

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

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)
Telebrands Corp. and sole member)
of TV Savings, LLC.)
_____)

RESPONDENTS' MEMORANDUM IN SUPPORT
OF THEIR MOTION *IN LIMINE* TO EXCLUDE
THE TESTIMONY AND REPORT OF MICHAEL B. MAZIS, Ph.D.

Respondents Telebrands Corporation, TV Savings, LLC and Ajit Khubani hereby request that the Court enter an order prohibiting Complaint Counsel from introducing the testimony of Michael B. Mazis, Ph.D., and the consumer survey on which he relied, at the hearing in this case, if any.¹

INTRODUCTION AND SUMMARY

In this deceptive advertising case, Dr. Mazis is being offered to present the overall opinion that the Ab Force advertising makes the following claims: that Ab Force users will experience weight loss, fat loss and inch loss; that the Ab Force is an effective alternative to volitional exercise; and that use of the Ab Force will give consumers “six-pack abs.” Dr. Mazis bases this opinion on a so-called “facial analysis” and on a separate consumer survey. However, both the “facial analysis” and the consumer survey are utterly unreliable, fall well short of the standards for admissible evidence set forth in Commission decisions and rules and in relevant federal case law, and thus should be excluded.

Dr. Mazis’ “facial analysis” is nothing more than Dr. Mazis’ bald conclusion that the advertising makes the challenged claims, and is unreliable for several reasons. First, Dr. Mazis arrived at this interpretation of the advertising through his

¹ Respondents have previously filed a Motion for Summary Decision which is currently pending before this Court. As discussed in that motion, and as discussed in the Opposition to Complaint Counsel’s Cross-Motion for Summary Decision, if Complaint Counsel is to prove its case, they must do so through reference to extrinsic evidence. Complaint Counsel has recognized that it has this burden. However, the extrinsic evidence Complaint Counsel intends to rely on – the opinions of Dr. Mazis and the consumer on which he rests many of those opinions – is inherently unreliable and is inadmissible as evidence. Consequently, if this motion is granted, Respondents’ Motion for Summary Decision should also be granted.

unarticulated expertise in advertising, but Dr. Mazis himself admits that his expertise in interpreting advertising claims is no greater than that of an ordinary consumer – in other words, not expert at all. Second, Dr. Mazis offered his interpretation only after consulting with Complaint Counsel and reviewing the Complaint in this matter, drawing the objectivity of such interpretation into grave doubt. Third, Dr. Mazis has done absolutely no testing to support his opinion that the Ab Force advertising “exploited” consumers’ perceptions about ab belts, thereby causing consumers to perceive advertisements for the Ab Force as making the challenged claims. This is, at bottom, the very worst kind of *ipse dixit* evidence rejected by the Commission and by federal courts, and consequently should be excluded from the hearing.

The consumer survey on which Dr. Mazis bases much of his testimony should also be excluded, as should the opinions drawn from that survey. Dr. Mazis’ own testimony reveals that the survey is rife with numerous fundamental methodological flaws:

- The survey fails to control for – or even inquire into – the basic fact alleged in the Complaint: that prior exposure to three particular infomercials for EMS ab belts (Ab Energizer, AbTronic and Fast Abs) was utilized by the Respondents to incorporate into their advertising claims never expressly made for Ab Force;
- The survey “control” advertisement utilized ineffective controls because it did not “cleanse” all of the elements cited by Dr. Mazis as leading to perceptions of the challenged claims;
- The control group had, in Dr. Mazis’ words, a “relatively high proportion of respondents (over 40%)” who reported weight loss and six-pack ab claims, claims that should have been controlled by the exclusion of the “cleansed” elements

– but rather than recognize that this was the result of bias, Dr. Mazis explains it away as resulting from preconceptions – which begs the question;

- By defining the population, in part, by screening for people who had purchased a product for “weight loss,” Dr. Mazis fails to properly represent people who exercise and most especially, people looking for a stomach or muscle massage, not all of whom are necessarily interested in weight loss, and biases the study toward a finding that weight loss was an included claim;
- There were inherent flaws in several survey questions that injected a bias into the survey results because they had the effect of leading participants; and
- The decision by Dr. Mazis to drop 81 respondents for no apparent reason resulted in the results being exaggerated.

Because the consumer survey is hopelessly flawed, and the trustworthiness of the survey compromised by Complaint Counsel's heavy involvement in designing the survey, the results obtained are wholly unreliable and the opinions based on those results are equally unreliable and should be excluded. Dr. Jacob Jacoby, a leading expert in the field of advertising surveys and scientific standards, has identified these flaws and explained their fatal impact on the survey in an accompanying declaration. But this Court need not rely on Dr. Jacoby's conclusions in order to determine that the survey is inadmissible. Rather, the Court's function as gatekeeper, guided by the standards set forth in the law, requires this conclusion.

ARGUMENT

I. DR. MAZIS' SO-CALLED FACIAL ANALYSIS HAS NO RELIABLE FOUNDATION.

Complaint Counsel has proffered Dr. Mazis to testify that based upon his own “facial analysis,” he was able to discern the following intricate causal chain between the Ab Force ads and ads for Ab Energizer, AbTronic and Fast Abs: (1) the ads for Ab Energizer, AbTronic and Fast Abs were on around the same time as the ads for Ab Force, and (2) consumers who saw the Ab Force ads probably saw the ads for the three other ab belts, and (3) those three ads contained the challenged claims, and (4) because the Ab Force advertising contained certain discrete elements similar to those found ads for Ab Energizer, AbTronic and Fast Abs, therefore (5) the Ab Force ads probably caused consumers to believe that the Ab Force made the same claims found in those ads. This interpretation of the claims made in the Ab Force advertising is therefore not drawn from the four corners of the advertising itself, but is purportedly shaped by reference to other infomercials that Dr. Mazis had not seen prior to his engagement in this matter. (Exh. 1, Mazis Expert Report, ¶ 11).

