

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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In the Matter of	)	
	)	
TELEBRANDS CORP.,	)	
a corporation,	)	
	)	
TV SAVINGS, LLC,	)	
a limited liability company, and	)	
	)	DOCKET NO. 9313
AJIT KHUBANI,	)	
individually and as president of	)	PUBLIC DOCUMENT
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

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**COMPLAINT COUNSEL'S OPPOSITION TO  
NACDS'S MOTION TO FILE AN UNTIMELY *AMICUS* BRIEF**

Complaint Counsel opposes the motion for leave to file an *amicus* brief filed by the National Association of Chain Drug Stores (“NACDS”) as untimely. If the Commission grants the motion for leave to file the *amicus* brief, Complaint Counsel hereby moves for a one week extension of time to file its answering brief and a 1000-word extension of the existing word count limitation.

Commission Rule 3.52(j) states, “Except as otherwise permitted by the Commission, an *amicus curiae* shall file its brief within the time allowed the parties whose position as to affirmation or reversal the *amicus* brief will support. The Commission shall grant leave for a later filing only for cause shown . . . .” The National Association of Chain Drug Stores (“NACDS”) attached to its motion an *amicus* brief that supports the position of the Appellants/Respondents in the above-entitled matter - *i.e.*, the reversal of the Initial Decision

filed by the Administrative Law Judge.<sup>1</sup> Thus, their *amicus* brief should have been filed on November 3, 2004, the due date for the brief filed by Appellants/Respondents.<sup>2</sup> In fact, their brief was filed one week later, on November 10, 2004. NACDS has not sought Commission leave to file late nor has it offered any reason for filing its brief one week late. Under Rule 3.52.(j), its brief should be rejected.

In addition, NACDS should have moved for an extension of time for filing an *amicus* brief supporting Respondents prior to the deadline for filing such briefs. This is an independent basis for the denial of NACDS's motion. Commission Rule 4.3(b) states, "where a motion to extend is made after the expiration of the specified period, the Administrative Law Judge or the Commission may consider the motion where the untimely filing was the result of excusable neglect." In promulgating this rule, the Commission declared that in a post-deadline motion for extension "the movant will have to meet the threshold test of excusable neglect before . . . the Commission will undertake to determine whether there is good cause to extend a time limit." 42 Fed. Reg. 30150 (June 13, 1977). NACDS does not even assert that its untimely request for an extension is the result of excusable neglect. Thus, it has not met the threshold test of establishing excusable neglect, and the Commission should not even entertain NACDS request

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<sup>1</sup> NACDS asserts, at p.2 of its motion, that its brief "would not support either party in this appeal." This statement is disingenuous, however. At p. 9, the proposed NADCS brief states that NACDS members are interested in this matter because "the decision by the ALJ might threaten the members of NACDS with liability . . ." At p. 10, it states that the ALJ's decision "threatens to create substantial problems for NACDS members . . ." The remainder of the brief argues, in essence, for a reversal of the ALJ's decision.

<sup>2</sup> The Initial Decision in this matter was filed on September 15, 2004. Pursuant to the Order Granting Motion for Extensions of Time to File Appellate Briefs dated October 19, 2004, Respondents' deadline for filing their Appeal Brief was extended from October 25, 2004 to November 3, 2004. Respondents did file their Appeal Brief on November 3, 2004.

for leave to file its brief. See General Mill, 86 F.T.C. 687 (1975) (denying post-deadline motion for extension of time because excusable neglect not shown).

The filing of NACDS' 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.<sup>3</sup> Although NACDS asserts Constitutional arguments remarkably similar to those raised by the Respondents in their appeal brief on one question presented, NACDS introduces a second question presented, not addressed in Respondents' brief, requesting the Commission to announce a blanket safe harbor to FTC Act liability for a specified type of promotional campaign.<sup>4</sup> NACDS' delay, however, gives Complaint Counsel one less week to respond to the issues raised in the *amicus* brief. In addition, absent an extension on the word count, Complaint Counsel must respond within the word limit of 26,250 word imposed by Rule 3.52(c), to the NACDS brief in addition to Respondents' brief. Moreover, the late filing of NACDS's brief shortens the time within which *amici curiae* supportive of Complaint Counsel may to respond to the NACDS' brief.

