

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

In the Matter of)	
)	
TELEBRANDS CORP.,)	Docket No. 9313
a corporation,)	
)	
TV SAVINGS, LLC,)	
A limited liability company, and)	PUBLIC DOCUMENT
)	
AJIT KHUBANI,)	
Individually and as president of)	
Telebrands Corp. and sole member)	
of TV Savings, LLC.)	
_____)	

**RESPONDENTS' OBJECTIONS TO COMPLAINT COUNSEL'S
FINAL PROPOSED WITNESS LIST AND EXHIBIT LIST**

Respondents Telebrands Corporation, TV Savings, LLC and Ajit Khubani submit the following objections to Complaint Counsel's exhibit list.

Respondents reserve the right to supplement, modify or withdraw any of the objections made. In addition, Respondents reserve the right to object to the limited admissibility of any exhibits and to interpose objections to exhibits that may have previously been identified as exhibits by Complaint Counsel based on pretrial rulings and rulings during the course of trial and to object to any exhibit not identified by witnesses at trial. Finally, Respondents reserve the right to interpose a specific objection at trial to any exhibit where a copy of the exhibit was not provided prior to the filing of these objections.

The following key is Key to Abbreviations for Specific Objections:

H = Hearsay

F = Foundation

R = Relevance

L = Armstrong reserves the right to seek a limiting instruction for the use of this exhibit at trial

I = The exhibit list contains an insufficient identification to allow for a specific objection to this exhibit

O = Opinion

N = Inconsistent with terms of scheduling order and/or Rules of Court

<u>Exhibit</u>	<u>Title or Description</u>	<u>Objection</u>
CX-7	Image of Pat Murphy Stark with Female Torso from Ab Force 2 Min. Spot Supered/Mixed \$10.00 Offer (Dec. 28, 2001) [Liantonio Dep. CC Ex. 7]	Respondents object that the still images are cumulative of other evidence because the commercials from which these briefly displayed images were taken have already been identified as potential exhibits; Respondents further object that the images are irrelevant because they are being offered by Complaint Counsel separate and apart from the totality of commercial. The Commission has repeatedly held that the entire commercial must be considered in determining whether alleged claims were made.
CX-8	Image of Pat Murphy Stark with Female Torso from Ab Force 2 Min. Spot Supered/Mixed \$10.00 Offer (Dec. 28, 2001) [Liantonio Dep. CC Ex. 8]	
CX-9	Image of Pat Murphy Stark with Male Torso from Ab Force 2 Min. Spot Supered/Mixed \$10.00 Offer (Dec. 28, 2001) [Liantonio Dep. CC Ex. 9]	
CX-13	“Cyclone Diet Opening” Collette Liantonio, Handwritten Page [Liantonio Dep. CC Ex. 13]	Relevance
CX-23	Email from Fiona Yiu to Raj Shahani and Ajit Khubani (Jan. 22, 2002) Re: Ab Forces	Hearsay; Relevance

<u>Exhibit</u>	<u>Title or Description</u>	<u>Objection</u>
CX-28	Email from Fiona Yiu to Bob Barnett, Bala Iyer, Raj Shahani, and Ajit Khubani (Feb. 7, 2002) Re: Project Updated 07/Feb [Shahani Dep. CC Ex. 28]	Hearsay; Relevance
CX-30	Email from Ajit Khubani to Fiona Yiu, Raj Shahani, Bala Iyer, Shail Prasad, and Bob Barnett (Feb. 1, 2002) Re: Important [Shahani Dep. CC Ex. 30]	Relevance
CX-31	Email from C.Y. Mung to Ajit Khubani, Bala Iyer, and Raj Shahani (Feb. 22, 2002) (with attachment) Re: Motorized massager with programmed message step [Shahani Dep. CC Ex. 31]	Hearsay; Relevance
CX-43	Email from Mark Golden to Shail Prasad and Jiezl Pineda (Jan. 7, 2002) Re: More Questions on TB_Electronic Ab Force [Prasad Dep. CC Ex. 43]	Hearsay; Relevance
CX-44	Email from Jiezl Pineda to Shail Prasad and Mark Golden (Jan. 7, 2002) Re: Ab Force FAQs [Prasad Dep. CC Ex. 44]	Hearsay; Relevance
CX-48	Email from R. Davis to Bala Iyer (Feb. 7, 2002) Re: Telebrands Product Descriptions (with attachment) [Iyer Dep. CC Ex. 48]	Hearsay; Relevance
CX-49	Email from Tony Sperrazza to Bala Iyer (Jan. 31, 2002) Re: Ab Force Revisions [Iyer Dep. CC Ex. 49]	Hearsay; Relevance
CX-62	Tabulation from Infomercial Monitoring Service regarding Slendertone Flex ads.	Hearsay
CX-63	Complaint in the Matter of <i>Telebrands Corp., et al.</i> , Docket No. 9313 (with notice)	Hearsay; Relevance