Although this tortured syllogism is outlined in Dr. Mazis' expert report, his reports and testimony fail to describe any reliable information supporting his conclusions. Instead, they are based on "expertise," which Dr. Mazis admitted was no greater than that of any consumer on the street, and consequently is no "expertise" at all. These conclusions are, at bottom, nothing more than Dr. Mazis' personal interpretation. Moreover, these interpretations were reached only after reviewing the Complaint and are based on incomplete information selectively

provided to Dr. Mazis by Complaint Counsel. Consequently, Dr. Mazis' conclusions amount to nothing more than inadmissible *ipse dixit*, with no detail that would allow others to determine how he reached a particular conclusion.

Central to Dr. Mazis' interpretation is the existence of the ads for Ab Energizer, AbTronic and Fast Abs. Picking up on Complaint Counsel's "importation" theory, Dr. Mazis concludes that the Ab Force ads are "'free riding' on the claims made in ads for other EMS ab belts." (Exh. 1, Mazis Expert Report, ¶ 19). However, Dr. Mazis proceeds from the faulty assumption that the ads for these three other ab belts were the only ones widely aired at the time. Specifically, he states that "[t]hirty-minute infomercials were aired for AbTronic, AB Energizer, and Fast Abs [and] were among the most frequently aired infomercials in the nation." (Exh. 1, Mazis Report, ¶ 15).

But what Dr. Mazis did not know, because he did not independently investigate and because he was not told by Complaint Counsel,² was that at the time Ab Force was being advertised, there were a number of other infomercials and television commercials being broadcast, on a national basis, for ab belts and other EMS devices. These products included Electrosage, Accusage, Electro-gym, Gym Fitness, Slendertone, IGIA Mini Wireless Massage, Slim Tron, Micro Sage, Dermal

² It is clear that Dr. Mazis draws all of his "facts" from what Complaint Counsel told him, and not from his own investigation into the possible sources of consumer perceptions. (Exh. 3, Mazis Dep., pp. 18:22 – 20:18 (Complaint Counsel only provided videotapes of advertisements for Ab Energizer, AbTronic and Fast Abs); Exh. 1, Mazis Expert Report, ¶ 9 (the only materials, other than articles, that he considered were (1) the Complaint and Exhibits, (2) commercials for the three other ab belt products, and (3) a transcript of the Ab Force ads).

Tone, Rejuvenique and others. Many of these products contained claims that related only to massage and muscle toning, and contained many of the same depictions as those seen in the Ab Force commercial.³

From the outset, then, Dr. Mazis viewed the Ab Force ads through a prism of incomplete facts. Because there were other commercials out there for other EMS devices that contained many of the same visual and other elements as those found in the Ab Force, and because many of those other ads contained claims not challenged by Complaint Counsel, Dr. Mazis cannot conclude as a matter of facial interpretation that consumers would recollect the claims for three specific ads. These conclusions simply cannot be reached without resorting to extrinsic evidence establishing a connection between the Ab Force ads and the ads for the three other ab belts identified by Complaint Counsel. And yet, from these limited facts Dr. Mazis astonishingly concludes that “[a]s a result, the broadcast of infomercials for AbTronic, AB Energizer and Fast Abs is likely to have had an impact on consumers’ perceptions of the Ab Force.” (Exh. 1, Mazis Report, ¶ 17).

When asked whether he had done anything to test this causal connection, Dr. Mazis admitted he did not. (Exh. 3, Mazis Dep., pp. 67:11 – 69:6). Instead, Dr. Mazis purports to base this personal interpretation of the Ab Force ads on his "expertise" in the field:

³ Extensive details of the products advertised are found at Respondents Statement of Disputed Facts in Opposition to Complaint Counsel's Motion for Summary Decision at ¶¶ 9 - 15.

Q. What do you mean by the term "facial analysis"?

A. Well, facial analysis is looking at the advertising, and based on experience and research, to make a judgment on what the likely consumer perceptions are.

Q. What research did you do in connection with this meeting that helped you do a facial analysis of the ads for the Ab Force?

A. Well, what I mean by "research," I mean research that, say, I would have done in my lifetime of conducting a lot of consumer-perception surveys, having familiarity with academic literature. So my opinions are informed by all the ads that I've looked at – thousands of ads that I've looked at plus research I've done on consumer perceptions. So all of that enables me to conduct this facial analysis on the likely consumer perceptions of these advertisements.

(Exh. 3, Mazis Dep., pp. 23:18 – 24:7).

But Dr. Mazis admitted that he is no more of an expert than any consumer on the street:

Q. Do you believe that you are – have an ability that is superior to that of an average consumer to extract meaning from an ad?

A. No, I think they're different issues.

Q. In what respect are they different?

A. Well, an individual consumer perceives what he or she sees the ad communicates to him or her, but what I'm doing is looking at consumers as a group and trying to make some assessment about how consumers in general would be likely to perceive certain claims made in advertising.

(Exh. 3, Mazis Dep. pp. 24:8 – 24:18).

Dr. Mazis' claim to be able to "try[] to make some assessment" about consumers "in general" has no articulable connection to the interpretation he makes. Because it is no better than the knowledge held by any consumer, it is not "expertise" and is therefore irrelevant to determining consumers' perceptions of the Ab Force advertising. This is exactly the kind of immeasurable, subjective "say-so" evidence criticized by courts as inadmissible.⁴

The admissibility of expert testimony is governed by Commission Rule 3.43(b). Under the rule, "irrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b)(1) (evidence may be excluded even if relevant, material, and reliable because of considerations of "undue delay, waste of time or needless presentation of cumulative evidence."). Rule 702 of the Federal Rules of Evidence, amended in 2000, provides a framework for analyzing the reliability of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

⁴ Dr. Mazis cites articles concerning "categorization theory" in order to give his personal impressions a veneer of scientific basis. But in the article he cites, the "categorization theory" was tested by first determining whether consumers had developed preconceptions about a category of products – specifically, cameras. (Exh. 2, Mazis Rebuttal Report, ¶¶ 2 - 4. Dr. Mazis has no empirical evidence to support his assumption that consumers would have consumers have "knowledge" about ab belts in the first instance. He simply assumes they do. This is unacceptable.