If the Commission grants NACDS' motion notwithstanding NACDS' failure to comply with Rule 3.52(j) and the undue prejudice to Complaint Counsel, the Commission should grant Complaint Counsel's motion for an extension of time to file its answering brief one week and for a 1000-word extension to the existing word count limit. Rule 3.52(k) provides that the Commission will grant extensions of the word count limit only where the moving party

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<sup>3</sup> Although the NACDS brief is similar to Respondents' brief in numerous respects, it does raise some policy issues to which Complaint Counsel must respond.

<sup>4</sup> See NACDS' *amicus* brief at pp. 17 - 18.

demonstrates a strong showing that undue prejudice will result by complying with the existing word count limitation. As explained above, NACDS introduces into this appeal an issue of broad-ranging ramifications that, if granted, would significantly hinder the Commission's ability to assess a company's liability for violating the FTC Act on a case by case basis. Accordingly, a 1000-word extension would allow Complaint Counsel to respond succinctly to the NACDS' brief.

## **CONCLUSION**

Because it is seven days late, NACDS' *amicus* brief should be rejected. Alternatively, the deadline for Complaint Counsel's answering brief and any answering *amicus* briefs should be extended by a corresponding seven days, from December 7, 2004 to December 14, 2004 so as to avoid prejudice. In addition, the word count for Complaint Counsel's answering brief should be extended by 1,000 words to 27,250 words.

Respectfully submitted,

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Walter Gross (202) 326-3319  
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

Dated: November 16, 2004

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

Commissioners: Deborah Platt Majoras, Chairman  
Orson Swindle  
Thomas B. Leary  
Pamela Jones Harbour  
Jon Leibowitz

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 individually and as president of )  
 Telebrands Corp. and sole member )  
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DOCKET NO. 9313

PUBLIC DOCUMENT

**ORDER DENYING NACDS MOTION**

Upon consideration of the Motion of the National Association of Chain Drug Stores, it is hereby

ORDERED that the National Association of Chain Drug Stores' Motion is DENIED.

By the Commission.

Donald S Clark  
Secretary

ISSUED: \_\_\_\_\_, 2004

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

Commissioners: Deborah Platt Majoras, Chairman  
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**ORDER GRANTING COMPLAINT COUNSEL' MOTION FOR EXTENSION OF TIME  
TO FILE ANSWERING BRIEF AND EXTENSION OF WORD COUNT**

Upon consideration of the opposition of Complaint Counsel to the motion of the National Association of Chain Drug Stores to file an *amicus* brief, it is hereby

ORDERED that the due date for Complaint Counsel's Answering brief is extended until December 14, 2004 and the word count for that brief is expanded to 27,250 words.

By the Commission.

Donald S Clark  
Secretary

ISSUED: \_\_\_\_\_, 2004

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have caused to be served by hand this 16<sup>th</sup> day of November, 2004, a paper original and twelve copies as well as an electronic version of the foregoing Complaint Counsel's Opposition to NACDS's Motion to File an Untimely *Amicus* Brief, proposed Order Denying NACDS Motion, and proposed Order Granting Complaint Counsel' Motion for Extension of Time and Extension of Word Count to be filed with the Secretary of the Commission:

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

and one copy to served by hand upon:

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
Washington, D.C. 20580

and one copy to be served by United States mail and email upon:

Edward F. Glynn, Jr.  
VENABLE LLP  
575 7<sup>TH</sup> Street, N.W.  
Washington, D.C. 20004-1601

Don L. Bell, II  
General Counsel  
National Association of Chain Drug Stores  
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