

**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' MEMORANDUM IN OPPOSITION
TO COMPLAINT COUNSEL'S MOTION TO PARTIALLY
STRIKE RESPONDENTS' FINAL WITNESS LIST AND TO
PRECLUDE TESTIMONY OF DR. ERIC STERNLICHT**

INTRODUCTORY STATEMENT

Respondents Telebrands Corporation, TV Savings, LLC and Ajit Khubani hereby oppose Complaint Counsel's motion to preclude Dr. Eric Sternlicht from testifying at the hearing in this case. The motion should be denied for two reasons.

First, Dr. Sternlicht is expected to offer evidence that is purely rebuttal in nature. Dr. Sternlicht's opinions, all of which are contained in the declaration he provided on March 23, 2004, are offered as classic rebuttal evidence to opinions rendered by Dr. Delitto well after his expert report was filed, and even after he was deposed in this case. Moreover, Complaint Counsel made it plain in its motion for summary decision that it intends to go far beyond the narrow opinions in Dr. Delitto's report (which were limited to whether the Ab Force could

meet the alleged advertising claims) and will raise arguments as to whether the Ab Force could provide any benefits whatsoever. Because Dr. Sternlicht was offered for the sole purpose of rebutting these new opinions and new arguments, he is not part of Respondents' case in chief and his designation in the final witness list does not run contrary to the terms of the Scheduling Order.

Second, even if the Court were to find the disclosure untimely, striking Dr. Sternlicht as a rebuttal witness would pose a substantial injustice to Respondents. They would be unable to rebut opinions and arguments that were raised for the first time after Dr. Delitto's expert report was provided to Respondents. Moreover, Complaint Counsel have not been unduly prejudiced by the disclosure of Dr. Sternlicht.

ARGUMENT

I. BECAUSE DR. STERNLICHT'S DECLARATION IS A REBUTTAL WITNESS WHOSE TESTIMONY IS SOLELY RESPONSIVE IN NATURE, HIS IDENTIFICATION AND DECLARATION ARE TIMELY.

As Commission Counsel argued in opposing a challenge to their expert rebuttal witness in a motion similar to Complaint Counsel's in this case,¹ the purpose

¹ In the ongoing case of *FTC v. Trudeau*, Civ. No. 03-C-3904 (N.D. Ill.), counsel for the Commission opposed defendant's motion to strike the testimony and report of Dr. Michael B. Mazis. The Commission had identified Dr. Mazis and provided his report well after the deadline for designating experts to be called by parties in their respective cases-in-chief. Commission counsel argued that Dr. Mazis was purely a rebuttal expert and that his testimony could be offered regardless of timing because it was not part of the Commission's case-in-chief, and did not affect defendant's ability to put on his case-in-chief. *See, id.*, Memorandum in Opposition to Defendants' Motion to Strike the Rebuttal Expert Report and Testimony of Michael B. Mazis, attached hereto as Exhibit E. The Commission was successful, and the motion was denied. (Exhibit F, Order Denying Motion to Strike).

of rebuttal testimony is "to meet the new facts put in by the opponent in his case in reply. Everything relevant as a part of the case in chief would naturally have already been put in, and a rebuttal is necessary only because on a plea in denial new subordinate evidential facts have been offered..." 6 J. Wigmore, Evidence §1873 (Chadbourn rev. 1976); see, e.g., *Benedict v. United States*, 822 F.2d 1426, 1428 – 30 (6th Cir. 1987). Dr. Sternlicht's declaration, and the testimony he is expected to give at the hearing consistent with that declaration, is textbook rebuttal testimony. It is being offered to counter opinions put forth by Dr. Delitto for the first time after he issued his expert report.

A. The Opinions Set Forth in the Expert Report

In his January 30, 2004 Report, Dr. Delitto identified the four specific opinions he had been asked to provide:

The FTC has asked me to determine, based on my professional experience, knowledge and examination of the AB Force device, whether any of the following claims have any scientific merit:

- a. Use of the Ab Force will cause loss of inches, fat and weight;
- b. Use of the Ab Force will cause greater definition of the abdominal musculature;
- c. Use of the Ab Force can be an effective alternative to volitional exercise;
- d. That the evidence provided offers reasonable basis for the above-mentioned claims.

(Exhibit A, Delitto Report, ¶ 13). Dr. Delitto then grouped his opinions according to each of the alleged claims identified above, as well as a brief, unspecific opinion that the Ab Force "likely" could not offer a relaxing massage. (Exhibit A, Delitto Report, ¶¶ 15 – 31). He offered no other opinions, general or specific, regarding any other benefits of the Ab Force,

and made no mention of any other EMS device, such as the Slendertone Flex which would later feature prominently in his new opinions).