Rule 702 was amended in 2000 primarily in response to a pair of Supreme Court cases. F.R. Evid. 702, Comment, 2000 Amendments. Those cases, *Kumho Tire v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999) and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993) established that the general acceptance test for the admission of scientific and technical evidence was no longer the sole determinant for the admission of such evidence and that to be admitted, such evidence had to be reliable and relevant. A primary focus of the cases since *Daubert* has been that "unverified statements that [are] unsupported by any scientific method ... [provide] no basis for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence" *Rogers v. Ford Motor Co.*, 952 F.Supp 606, 615 (N.D. Indiana 1997) (expert testimony that offers nothing more than a bottom line conclusion is excluded).

In order for an expert's opinion to be reliable, it must be based on sufficient facts or data. See *Elcock v. Kmart Corp.*, 233 F.3d 734 (3rd Cir. 2000) (expert economist excluded because model relied on assumptions "wholly without foundation in the record"); *Coffey v. Dowley Manufacturing, Inc.*, 187 F.Supp.2d 958 (M.D. Tenn 2002) (expert opinion is rejected in part because it is based on "guestimations"). The expert's opinion must provide some basis on which to examine the reliability of the report. See *Donnelly v. Ford Motor Co.*, 80 F.Supp.2d 45, 50 (E.D.N.Y. 1999) ("Without some explanation of the data, studies or reasoning [an expert] employed, his conclusion is simply inadmissible *ipse dixit*"). An assertion of an expert's qualifications, conclusions and an assurance of reliability is not enough to allow a

court to consider an expert's proffered opinion to be reliable. *See Daubert v. Merrill Dow Pharmaceuticals Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (on remand).

In deciding whether to admit expert testimony, the court's foremost objective must be to rule out "subjective belief or unsupported speculation." *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106 (7th Cir), cert. denied, 512 U.S. 1222 (1994). An expert witness may rely on his experience as the basis for his testimony. F.R. Evid. 702, Comment, 2000 Amendments. However, if the expert is relying solely or primarily on experience, "then he must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion and how that experience is reasonably applied to the facts." *Id.*; *Nemir v. Mitsubishi Motors Corp.*, 200 F.Supp.2d 770, 774 (E.D. MI 2002). "The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable." *Nemir v. Mitsubishi Motors Corp.*, 200 F.Supp.2d at 774. An expert is required to employ "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. at 1176.

Dr. Mazis' personal impressions – formed after he had consulted with Complaint Counsel and had been provided by Complaint Counsel with the Complaint and other selected information – hardly satisfy the requirement of Rule 702 that each opinion be based on "sufficient facts or data."ⁱ Dr. Mazis' so-called "facial analysis" is nothing more than a series of assumptions, based on no articulable experience or expertise, and completely unverified by any empirical data. Nowhere in

his report or in his testimony does he explain how or why his experience constitutes a sufficient basis for the opinion, or how that experience is reasonably applied to the facts. Indeed, to the extent we know of Dr. Mazis' assumptions – for example, that the only infomercials for EMS ab belts airing at the time were the three identified by Complaint Counsel – we know those assumptions are wrong. Accordingly, this Court should not accept the interpretation of Complaint Counsel's paid witness whose conclusory opinions go directly to the heart of the central issue in this case. Instead, the Court should properly find such impressions to be outside the scope of Rule 702 and exclude any "facial analysis" opinion from Dr. Mazis, if there is a hearing.

II. BECAUSE THE CONSUMER SURVEY IS UTTERLY UNRELIABLE, DR. MAZIS' OPINIONS RELATED TO THE SURVEY SHOULD BE EXCLUDED.

Dr. Mazis is also being proffered to provide testimony and opinions based on a consumer survey conducted for this litigation at the direction of Dr. Mazis and Complaint Counsel. However, as revealed by the questions asked (or not asked in the survey), and by the testimony of Dr. Mazis himself, the indicia of reliability necessary to allow evidence of a consumer survey are missing in this case. Based on the numerous fatal flaws described below, and the lack of trustworthiness created by Complaint Counsel's involvement in designing the survey, this Court should find that

the consumer survey and any opinions based on that survey are inadmissible.⁵

A. Complaint Counsel's Active Involvement in the Design of the Survey Renders it Inadmissible.

As an initial matter, the consumer survey conducted in this case was designed in large measure by Complaint Counsel after the Complaint was drafted and before Dr. Mazis was ever retained. This heavy participation by Complaint Counsel strips the survey of any trustworthiness, particularly in light of the numerous flaws in the elements designed by Complaint Counsel. For this reason, the survey and the opinions related to it should be excluded.

The undisputed facts of this case demonstrate that Dr. Mazis did not act independently in designing the survey. Indeed, Dr. Mazis was not the person who designed the survey in the first place. Instead, almost every aspect of the survey was designed by Complaint Counsel, including (1) the type of survey to be undertaken, (2) the number of respondents to be surveyed, (3) the number of mails to be used in the survey, (4) the conditions for the survey, (5) the use of taped commercials to be shown to participants, (6) the number of open-ended questions, (7) the number of closed ended questions, (8) the screening criteria to be used in selecting the participants, and (9) the quotas for the selection of participants by gender and age.

⁵ Respondents again refer the Court to the first Declaration of Jacob Jacoby, Ph.D, (the "Jacoby Expert Report") attached hereto as Exhibit 4, and the subsequent Declaration of Jacob Jacoby, Ph.D., which is attached as Exhibit 5. While Dr. Jacoby's declarations explain in detail the respects in which the survey falls short of standards for reliability, these flaws are apparent on the face of the survey and, indeed, in many cases have been admitted by Dr. Mazis in his deposition.

These parameters of the survey were put into place long before Dr. Mazis was even contacted by Complaint Counsel about serving as an expert in this matter.

The active involvement of attorneys in the design of a survey has been held to cast sufficient doubt on the trustworthiness of the survey to render it worthless:

It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques. *Just as important, the survey must be conducted independently of the attorneys involved in the litigation.*

Pittsburgh Press Club v. United States, 579 F.2d 751, 759 - 760 (3d Cir.1978) (emphasis added). *See also Delgado v. McTighe*, 91 F.R.D. 76 (E.D.Pa.1981) (concluding that a survey lacked "circumstantial guarantees of trustworthiness" due to lawyers' active involvement in design and administration of survey); *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Laboratories*, 532 F.Supp. 1040, 1058 (D.N.J.1980) (excluding survey in part because "plaintiffs' attorneys were involved in designing the questions that were to be asked ... This conflicts with the admonition in *Pittsburgh Press* that surveys be designed without guidance from lawyers.").

