

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)
_____)
_____)



II.

A. Respondents' Arguments

1. Respondents' argument that the January 10, 2006 Order "likely eliminating

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III.

A. Overview

Respondents misrepresent the January 10, 2006 Order as “excluding all pre-Complaint

evidence.” Certification/Reconsideration Motion at 4. See also Certification/Reconsideration

Motion at 2 (“By eliminating all pre-Complaint evidence, your Honor encumbers Respondents’

(Feb. 12, 2002) (citing *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996); *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *2 (Nov. 20, 1979)).

A question of law or policy as to which there is a substantial ground for difference of opinion “requires a finding that the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a “substantial ground for difference of opinion” and triggers certification.” *In re Schering-Plough Corp.*, 2002 WL 31433937 (citing *Int’l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995). “Commission precedent also holds

seeking certification must make a showing of a likelihood of success on the merits.” *In re Schering-Plough Corp.*, 2002 WL 31433937 (citing *Int’l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5; *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979)).

The order for which Respondents seek interlocutory review is an order excluding evidence. “The question of whether evidence on particular factual propositions is relevant to one

“...the practice of exclusion of evidence on appeal to the Commission” *Id.* at 720. See also

their constitutional objections in any suit seeking review of the Commission’s final order.”).

Respondents' interpretation of the January 10, 2006 Order is, again, misplaced. Respondents appear to posit that the January 10, 2006 Order precludes the admission of any evidence or testimony obtained in a pre-Complaint investigation. It most certainly does not. Respondents have seized on a single statement in the January 10, 2006 Order and taken it out of context. The Court assumes that Respondents' erroneous interpretations were inadvertent, but cautions the parties to avoid any intentional misrepresentations of the Court's rulings. The Order does not exclude evidence simply because it was gathered during the pre-Complaint investigative stage.

Moreover, to exclude evidence on the ground that it was gathered during the pre-