Indeed, during his deposition a month later, Dr. Delitto reiterated that his opinions were limited to those claims identified in Paragraph 13 of his Report:

- Q.** Just so that I can summarize this and correct me if I'm wrong, you weren't asked to provide an opinion by the FTC with regard to the efficacy of the Ab Force with regard to any of those indications of use?
- A.** I was asked to provide the information as listed in a, b and c under paragraph 13, loss of inches, fat and weight, greater definition of abdominal musculature and an effective alternative to volitional exercise.

(Exhibit B, Delitto Deposition, pp. 66:18 – 67:5).

B. Dr. Delitto Offered New Opinions During his Deposition

Just prior to his testimony that he limited his opinions to those cited in the Report, Dr. Delitto had been specifically asked whether, as he sat there, he had any opinion whether the Slendertone Flex (for which the Food and Drug Administration had granted a 510(k) marketing approval allowing claims that it firmed and toned abdominal muscles) was stronger, weaker or the same as the Ab Force product sold by Respondents. Although Dr. Delitto had reviewed the technical specifications for the Ab Force and the Slendertone Flex (a fact not disclosed anywhere in his Report), he stated he did not have any opinion on that subject:

- Q.** Do you have any opinion as you sit here today as to whether the Ab Force is more or less or as effective as the Slendertone for the improvement of abdominal muscle tone?
- A.** I can't really answer that because I don't know enough about the Slendertone.
- Q.** So you don't have an opinion; is that correct?
- A.** That's correct.

- Q.** Do you have an opinion as to whether the Ab Force is more, less or as effective as the Slendertone for strengthening of the abdominal muscles?
- A.** I would have to say that I don't have an opinion.
- Q.** And, finally, do you have an opinion as you sit here today whether the Ab Force is more, less or as effective as the Slendertone for the development of a firmer abdomen?
- A.** I don't have an opinion on that.

(Exhibit. B, Delitto Dep., pp. 64:5 – 65:17).

Similarly, Dr. Delitto testified that he had no opinion as to whether the Ab Force could provide any of a number of other benefits unrelated to those at issue in the alleged advertising claims:

- Q.** You weren't asked to render an opinion with regard to the ability of the Ab Force to tone abdominal muscles; is that correct?
- A.** Say that again.
- Q.** Were you asked by the FTC to render an opinion with regard to the ability of the Ab Force to tone abdominal muscles?
- A.** No. I was asked for the three indications that I said earlier, loss of inches, fat and weight, greater definition of abdominal musculature and effective alternative to volitional exercise. The answer would be no, I wasn't asked to look at the Ab Force with regard to tone.
- Q.** Nor with regard to the strengthening of abdominal muscles?
- A.** No.
- Q.** And nor with regard to the development of a firmer abdomen?
- A.** No.

(Exhibit B, Delitto Deposition, pp. 64:5 – 66:14).

However, after a lengthy break prior to Dr. Delitto's redirect, Complaint Counsel showed Dr. Delitto the technical specifications for the Ab Force and the Slendertone products, and extracted two new opinions from Dr. Delitto. First, Complaint Counsel had Dr. Delitto compare the technical differences between the products, leading Dr. Delitto to offer the opinion that

the Slendertone Flex has at least the minimum criteria of what we would see as current characteristics necessary to produce a muscle contractile force that was in the neighborhood of at least causing movement of the joint and thighs, minimum level of muscle contractile force before one could make claims about strengthening.

(Exhibit B, Delitto Dep., p. 120:8 – 15). Second, Complaint Counsel lead Dr. Delitto to the conclusion that the Ab Force does not have the minimal level of current characteristics to cause muscle movement (as does the Slendertone Flex), and could therefore not strengthen muscles. (Exhibit B, Delitto Dep., p. 121:1 – 8).

On additional cross examination, Dr. Delitto was asked to identify certain technical aspects of the Slendertone Flex and the Ab Force, such as phase duration and pulse duration. Dr. Delitto testified, without further explanation, that "off the top of his head," he thought they were "similar." (Exhibit B, Delitto Dep., pp. 123:20 – 124:6). He was, however, unfamiliar with the phase duration of the Ab Force. (*Id.*, p. 124:7 – 15). In no case did he have any idea regarding the difference between the voltage outputs of either product. (*Id.*, p. 124:16 – 125:6).²

These opinions were not disclosed in Dr. Delitto's Report, nor were they revealed under cross-examination. It was only when Dr. Delitto was directly examined by Complaint Counsel that his opinions regarding muscle movement and the technical abilities of the Ab Force (as compared to the Slendertone product) were first revealed.