There is no question that Complaint Counsel was heavily involved in the design of critical aspects of the consumer survey. Specifically, Complaint Counsel provided Jack Kloc, the head of U.S. Research, the company that conducted the actual survey, with a government contract for his services in September 2003. (Exh. 6, Solicitation for Commercial Items). The Statement of Work in that Contract sets forth a variety of design parameters. In particular, through the statement of work, the Commission established the type of survey to be used and the number of respondents to be interviewed:

Research Design

The proposed study will use a mall-intercept methodology and will include interviews with 600 consumers to be conducted in a minimum of ten (10) malls across the U.S.

(Exh. 6, Solicitation, p. ABF Expert 00018). In addition, the statement of work set forth the conditions for the survey:

The study will consist of three conditions. Each condition will involve exposure to one or more commercials. Two hundred respondents will be assigned to each condition. The FTC anticipates that the interviews will consist of two or three open-ended questions and 10 to 12 closed-ended questions. The questionnaires will be provided by the FTC's designated consultant.

(*Id.*). It also set instructed the contractor to conduct the survey at a number of malls and regions selected by the Commission:

The Contractor shall identify shopping malls in a minimum of 10 (ten) geographically dispersed locations. At least two and no more than three of the mall locations shall be in each of the four U.S. Census regions for the study.

(*Id.*). Additionally, the statement of work also set forth the participant selection criteria:

Using a screening questionnaire to be provided by the FTC, the Contractor shall screen a sufficient number of individuals to produce 600 respondents (split equally among the ten malls selected). The screening criteria are:

1. In the past two years, have either attempted to lose weight or to exercise.
2. In the past two years, have watched at least several minutes of at least five TV infomercials.

(*Id.*). Finally, the statement of work also established the population quotas to be used:

Quotas for study include:

3. 50% male and female respondents.
4. 80% of the respondents between the ages of 21 and 50.
5. 20% of the respondents between the ages of 51 and 65.

(*Id.* at p. ABF Expert00019). The contracting officer for technical matters for this Solicitation was Walter Gross, one of the acting Complaint Counsel in this matter.

(*Id.* at p. ABF Expert00021).

Significantly, this solicitation was presented to and signed by Mr. Kloc on September 3, 2003. (Exh. 6, Solicitation, p. ABF Expert 00016). But Dr. Mazis testified that he did not get involved in the case until mid-November and didn't discuss the case with the Commission until then. (Exh. 3, Mazis Dep., pp. 139:19 – 141:19; 143:19 - 21). He also testified that he did not see the statement of work prior to his involvement. (Exh. 3, Mazis Dep., pp. 141:1 – 11). In short, Complaint Counsel developed the survey criteria alone, without any participation of the expert who purportedly designed the survey.

An attorney's participation with an expert in designing a survey is usually not a concern of the Court, *see Reference Manual on Scientific Evidence*, p. 237 - 238 (2nd Ed. 2000), because counsel's involvement may not signal any flaw attributable to counsel's participation. *See, id.* (citing *Upjohn Co. v. American Home Products Corp.*, 1996 WL 33322175 (W.D. Mich. 1996)(objection that "counsel reviewed the design of the

survey carries little force with this Court because [opposing party] has not identified any flaw in the survey that might be attributable to counsel's assistance.")(attached as Exhibit 8)).

Complaint Counsel's involvement goes beyond mere review of the design. It set forth the survey design criteria, and even guided such elements as where the survey would be conducted without revealing its reasons for doing so.⁶ Additionally, elements of the survey that were designed by Complaint Counsel are directly challenged by Respondents as flawed. For example, as discussed below, the screening criteria were designed so that the universe of survey participants would be made up of those who would consider purchasing the Ab Force. But the inclusion of a criterion that participants must have purchased a weight loss or exercise product in the past year necessarily limits the universe to those who have an interest in losing weight, as Dr. Mazis admitted. (Exh. 3, Mazis Dep., pp. 89:9 – 91:2). Not surprisingly, these criteria were created by the very Complaint Counsel who argue that the advertising conveys "weight loss" claims. It is therefore no coincidence that the population surveyed was a population who would be more inclined to find weight loss claims in the advertising.

Complaint Counsel, in an effort to create new law through a novel theory, has influenced or outright directed critical aspects of the survey design. The result has

⁶ Jack Kloc testified that once he prepared a list of locations to Complaint Counsel, he forwarded it to Complaint Counsel. (Exh. 7, Deposition of Jack Kloc, pp. 118:16-120:17). Three of the cities selected by U.S. Research were objected to by Complaint Counsel. (*Id.*). Mr. Kloc was never told why the apparently arbitrary decision to use different mall locations was made, and was in fact told by Complaint Counsel that "they couldn't say why." (*Id.*). Mr. Kloc was informed of that decision by Walter Gross.

been biased questions, inadequate controls, and other flaws. The level of Complaint Counsel's involvement, coupled with the fact that Dr. Mazis only reviewed a select number of ads for EMS devices provided by Complaint Counsel (out of the dozens of such devices on the market) and only reviewed the Complaint, which sets forth Complaint Counsel's claims and allegations, overwhelmingly leads to the conclusion that Complaint Counsel's involvement was monumentally influential. The circumstances of trustworthiness necessary to the objectivity of the survey are not there, and the survey and resulting opinions should be excluded for this reason.

B. Dr. Mazis' Methodology Must be Excluded if it is Not Competent and Reliable.

The admissibility of Dr. Mazis' opinions concerning the consumer survey at issue is also governed by Commission Rule 3.43(b). Under that rule, "irrelevant, immaterial, and unreliable evidence shall be excluded." Specifically, the Commission requires that consumer surveys be "methodologically sound" in order to be accepted as extrinsic evidence of consumer perceptions. *Kraft, supra*, 114 F.T.C. at 121; *Cliffdale Associates, Inc., supra*, 103 F.T.C. at 164-66. In determining whether a consumer survey is methodologically sound, the Commission will look to whether it "draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." *Thompson Medical, supra*, 104 F.T.C. at 790. The Commission looks to whether such evidence is reasonably reliable and probative. *See Bristol-Myers Co.*, 85 F.T.C. 688, 743-44 (1975). Flaws in the methodology may affect the weight that is given to the results of the copy test or other consumer survey.