<u>Exhibit</u>	<u>Title or Description</u>	<u>Objection</u>
	order and attachments) [Khubani Dep. CC Ex. 63]	
CX-65	Adcomm Advertising, Invoice #05902-3 to Ajit Khubani, Telebrands Corp. (Feb. 28, 2002) [Khubani Dep. CC Ex. 65]	Hearsay; Relevance
CX-66	Treehouse Media Services, Inc., Invoice #53852 to Telebrands Corp. (Jan. 31, 2002) [Khubani Dep. CC Ex. 66]	Hearsay; Relevance
CX-67	Document from E&M Advertising, Inc., Numbered #52804 [Khubani Dep. CC Ex. 67]	Hearsay; Relevance
CX-68	Document from E&M Advertising, Inc., Numbered #52803 [Khubani Dep. CC Ex. 68]	Hearsay; Relevance
CX-69	Email from E&M Advertising, Inc. to Shail Prasad (Jan. 25, 2002) Re: Fw: Cyclone Diet with Ab Force [Khubani Dep. CC Ex. 69]	Hearsay; Relevance
CX-70	Media Advantage Corp., Invoice # 02-227 to Telebrands Corp. (Feb. 14, 2002) [Khubani Dep. CC Ex. 70]	Hearsay; Relevance
CX-72	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Fall Double Issue Sept. 3/10, 2001)	Hearsay
CX-73	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Sept. 17, 2001)	Hearsay
CX-74	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Sept. 24, 2001)	Hearsay
CX-75	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (October 1, 2001)	Hearsay
CX-76	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (October 8, 2001)	Hearsay

<u>Exhibit</u>	<u>Title or Description</u>	<u>Objection</u>
CX-77	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Oct. 15, 2001)	Hearsay
CX-78	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (October 22, 2001)	Hearsay
CX-79	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (November 5, 2001)	Hearsay
CX-80	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (November 12, 2001)	Hearsay
CX-81	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (November 19, 2001) [Khubani Dep. CX-62]	Hearsay
CX-82	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (November 26, 2001)	Hearsay
CX-83	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Dec. 3, 2001)	Hearsay
CX-84	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Dec. 10, 2001)	Hearsay
CX-85	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Dec. 17, 2001)	Hearsay
CX-86	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Dec. 24, 2001)	Hearsay
CX-87	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Double Issue, Dec. 31, 2001/Jan. 7, 2002)	Hearsay
CX-88	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Jan. 14, 2002)	Hearsay
CX-89	Jordan Whitney, Inc., <i>Direct Response</i>	Hearsay

Exhibit	Title or Description	Objection
	<i>Television Monitoring Report</i> (Jan. 21, 2002)	
CX-90	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Jan. 28, 2002)	Hearsay
CX-91	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Feb. 4, 2002)	Hearsay
CX-92	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Feb. 11, 2002)	Hearsay
CX-93	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Feb. 18, 2002)	Hearsay
CX-94	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Feb. 25, 2002)	Hearsay
CX-95	Jordan Whitney, Inc., <i>Direct Response Television Monitoring Report</i> (Mar. 4, 2002)	Hearsay
CX-96	Complaint in <i>Federal Trade Commission v. Hudson Beckley, Corporation, et al.</i> , C'S-02-0649-P.P., (May 7, 2002), with transcript of Abronia infomercial (Complaint Exhibit 2).	Hearsay; Relevance
CX-98	Complaint in <i>Federal Trade Commission v. Electronic Products Distribution, LLC, et al.</i> , 02CV0888 H(A.B.), (May 7, 2002), with transcript of Ab Energizer infomercial (Complaint Exhibit 2).	Hearsay; Relevance
CX-100	Complaint in <i>Federal Trade Commission v. United Fitness of America, LLC, et al.</i> , CV-S-02-0648-KD-LAL, (May 7, 2002), with transcripts of two Fast Abs infomercial (Complaint Exhibits B and D)	Hearsay; Relevance
CX-109	Excerpts from deposition of Raj Shahani dated February 19, 2004	Foundation; Relevance