² Dr. Delitto offered another new opinion during his deposition. In his Report, he indicates that the Ab Force produces muscle contraction, but not enough to cause one to "double-up" sufficient to cause muscle overload. (Exhibit A, Delitto Report, ¶ 19). But in his deposition, he testified that he did not feel (with his hands) any muscle contraction during his testing, as noted in his handwritten notes. (Exhibit B, Delitto Dep., p. 104:3 – 22). This directly contradicts his Report, and is an opinion that is also rebutted by Dr. Sternlicht, as discussed below.

C. Dr. Delitto Offered New Opinions in his Recent "Correction to the Record"

The opinions described above were not the only new opinions offered by Dr. Delitto. A month after Dr. Delitto's deposition, and nearly two months after his Report was produced, Complaint Counsel provided a supplemental report entitled "Correction to the Record." (Exhibit C hereto). In the "Correction to the Record" served by Complaint Counsel on March 23, 2004, Dr. Delitto claimed to "correct and clarify" the new opinions offered in his deposition in a manner which is material to his conclusion about the relative merits of the Ab Force and the Slendertone Flex. In fact, the "correction" amounted to a supplemental expert report containing new opinions.

This supplemental report went into great detail about technical specifications of the Ab Force and Slendertone products, and Dr. Delitto's opinions as to the differences between each. (*Id.*) Dr. Delitto's new opinions were apparently informed by additional research beyond that conducted for his original Report and by a further review of the technical specifications of the Slendertone Flex and the Ab Force products. (*Id.*) In the last paragraph, he provided his opinion that the Slendertone Flex had a phase charge five times greater than that of the Ab Force, and a pulse charge ten times greater than that of the Ab Force, opinions he did not offer in his Report or in his deposition because he testified he did not "know enough about the Slendertone." (Exhibit B, Delitto Dep., p. 64:20 – 65:3).

D. Complaint Counsel's Broad Arguments Regarding Ab Force

Based on Dr. Delitto's newly offered opinions, Complaint Counsel has gone beyond arguing that there is no scientific substantiation for the alleged advertising claims. Instead of limiting its argument to the opinions found in the four corners of Dr. Delitto's Report (that

there is no scientific merit to the alleged claims that Ab Force can cause loss of inches, weight or fat, etc.), Complaint Counsel now argues that there is no evidence that Ab Force provides any benefits. This is a far cry from arguing that the Ab Force does not meet the alleged advertised claims, which are limited in scope.

In support of this broad assertion that the Ab Force does not provide any benefits, Complaint Counsel relies on the new opinions from Dr. Delitto concerning the Ab Force and the Slendertone Flex. (Complaint Counsel's Memorandum in support of its Motion for Summary Decision, p. 18 – 20). Complaint Counsel's willingness to raise this argument in moving for summary decision raises the strong likelihood that Complaint Counsel will use Dr. Delitto's new opinions to argue at the hearing that the Ab Force provides no benefits whatsoever.

E. Dr. Sternlicht's Declaration and Expected Testimony Only Rebutts Dr. Delitto's New Opinions

Dr. Sternlicht is offered by Respondents to rebut Dr. Delitto's new opinions that (1) the Ab Force and Slendertone Flex are dissimilar products, and therefore the Ab Force cannot provide the same benefits as Slendertone Flex, and (2) Complaint Counsel's argument (based on Dr. Delitto's new opinions) that the Ab Force cannot provide any benefits to users. His limited rebuttal opinions are set forth in his April 4, 2004 Rebuttal Declaration. (Exhibit D hereto).

The first rebuttal by Dr. Sternlicht of the testimony of Dr. Delitto is found in paragraphs 20 through 25 of the Sternlicht Rebuttal Declaration, in which Dr. Sternlicht compares the Slendertone Flex unit approved by the Food and Drug Administration on September 27, 2001 with the Ab Force. He notes that the Ab Force produces higher mean

voltages and high mean currents than does the Slendertone Flex unit. (Exhibit D, Sternlicht Rebuttal Dec., ¶¶ 20 – 25). The significant fact is that the FDA has approved the marketing of the Slendertone device with the following indication of use: “Slendertone Flex is indicated for the improvement of abdominal muscle tone, for strengthening of the abdominal muscles and for the development of a firmer abdomen.” (*Id.*). Dr. Sternlicht states that, based on the design and electrical data of the Ab Force and Slendertone, he believes these devices are substantially equivalent and that similar responses in terms of muscle tone or strength adaptations would be expected from either device. (*Id.*). This directly rebuts the testimony of Dr. Delitto (and his subsequent "Correction to the Record") that the Ab Force cannot provide the same benefits as the Slendertone Flex.