This approach mirrors that taken under Rule 702 and cases interpreting it. Under *Daubert*, expert testimony that lacks a "reliable foundation" must be excluded. *Daubert*, 509 U.S. at 597. *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705,708 (2d Cir. 1989) ("For an expert's testimony to be admissible . . . it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help.").

The proffered testimony "must be supported by appropriate validation- i.e., 'good grounds,' based on what is known." *Id.* at 590. It must be shown that the "reasoning or methodology underlying the testimony is scientifically valid" and that the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Because Complaint Counsel seeks to present expert testimony based on a consumer survey, they have the burden of showing that Dr. Mazis' opinions and the survey on which they are founded "are based on sound science." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir.), *opinion after remand, cert. denied*, 516 U.S. 869 (1995). The Court's task "is to analyze not what the experts say, but what basis they have for saying it." *Daubert v. Merrell Dow*, 43 F.3d at 1316.

Rejecting the usual argument raised in opposition to a *Daubert* motion, one court has explained:

The court need not and should not respond reflexively to every criticism by saying it merely "goes to the weight" of the survey rather than to its admissibility. If the flaws in the proposed survey are too great, the court may find that the probative value of the survey is substantially outweighed by the prejudice, waste of time, and confusion it will cause at trial.

Simon Property Group L.P. v. mySimon, Inc., 104 F.Supp.2d 1033, 1039 (S.D. Ind. 2000) (citing Rule 403) (emphasis added). In *Simon Property*, the district court excluded the survey at issue because “although no survey is beyond criticism”, that survey’s flaws were “so basic as to strip [it] of any significant probative value” and thus it would not have “been fair to treat [those flaws] as matters going only to the weight of the evidence”. *Id.* at 1041.

Indeed, district courts regularly fulfill their gatekeeper obligation by excluding irrelevant or insufficiently reliable evidence. *See, e.g., Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 296-97 (2d Cir. 1999) (upholding district court’s ruling excluding survey that was so flawed that its findings were irrelevant to the Lanham Act claims at issue); *National Football League Properties, Inc. v. ProStyle, Inc.*, 57 F.Supp.2d 665, 668-70 (E.D. Wisc. 1999) (“exercis[ing] its gatekeeping function”, and excluding survey results after finding survey expert’s failure to use adequate controls caused results’ prejudicial effect to outweigh their probative value). And, of course, unlike the Federal Rules of Evidence, Commission Rule 3.43(b) contains an explicit direction to exclude “irrelevant, immaterial and unreliable evidence.” 16 C.F.R § 3.43(b).

There is no set formula for determining whether a survey or opinion has met that standard, but the Court should examine the following factors bearing on reliability: (1) whether a “theory or technique . . . can be (and has been tested);” (2) whether it has been “subjected to peer review and publication;” (3) whether the particular technique has a “known or potential rate of error” and whether there are “standards controlling the technique’s operation;” and (4) whether the theory or

technique enjoys "general acceptance" in the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

Specifically, with regard to consumer surveys and other survey evidence, federal courts have identified several hallmarks of a properly conducted survey:

- a. The population was properly chosen and defined.
- b. The sample chosen was representative of that population.
- c. The questions asked were clear and not leading.
- d. The data gathered were accurately reported.
- e. The data were analyzed in accordance with accepted statistical principles.
- f. The process was conducted so as to insure objectivity.
- g. The survey was conducted by qualified people following proper interview procedures.

Federal Judicial Center's *Manual for Complex Litigation* (3rd, Section 21.493).

Dr. Mazis' consumer survey fails to meet these standards of reliability in several regards. First, the survey failed to properly control for already existing consumer preconceptions (or misconceptions) about the Ab Force, rendering the results worthless. Second, the survey was hopelessly confounded, rendering Dr. Mazis' conclusions as to the cause of consumer perceptions uncertain and unreliable. Finally, the survey population was chosen according to confusing or biasing screening criteria, raising grave doubts as to the accuracy of the results reported.

C. The Survey Lacks Adequate, Necessary Controls

As discussed in Respondents' Opposition to Complaint Counsel's Motion for Summary Decision, Dr. Mazis' survey failed to adequately control for consumer

perceptions (or misperceptions) about the Ab Force product. In this regard, Dr. Mazis' methodology is riddled with inconsistencies, as discussed below. First, although he admitted that the existence of consumer preconceptions about ab belts would impact survey participants' responses (thus skewing the results), he claimed that it was not necessary to consider participants' preconceptions because they were somehow "irrelevant" to the survey. Second, Dr. Mazis' decision not to ask about the existence of participant preconceptions (again, because they were "irrelevant") clashes with his eleventh-hour decision to remove from the results responses by participants who had seen a single news story concerning ab belts in the month prior to the survey. These inconsistencies loudly herald flaws with survey controls, flaws which doom the survey as unreliable.

The failure to adequately control for pre-formed beliefs in a case such as this is alone sufficient to render a survey unreliable. In *American Home Products Corp. v. The Procter & Gamble Co.*, 871 F. Supp. 739 (D. N.J. 1994), the court, evaluating a mall consumer survey on perceptions of an analgesic product, noted that “a survey in a false advertising case should typically distinguish between the participant’s prior knowledge and/or prior (mis)conceptions regarding the product before seeing its advertisement from any effect due to the advertisement alone.” *American Home Products Corp.*, 871 F. Supp. at 749 (D. N.J. 1994). The court further noted that “a survey addressed to an analgesic commercial must properly control for preconceptions (both accurate and inaccurate) that consumers may possess given their continual exposure to [over the counter] products and advertising.” *Id.*

Controls "are an essential feature of reliable survey evidence because they enable the surveyor to separate the wheat (the effect of the advertisement, alone, on the participant) from the chaff (the effect of 'the participant's prior knowledge and/or prior (mis)conceptions)". *Id.* See also, *Pharmacia Corp. v. GlaxoSmithKline Consumer Healthcare, L.P.*, 292 F.Supp.2d 594, 604 - 605 (D.N.J. 2003)(striking expert testimony for failure to adequately control for preconceptions by not removing from the results participants with defined preconceptions and stating, "because of this control failure the Court cannot determine if consumers actually perceived a superior quitting efficacy claim in 'Revised Smart Choice,' or if they were led to perceive one that was not there as a result of their pre-existing biases".)