<u>Exhibit</u>	<u>Title or Description</u>	<u>Objection</u>
CX-106	Declaration of Shail Prasad	Hearsay; Foundation; Relevance
CX-107	Excerpts from deposition of Collette Liantonio dated February 12,2004	Hearsay; Foundation; Relevance
CX-108	Excerpts from deposition of Bala Chandra Iyer dated February 19,2004	Foundation; Relevance
CX-110	Excerpts from deposition of Ajit Khubani dated March 5, 2004	Foundation; Relevance
CX-111	Excerpts from deposition of Raj Shahani dated February 19,2004	Foundation; Relevance
CX-112	Excerpts from deposition of Jacob Jacobi, Ph.D. dated February 26, 2004	Hearsay; Foundation; Relevance
CX-113	Export Report of Anthony Delitto, Ph.D. dated January 30, 2004 in the Matter of <i>Telebrands Corp., et al.</i> , Docket No. 9313	Hearsay; Foundation; Relevance
CX-114	Excerpts from deposition of Anthony Delitto dated February 27, 2004	Hearsay; Foundation; Relevance
CX-115	Technical Specifications for Ab Force EMS device	Relevance
CX-116	Import Alert IA #89-01 Revised 3/19/97 "Electrical Muscle Simulators and Iontophoresis Devices" Attachment I, 5/23/01, II, 5/13/92 issued by Food and Drug Administration	Hearsay; Relevance
CX-117	Letter from Food and Drug Administration to Telebrands Corp. Dated May 2, 2002	Hearsay; Relevance
CX-118	Letter from Venable to Food and Drug Administration dated June 12, 2002.	Relevance
CX-119	Guidance for Industry, FDA Reviewers/Staff and Compliance - Guidance Document for Powered Muscle Simulators 510(k)s.	Relevance
CX-125	Correction to the Record of Testimony of Dr. Anthony Delitto, Ph.D.	Untimely expert submission (as discussed in Respondents' Motion <i>In Limine</i>)
CX-126	Tabulation of rankings for AbTronic, Ab	Hearsay; Relevance

<u>Exhibit</u>	<u>Title or Description</u>	<u>Objection</u>
	Energizer, and Fast Abs infomercial for period January through February, 2002.	
XXXX	Documents produced by Respondent as purported substantiation for ad claims and identified in CX-128, Response to Specification 3.	Including Bates T000005-T0000012 (10/3/02; T008697-T009443 (10/22/02); T009447-T009840 (10/22/02); the description of Omron "HV-F-126 Electronic Pulse Massager" (attached to letter of 11/6/02); and T010618- 010712 (11/7/02).

Respondents object to each of Complaint Counsel's designations as hearsay not subject to any exception. As a general matter, Rule 3.33(g) prohibits admission of a witness's deposition testimony at trial unless the witness is an adverse party or unavailable to testify at trial. Federal Rule of Civil Procedure 32, the counterpart to Rule 3.33(g), codifies "the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person." Wright & Miler 8A Fed. Prac. & Proc. Civ.2d 2142; In re Herbert R. Gibson, Jr. 1978 FTC LEXIS 375, at *21 (May 3, 1978) (Federal Rules of Evidence are "persuasive authority" in FTC adjudicative hearings). For example In Six West Retail Acquisition, Inc. v. Loews Cineplex Entertainment Corp. 286 RR. 239, 250 (S.D. N.Y. 2002), a party tried to introduce deposition testimony of a witness "located in Japan." The court excluded the testimony because there was no indication that the witness was unavailable to testify or that his statements were made against his interest. *Id.*

Several of Complaint Counsel's designations do not fall into a hearsay exception. Of the witnesses whose deposition testimony Complaint Counsel has designated, Complaint

Counsel has listed them on its final proposed witness list. Complaint Counsel cannot, therefore, claim that any of these witnesses are unavailable to testify at trial, and Complaint Counsel has not provided any evidence showing that any of the witnesses are in fact unavailable. Ms. Liantonio and Mr. Prasad are third parties, and Dr. Delitto, Complaint Counsel's expert, is clearly not an adverse party.

Finally, and in addition to these reasons, Respondents further object to the proposed testimony of Michael B. Mazis, Ph.D. for the additional reasons stated in the Motion *in Limine* that they have filed with respect to Dr. Mazis.

Respectfully submitted,

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