Second, Dr. Sternlicht also directly rebuts Complaint Counsel's argument – raised for the first time in its motion for summary decision and which it is anticipated to raise at the hearing – that the Ab Force provides none of the benefits associated with other EMS devices. First, Dr. Sternlicht offers the rebuttal opinion that “the Ab Force is able to simulate the feeling of being squeezed, tapped, and chopped, similar to what people would report to feel when receiving a traditional, manual massage.” (Exhibit D, Sternlicht Rebuttal Dec., ¶ 9). Dr. Sternlicht also offers the opinion that, like other EMS devices, the Ab Force can provide a relaxing massage to users. (Exhibit D, Sternlicht Rebuttal Dec., ¶¶ 26 – 34). As he explains, this testimony directly rebuts Complaint Counsel's argument that the Ab Force cannot provide any benefit, and also rebuts Dr. Delitto's opinion that the Ab Force cannot provide a relaxing massage. (*Id.*). Dr. Sternlicht would also testify consistent with his declaration that the Ab Force can promote active muscle recovery, a benefit also found in

other EMS devices similar to the Ab Force. (Exhibit D, Sternlicht Dec., ¶¶ 35 – 43). The opinions found in Dr. Sternlicht's declaration are directly in rebuttal to the new opinions put forth by Dr. Delitto in his testimony and Report, as well as the broad position not found in the Complaint, that the Ab Force provides none of the benefits associated with other EMS devices.³

F. Dr. Sternlicht's Rebuttal Testimony Should be Admitted

Because of the close of discovery, and the significant change in Dr. Delitto's position on this issue, Respondents believe that it was important to identify a rebuttal witness whose testimony would be limited to rebutting the new conclusions of Dr. Delitto and the new position apparently embraced by Complaint Counsel. It is the intention of Respondents to call Dr. Sternlicht purely as a rebuttal witness to counter the testimony of Dr. Delitto and that procedure is not only appropriate under the Scheduling Order but, in light of the belated change in Dr. Delitto's testimony almost a month after his deposition, fully justified.

The declaration is classic rebuttal testimony that is solely responsive to the assertions set forth by Dr. Delitto in his unsworn statement in support of Complaint Counsel's motion. Respondents do not intend to call Dr. Sternlicht as part of their case-in-chief. Indeed, Your Honor need not even reach the testimony of Dr. Delitto unless Your Honor concludes that some or all of the claims on which Dr. Delitto offers his opinion with respect to weight loss, loss of inches and the like have actually been made by Respondents.

³ Dr. Sternlicht's Rebuttal Declaration also rebuts expert opinions found in the Declaration of Robert Gatling, Jr., which is clearly expert testimony but was first produced by Complaint Counsel in support of its Motion for Summary Decision. Mr. Gatling's opinions that the Ab Force did not receive a 510(k) from the FDA and his implication that the Ab Force could not receive 510(k) approval is directly rebutted by Dr. Sternlicht. (Exhibit D, Sternlicht Rebuttal Declaration, ¶¶ 26 – 28).

That Respondents could have earlier identified Dr. Sternlicht as an expert as part of their case-in-chief does not preclude him from being called to offer admissible rebuttal evidence, especially where, as here, Complaint Counsel's expert has attempted to parachute substantially new opinions into the case more than three weeks after his deposition and more than two weeks after the close of discovery. Where the evidence rebuts new evidence or theories proffered in the opponent's case-in-chief, that the evidence may have been offered in one's case-in-chief does not preclude its admission in rebuttal. *Datamatic Servs., Inc. v. Barton*, 909 F.2d 1029 (7th cir. 1990); *United States v. Braxton*, 877 F.2d 556 (7th Cir. 1989); *Arnold v. Riddell, Inc.*, 882 F. Supp. 979, 994 (D. Kan 1995)("Generally, where the evidence rebuts new evidence or theories proffered in the defendant's case in chief, that the evidence may have been offered in plaintiff's case in chief does not preclude its admission in rebuttal.). Here, Dr. Sternlicht's report is only necessary to respond to Dr. Delitto and Dr. Sternlicht's testimony will not go beyond rebuttal.