The risk of failing to properly control may mean that “noise (in this case, preconceptions regarding an analgesic’s duration and/or efficacy) may exist and may be seen by customers even where such claims have not been asserted.” *Id.*, at 750. Because the survey did not contain any “adequate controls” that would filter out such “noise,” the court held that it could not reliably “discern whether if [the] survey results are attributable to the advertisement or are instead attributable to consumers being bombarded with [other] advertising from which their pre- or misconceptions of these products have developed.” *Id.*, at 762.

The single greatest flaw in the survey in this case is that Dr. Mazis *never asked* the survey participants if they had ever seen the commercials for any other of the other numerous EMS devices marketed at the same time as Ab Force, let alone the ads for the AbTronic, Ab Energizer or Fast Abs products pointed up by Complaint

Counsel. (Exh. 3, Mazis Dep., pp. 82:12 – 84:4). Therefore, Dr. Mazis has no idea whether there was a disproportionate number of survey participants between the control group and the test groups that may have held preconceptions (or misconceptions) about the Ab Force product.

This is important for two reasons. First, Dr. Mazis freely admitted that such preconceptions, if held by a survey participant "may have an impact on their perceptions of the current advertising." (Exh. 3, Mazis Dep., pp. 22:1 – 23:11). Indeed, Dr. Mazis was concerned enough about preconceptions affecting the survey responses that he eliminated from the results anyone who had seen a news article or story about ab belts, and who developed particular beliefs about ab belts as a result. (Exh. 3, Mazis Dep., pp. 94:11 – 99:7).

Second, even though Dr. Mazis knew that such preconceptions could affect the results of his survey, he made no effort to adequately control for those preconceptions. Indeed, Dr. Mazis claimed that such controls would be irrelevant:

Q. Did you consider asking in the main questionnaire whether individuals were aware of advertising for other ab belt products?

A. No. It wasn't relevant question.

Q. Did you consider asking in the screening questionnaire whether they had actually purchased an ab belt?

A. No.

Q. Why not?

A. I didn't think it was relevant.

(Exh. 3, Mazis Dep., pp. 82:9 – 21).

Clearly such controls were not irrelevant, because Dr. Mazis imposed a very narrow control to eliminate consumers who, in the month before the survey, developed certain impressions about ab belts. Specifically, Dr. Mazis included last-minute questions to the main questionnaire designed to identify those who saw news stories in the 30 days prior to the survey. But this effort to control such preconceptions was limited, and was hardly sufficient to screen for all preconceptions that may affect the results. Dr. Mazis admitted that his limited control questions related only to news sources, as opposed to any of the other "numerous "sources of information" about ab belts that he admitted were available to the consumers. (Exh. 3, Mazis Dep., pp. 30:2 - 21). Moreover, he limited his control by only removing anyone who had seen such a news article or story within the 30 days preceding the survey. (Exh. 3, Mazis Dep., pp. 94:11 – 99:7; Questions 7 and 8 of the Main Questionnaires, attached as Exh. H to the Mazis Expert Report, which is attached as Exhibit 1). Dr. Mazis made absolutely no effort to identify and screen out those who may have, for example, seen a news story 45 days prior to the survey. Or who may have seen an ab belt ad the day before the survey. Or who may have even purchased an ab belt prior to participating in the survey.

The effect of this omission is staggering, and absolutely fatal to the reliability of the survey. Because he did not take the simple step of identifying participants who had developed preconceptions about ab belts, he cannot know whether there were more participants in one group or another.

Dr. Mazis wrongly dismisses this by asserting – without any cognizable basis for his bald assertion – that "probabilities" would put an equal number of participants with preconceptions in the test group as in the control group. (Exh. 3, Mazis Dep., pp. 41:18 – 42:14). He also dismisses this concern by claiming that his control ad was sufficiently "cleansed" to prevent an ocean of preconceptions from seeping into the control participants' responses.

There are, of course, significant problems with Dr. Mazis' efforts to explain this all away. First, as noted by Dr. Jacoby, there is absolutely no scientific, statistical, or other basis for Dr. Mazis' claim that "probabilities" would evenly divide those with pre-formed notions about ab belts or other EMS devices into the control and test groups. (Exh. 5, Jacoby Decl., ¶¶ 29 - 34). Indeed, if simple "probabilities" took care of any issues of preconceptions, there would never be a mention in the case law of a need to control for preconceptions (both accurate and inaccurate) that consumers may possess given exposure to products and advertising

Second, Dr. Mazis' efforts to "cleanse" the ad were incomplete and ineffective. He testified that he "cleansed" the ad of any depictions or representations that might trigger participant preconceptions by (1) removing the statement ("You've seen those amazing ab belt infomercials"), and (2) removing depictions of attractive men and women from the ad. These efforts were incomplete and ineffective because he did not remove all references to other ab belts and he did not remove all depictions of, as he describes them, trim women and well-muscled men. The control ad still contained a reference to "other ab belts," and still contained images of trim women and well-

muscled men. (*Compare*, Test Ad and Control Ad, submitted as Exhibits 30 and 31 to Respondents' previously filed Declaration of Theodore W. Atkinson, submitted as part of the Opposition to Complaint Counsel's Motion for Summary Decision).

Further, the removal of the reference to "other ab belt infomercials" was ineffective in controlling for all preconceptions because, even if that statement triggered preconceptions, it would have triggered preconceptions only developed as a result of seeing other ab belt advertisements. It would not, however, have controlled for preconceptions developed from any of the other "numerous sources of information." that Dr. Mazis said necessarily would influence the results of the survey.

