign sales figures is otherwise not relevant to the Complaint, the proposed relief, or any defenses.

III.

Complaint Counsel argue that sections 4 and 5 of the FTC Act confer jurisdiction over false advertising claims made in foreign countries by United States citizens. Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45. Section 4 defines “commerce” as “commerce among the several States or with foreign nations.” 15 U.S.C. § 44.

“It is undisputed that Congress has the power to regulate the extraterritorial acts of U.S. citizens.” *Nieman v. Dryclean U.S.A. Franchise Co., Inc.*, 178 F.3d 1126, 1129 (11th Cir. 1999). Whether Congress has chosen to exercise that authority is a matter of statutory construction. *Id.* “It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1957)). “In applying this principle, ‘we assume that Congress legislates against the backdrop of the presumption against extraterritoriality.’” *Smith v. U.S.*, 507 U.S. 197, 204 (1993) (quoting *Arabian Oil*). “The presumption against extraterritoriality can be overcome only by clear expression of Congress’ intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty.” *Nieman*, 178 F.3d at 1129. The presumption against extraterritorial application of United States statutes therefore requires that any doubt be resolved against finding extraterritorial reach. *Smith*, 507 U.S. at 204.

The Eleventh Circuit held in *Nieman* that the Federal Trade Commission’s Franchise Rule did not apply extraterritorially, relying on the Supreme Court’s 1991 decision in *Arabian Oil*. 178 F.3d at 1129-31. The court reasoned that the jurisdictional reach of the franchise rule could not extend further than the jurisdiction of the Commission under the FTC Act. *Id.* at 1129. “[T]he language of the FTC Act does not clearly indicate that Congress intended the Act to apply extraterritorially.” *Id.* at 1130. Specifically, the definition of “commerce” in 15 U.S.C. § 44 as meaning “commerce among the several States or with foreign nations” was described by the court as “ambiguous.” *Id.* at 1130. Therefore, implicit in their finding that the franchise rule did not apply extraterritorially was a finding that the FTC Act also did not apply extraterritorially.

The cases relied upon by Complaint Counsel are distinguishable. In *Branch v. FTC*, a 1944 case decided prior to *Nieman* and *Arabian Oil*, the Seventh Circuit found that the Commission had jurisdiction to issue an order over a United States correspondence school that made fraudulent representations to its Latin American customers. 141 F.2d 31 (7th Cir. 1944). The court based its finding regarding jurisdiction on the effect of the unfair trade on domestic competition, specifically on other United States correspondence schools. *Id.* at 34-35; *see also Nieman*, 178 F.3d at 1130. The court noted that the Commission did “not assume to protect the petitioner’s customers in Latin America.” *Branch*, 141 F.2d at 35. In the case *sub judice*, Complaint Counsel have not asserted an attempt to protect domestic competition.

The other cases relied upon by Complaint Counsel are not persuasive. In *FTC v. Skybiz.com, Inc.*, affirming a preliminary injunction which in part required repatriation of assets and documents located in foreign countries, the Tenth Circuit stated in an unpublished opinion that “[w]e deem the facts of the instant case to be different than those in [*Arabian Oil and Nieman*]. The facts in the instant case are somewhat similar to those in [*Branch*].” 57 Fed. Appx. 374, 378, 2003 WL 202438, *3 (10th Cir. 2003). The court did not identify which facts led to this conclusion. *Id.* The other two cases, both decided prior to *Nieman*, address the impact of an amendment limiting the Commission’s extraterritorial jurisdiction in unfair competition cases. *FTC v. Magui Publishers, Inc.*, 9 F.3d 1551, 1993 WL 430102, *5 (9th Cir. 1993); *FTC v. Commonwealth Marketing Group, Inc.*, 72 F. Supp. 530, 545 (W.D. Pa 1999). Such an argument is not made here and Complaint Counsel have provided no further basis to overcome the presumption against extraterritorial application of the FTC Act. *See Nieman*, 178 F.3d at 1129-30.

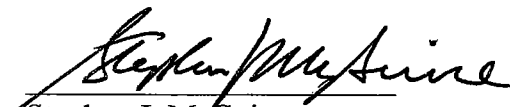
Moreover, the discovery sought by Complaint Counsel is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of the Respondents, as required by Commission Rule 3.31(c)(1). Advertisements disseminated abroad which were never broadcast in the United States have no bearing on the determination of whether the advertising disseminated in the United States contained false messages, implied or otherwise, as Complaint Counsel contend. Respondents aver that all advertising claims were created and authored by Respondent Ajit Khubani, so that there is no dispute regarding who created the ads. In addition, Respondents contend that Complaint Counsel and its experts want to evaluate the effects of claims and sales in different countries, as well as potential consumer injury in those countries, to fashion a cease and desist order which impermissibly reaches conduct in foreign countries.

Complaint Counsel have not provided sufficient evidence to find that the requested information is reasonably likely to yield information relevant to injury to American consumers or to any issue relevant and material to this case. Moreover, Complaint Counsel do not contend that Respondents have failed to provide any requested information related to the sale or marketing of the Ab Force within the United States.

IV.

Because Complaint Counsel have not established that the requested material is relevant and within the jurisdiction of the Commission, Complaint Counsel’s motion is **DENIED**.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

February 25, 2004