Complaint Counsel is incorrect that the Scheduling Order and the Rules prohibit the identification of Dr. Sternlicht as a rebuttal expert. Respondents note that paragraph 9 of the Scheduling Order in this case requires only the designation "of all potential witnesses who counsel reasonably expect may be called in their case-in-chief." (emphasis added). The Order does not apply to "all potential witnesses who counsel reasonably expect may be called." With regard to rebuttal experts, about which the Scheduling Order appears to be silent, Commission Rule 3.31(b) provides that a rebuttal expert may be identified "if the evidence is intended solely to contradict or rebut proposed expert testimony on the same

subject matter identified by another party under this paragraph, within 30 days after disclosure made by the other party." 16 C.F.R. § 3.31(b).

Where, as here, a scheduling order is silent regarding rebuttal experts, federal courts have held that the guiding date is that set forth in Rule 26(a)(2)(C), which Rule 3.31 mirrors. *See, e.g., Knapp v. State Farm Fire & Cas. Co.*, 1995 WL 340991, at *2 (D. Kan. 1995)(When the "court set deadlines for designating expert testimony, but not specifically as to rebuttal," Rule 26(a)(2)(C) applies with respect to rebuttal and "does not restrict rebuttal testimony to expert witnesses previously designated to testify in the case in chief."); *Syringe Dev. Partners LLC v. New Med. Tech., Inc.*, 2001 WL 403232, at *36 n. 7 (S.D. Ind. 2001)("Absent a stipulation from the Court or an agreement by the parties to the contrary, Rule 26 would govern disclosure of rebuttal experts and their reports. The Amended CMP [Case Management Plan] language on the issue of expert disclosures and reports is sufficiently vague about rebuttal experts to allow for resort to Rule 26(a)(2)(C).").

Dr. Sternlicht was identified and his April 4, 2004 Rebuttal Declaration was provided within 30 days of Dr. Delitto's March 19, 2004 "Correction to the Record" and Complaint Counsel's new argument, raised for the first time on March 23, 2004, that the Ab Force provides users with no benefits. Consequently, Dr. Sternlicht's Rebuttal Declaration is timely.⁴

⁴ Dr. Sternlicht was identified for the first time in Respondents' Witness List, which was provided to Complaint Counsel on March 29, 2004.

II. THE ADMISSION OF DR. STERNLICHT'S REBUTTAL DECLARATION AND TESTIMONY WOULD NOT PREJUDICE COMPLAINT COUNSEL.

Complaint Counsel has argued that allowing the testimony of Dr. Sternlicht will unduly prejudice Complaint Counsel because it will have to receive a report from Dr. Sternlicht, receive all of the information on which Dr. Sternlicht bases his opinions, depose Dr. Sternlicht, and then identify a rebuttal expert to the rebuttal expert. Respondents agree that Complaint Counsel should be afforded the opportunity to depose Dr. Sternlicht, an opportunity Respondents would provide as early as next week. In all other respects, however, Complaint Counsel is incorrect that it would be unduly prejudiced.

Complaint Counsel has already received Dr. Sternlicht's "report," which was provided in the form of his Rebuttal Declaration. That declaration set forth Dr. Sternlicht's background and qualifications, and all of the opinions he is expected to offer at the hearing. Much of the information Dr. Sternlicht relies on – 510(k) submissions and the Ab Force user's manuals – are already in Complaint Counsel's possession. Any other remaining material Dr. Sternlicht relied on would be provided sufficiently in advance of any deposition of Dr. Sternlicht. Finally, because Dr. Sternlicht is a rebuttal expert offered solely to rebut the opinions of Dr. Delitto, Complaint Counsel would not be entitled to a "rebuttal" expert to refute the rebuttal expert. Respondents have not acted in bad faith, and are only offering Dr. Sternlicht to rebut Dr. Delitto's new opinions and the arguments Complaint Counsel intends to raise based on those new opinions.

On the other hand, if Dr. Sternlicht is not permitted to testify, Respondents would suffer a tremendous amount of prejudice. Dr. Delitto's new opinions regarding the Ab

Force, which were revealed well after his Report was produced, would be allowed to come into the hearing unchallenged. Those opinions go far beyond the four corners of his Report, and Complaint Counsel has already signaled its intent to use those opinions to broaden its argument. Complaint Counsel's position would unfairly expand to include the argument that the Ab Force is without any benefit, and not just that the Ab Force cannot meet the handful of claims alleged. Without the limited testimony of Dr. Sternlicht, Respondents have no way to rebut that new argument. Consequently, Respondents would be severely prejudiced by the exclusion of Dr. Sternlicht from the hearing.

CONCLUSION

Because of the material post-deposition change in the testimony of Dr. Delitto and the limitation of the testimony of Dr. Sternlicht to rebuttal matters, inclusion of Dr. Sternlicht in the Respondents' final Witness List is appropriate.

Respectfully submitted,



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