If Dr. Mazis' "cleansing" efforts were an effective control, then there would have been no reason for Dr. Mazis to later eliminate from the survey those participants who developed preconceptions based on news stories seen within 30 days of the survey. And, if his dismissive explanations are correct, then "probabilities" would have sorted those participants between the two groups, and the "cleansed" ad would have prevented such preconceptions from affecting the results. That Dr. Mazis inserted that limited control at the last minute, however, underscores his own justifiable uncertainty about the effectiveness of the control in his "cleansed" ad. There is no logical way to reconcile those two things, and his survey is doomed because of it.

D. Bias in the Survey Questionnaire

Another flaw inherent in the survey is the leading and biasing questions found in the screening questionnaire. A survey is "not credible if it relies on leading questions which are "inherently suggestive and invite guessing by those who did not get any clear message at all." *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 127 (3d Cir.1994).

Dr. Mazis' survey contains a heavily biasing question concerning weight loss at the very beginning of the screening survey. Specifically, the survey was designed to include "people 18 years older who, in the last 12 months, had purchased a product or used a service to help lose weight, tone muscles or massage the body and who had purchased a product by calling a toll free number that was included in a TV ad, program or infomercial." (Exh. 1, Mazis Expert Report, ¶ 23). One of the first screening questions was as follows:

Over the past 12 months, have you purchased a product or used a service to help you lose weight, tone your muscles, or massage your body?

(Exh. 1, Mazis Expert Report, Exh. C thereto, Question B). Those who answered "No" or "I don't know" were terminated from the survey, and only those who answered "Yes" were included. (*Id.*). Similarly, Question F of the Screening Questionnaire asks participants:

Do you or does any member of your household work in any of the following... a store or company that sells exercise, fitness or weight loss products or programs?

(Exh. 1, Mazis Expert Report, Exh. C thereto, Question F).

As Dr. Jacoby notes, these questions provide a biasing mind set, suggesting to the respondent the way in which the commercials they see should be interpreted. (Exh. 4, Jacoby Expert Report, ¶ 38). Courts considering such biased questioning have recognized that such a question, while not expressly leading the participant to a direct response, may imply to the participant an improper association between the advertisement and the claim, rendering the results useless. *See, e.g., Simon Property Group L.P. v. mySimon, Inc.*, 104 F.Supp.2d 1033, 1048 (S.D. Ind. 2000) ("The question about whether the two items are put out by the same or a related source is likely to generate so-called 'demand effects' that bias the survey by suggesting to respondents, at least implicitly, that they should believe there is at least some sort of relationship between the different items when the possibility might not even have occurred to the vast majority of consumers who see the items.").

Dr. Mazis himself recognized the possibility of biasing the responses with leading questions, but limited his concern to questions regarding other advertising:

Q. Did you consider asking [participants] whether they had seen advertising for other ab belts?

A. No. I didn't think it was a relevant question, and it was biasing.

Q. [...] Why would it have been biasing?

A. Well, if you start to ask a bunch of questions about the product that you're exploring here, it could possibly influence their perceptions, but that wasn't really the prime reason why I didn't include it. I didn't include it because it just wasn't relevant. It wasn't relevant to isolate people who had seen Ab Force advertising – I

mean, or ab belt advertising previously. It wasn't the intent of the study.

(Exh. 3, Mazis Dep., pp. 82:5 – 83:11).

So Dr. Mazis, who was concerned about asking whether participants if they had ever seen an ab belt ad for fear that such a question might bias participants in their responses, was somehow unconcerned about asking two separate screening questions referencing weight loss -- a central alleged advertising claim in this case -- and including in the survey those who responded affirmatively to the weight loss questions.

Q. Was there any reason to inquire into weight loss other than the fact that it was raised in the FTC complaint?

A. Well, I think it just -- it shows that it's an issue of interest in this proceeding, so, I mean, when I --

Q. The fact that it was included in the FTC Complaint?

A. Right. The FTC is alleging certain claims are made in this advertising, and, so, obviously it's relevant for that reason.

(Exh. 3, Mazis Dep., pp. 89:9 – 91:2).

Thus, according to Dr. Mazis' testimony, there was no other reason to include the questions except that they seemed "relevant" to the allegations of the Complaint. Indeed, Dr. Mazis later confirmed that the question was designed for the purpose of drawing into the survey those who would be likely to purchase the Ab Force. And why would they be willing to buy the Ab Force? According to Dr. Mazis, because they bought weight loss products in the past:

Q. And now, you've just asked the question about over the last 12 months have you purchased a product or use of service to help you lose weight, tone your muscles, or massage your body, right?

A. Right.

Q. Well, in Question D you've asked whether they had purchased a product in the last 12 months by calling a toll-free number that was included in a TV ad or infomercial. Why were you interested in the answer to that?

A. Well, I was interested in getting people who at least might consider buying a product like Ab Force based on the infomercial. So, you know, figuring if people have never bought a product based on an infomercial or some advertisement, they've never called in, then the likelihood is that they probably wouldn't buy Ab Force. So I was sort of looking for people who might potentially buy Ab Force.

So when we put B [the weight loss question] and D together, that kind of gives us the set of people who might be in the market for Ab Force, at least it would be more likely than the norm to be in the market for a product like the Ab Force.

(Exh. 3, Mazis Dep., pp. 89:9 – 91:2)(emphasis added).

In essence, what Dr. Mazis is saying is that he designed the survey screening criteria based on the allegations of the Complaint and that he thought (based on those allegations) that people likely to buy the Ab Force were people who were interested in losing weight. Not only are the screening questions themselves suggestive of advertising claims, but the entire screening criteria were designed to draw participants who would be more likely to find weight loss (and fat loss and inch loss) claims than others. Instead of asking a less biased question to select a universe

of likely buyers (e.g., "Would you ever consider buying an ab belt?"), Dr. Mazis selected a population based partly on their desire to lose weight. This design bias renders the entire survey suspect and removes any certainty that the survey is reliable.

These particular screening questions, however, were not the only biasing elements in the survey. As Dr. Jacoby notes, there were a number of biasing elements in the main questionnaire as well:

- The main questionnaire repeats the name "Ab Force" to survey participants sixteen times. (Exh. 1, Mazis Expert Report, Exh. D thereto). The repeated reference to the name "Ab Force" may have biased respondents into providing certain answers. (Exh. 4, Jacoby Expert Report, ¶¶ 43 – 44). Indeed, Dr. Mazis himself testified that the name "Ab Force" alone conveys to people the idea that "it works on your abdominals" and "makes your abdominals a force, which, you know, might mean it makes them really great." (Exh. 3, Mazis Dep., p. 51:9 – 19). Even if Dr. Mazis is correct that the name alone conveys the alleged claims (and there is no empirical evidence to support his interpretation), then by his own admission the use of the term "Ab Force" sixteen times in the survey questionnaire would have had a biasing effect on participants. As Dr. Jacoby points out, this bias could have easily been avoided by use of the term "the product advertised" in place of the name "Ab Force." (Exh. 4, Jacoby Expert Report, ¶¶ 43 - 44).

- Several of the closed-ended questions are leading because they are framed in the affirmative and directly suggest an answer by being framed as declarative statements (e.g., "Using Ab Force causes users to lose inches around the waist;" "Using Ab Force causes users to lose weight."). (Exh. 1, Mazis Expert Report, Main Questionnaire attached thereto as Exh. D (Question 5 and subparts)). As Dr. Jacoby notes, these questions easily could have been framed in a non-leading manner (e.g., "Does or doesn't the Ab Force commercial say, show or imply that Ab Force causes users to lose weight?")(Exh. 4, Jacoby Expert Report, ¶ 46).
- Similarly, Question 6 of the Main Questionnaire creates impermissible "yea-saying" by asking participants "Do you agree" with a particular statement. (Exh. 1, Mazis Expert Report, Main Questionnaire attached thereto as Exh. D (Question 6 and subparts)). As Dr. Jacoby states, this type of question impermissibly leads the participant to respond with a particular, suggested response. (Exh. 4, Jacoby Expert Report, ¶¶ 47 - 48).

Given the fact that the results between the control group and the test group was only a 10 percent difference, (Exh. 5, Jacoby Decl. ¶ 37), the existence of these powerful leading questions simply cannot be overlooked. Their inclusion in the survey injected a bias that tainted the results, rendering the survey of no value to this Court.

E. The Survey Does Not Support Complaint Counsel's Theory

As has been discussed in the papers supporting and opposing the cross-motion, Complaint Counsel has presented the theory that consumers viewing the Ab Force ads would recall advertising for the Ab Energizer, AbTronic and Fast Abs, thus causing them to associate the claims made in those ads with the Ab Force product. (Memorandum in Support of Respondent's Motion for Summary Decision, pp. 18 – 19).

However, in its cross-motion for summary decision, Complaint Counsel appears to back away from that theory altogether. This retreat may be due to the fact that Dr. Mazis' survey, even if unbiased and otherwise methodologically sound, does nothing to prove the theory first set forth in the Complaint and advanced by Complaint Counsel throughout the course of this litigation.

The reasons why Dr. Mazis' survey does not support Complaint Counsel's central theory are discussed fully in Respondent's Memorandum in Support of the Motion for Summary Decision, which is incorporated herein. (*Id.*, pp. 18 – 21). In summary, the survey can not support that theory because Dr. Mazis did nothing to determine whether participants had ever seen the ads for Ab Energizer, AbTronic or Fast Abs. Indeed, as noted above, he claimed such questions were "irrelevant" to the survey. But if Dr. Mazis has no way of knowing that any of the participants actually saw those ads, then he cannot point to the survey as demonstrating the connection between the Ab Force ad and the other ads cited by Complaint Counsel. Any claim

to the contrary is simply untested assumption that hardly constitutes reliable evidence.

F. Other Survey Flaws

In his expert Report and in his Declaration that was filed in support of the motion for summary decision, Dr. Jacoby identifies other methodological flaws, which Respondents incorporate herein by reference. Those other flaws that render the survey hopelessly unreliable include:

- To the extent the survey universe was meant to draw in participants who would be likely to purchase the Ab Force, the two criteria for screening participants together make little sense and would likely not have resulted in drawing in those participants. (Exh. 4, Jacoby Expert Report, ¶ 31).
- Indeed, as discussed above, Dr. Mazis' testimony indicates that, if anything, the criteria screened for participants who were biased towards finding weight loss claims. Instead of establishing quotas reflecting the general population, Dr. Mazis states “the sample was selected so as to approximate the population of people in the U.S. who were trying to lose weight” (Exh. 1, Mazis Expert Report, ¶ 23). In this way, the sample becomes biased toward individuals possessing such a concern. (Exh. 4, Jacoby Expert Report, ¶ 35).
- Dr. Mazis inexplicably dropped from the survey 81 respondents who could not identify the name of the product after viewing the infomercial. As Dr. Jacoby explains, if Dr. Mazis' screening was unbiased and accurate (which

it was not) then these participants had already been screened and were part of the relevant universe. (Exh. 4, Jacoby Expert Report, ¶ 56). Consequently, by dropping these respondents for no valid reason, participants who were more likely not to perceive the alleged claims were not included in the results, thus falsely inflating the perception of those claims. (*Id.*). As Dr. Jacoby explains, this had the effect of "stacking the deck" in Complaint Counsel's favor.

CONCLUSION

For the reasons described herein, in Dr. Jacoby's Declaration and Expert Report, and in the memoranda incorporated herein by reference, Respondents respectfully request that the Court enter an order (1) excluding/striking Dr. Mazis "facial analysis" as unreliable, (2) excluding/striking the consumer survey as methodologically unsound, (b), and (3) excluding/striking any opinions of Dr. Mazis related to the survey, in accordance with Commission Rule 3.43

Dated: April 9, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2004, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing Respondents' Motion *In Limine* and supporting memorandum to be filed and served as follows:

(1) an original and one (1) paper copy filed by hand delivery and an electronic copy in Microsoft Word format filed by e-mail to:

Donald S. Clark, Secretary
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E-mail: secretary@ftc.gov

(2) one (1) paper copy served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Rm. H-112
Washington, D.C. 20580

(3) one (1) paper copy by first-class mail and by e-mail each to:

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I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

Theodore W. Atkinson, Esq.
