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

In the Matter of	)	
TELEBRANDS CORP.,	)	
TV SAVINGS, LLC, and	)	Docket No. 9313
AJIT KHUBANI,	)	
Respondents.	)	

ORDER DENYING COMPLAINT COUNSEL'S MOTION *IN LIMINE* AND MOTION TO STRIKE

I.

On April 9, 2004, Complaint Counsel filed a Motion *In Limine* and Motion to Strike ("Motions"). On April 19, 2004, Respondents filed an Opposition ("Opposition"). For the reasons set forth below, Complaint Counsel's Motion *In Limine* and Motion to Strike are **DENIED.**

II.

Complaint Counsel filed a motion *in limine* to exclude evidence from trial including advertising for electronic muscle stimulation ("EMS") devices other than ab belts and advertising outside the relevant time period, arguing that this evidence is irrelevant. Complaint Counsel also seeks to strike the declaration of Eric Sternlicht, Ph.D. submitted as part of Respondents' Opposition to Complaint Counsel's Motion for Summary Decision, arguing that Sternlicht was not timely identified as an expert. Complaint Counsel's motion to strike Sternlicht from Respondents' witness list is the subject of a separate motion and Order.

Respondents assert that advertising for other EMS devices is relevant to consumers' preconceptions about Respondent's product, the Ab Force, and that products advertised prior to the consumer survey conducted by Michael Mazis, Ph.D., are relevant to evaluating that survey. In addition, Respondents contend that the Motion to Strike is moot as Complaint Counsel's Motion for Summary Decision was denied on April 13, 2004.

III.

The admission of relevant evidence is governed by Commission Rule 3.43, which states in part that:

> Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

16 C.F.R. § 3.43(b)(1).

The Complaint in this proceeding alleges that Respondents violated sections 5 and 12 of the Federal Trade Commission Act ("FTC Act") in connection with their marketing of the Ab Force, an EMS device within the meaning of Sections 12 and 15 of the FTC Act. The Complaint alleges that Respondents represented that: the Ab Force causes loss of weight, inches, or fat; the Ab Force causes well-defined abdominal muscles; and use of Ab Force is an effective alternative to regular exercise. Complaint ¶ 19. The Complaint alleges, in part, that these claims were made by reference to advertising for other EMS devices on the market at that time including the Ab Energizer, Fast Abs, and Ab Tronic. Complaint ¶¶ 11-18, 21. Respondents deny these allegations and argue that the Ab Force was advertised to provide a massage. Answer ¶¶ 19, 20, 23; Opposition at 3.

Complaint Counsel objects to the admission at trial of four commercials for other EMS devices, three because they are not for ab belts and the fourth because it ran after the Ab Force advertising campaign ended. Complaint Counsel asserts that "advertising for other EMS devices that are not ab belts that may have been on the market at the time has no bearing on information consumers may have processed when considering the Ab Force ab belt." Motion at 4. In addition, Complaint Counsel claims that the advertisement for the Slendertone Flex did not run during or before the Ab Force marketing campaign based upon the November 2003 date on the tape of the advertisement provided by Respondents.

Respondents contend that advertising for EMS devices other than Ab belts challenges Complaint Counsel's assumption that when consumers viewed advertisements for Respondents' Ab Force, they made a connection to claims made in advertising for Ab Energizer, Fast Abs, or Ab Tronic, as alleged in the Complaint. Respondents assert that consumers may have made connections to other EMS devices which, like Respondents' Ab Force, claimed that the product was capable of delivering a massage. Respondents further argue that the advertisements for these other EMS devices used similar depictions as those found in the Ab Force ads and indicated that the products used electrical stimulation to cause muscle contractions. Moreover, Respondents

assert that there is a dispute regarding whether the Slendertone Flex advertisements ran prior to or during the advertising campaign for Respondents' Ab Force. Respondents point out that even using Complaint Counsel's date, the Slendertone Flex advertisements ran prior to Mazis's consumer survey and therefore are relevant to the weight to be given to that survey.

"Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, *1 (July 21, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products*, 231 F. Supp.2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, 1998 WL 102702, * 2 (N.D. Ill. 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also SEC v. U.S. Environmental, Inc.*, 2002 WL 31323832, *2 (S.D.N.Y. 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental,* 2002 WL 31323832 at *2; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp.2d 743, 750 (D.N.J. 2003). *In limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial. *Ohler v. U.S.*, 529 U.S. 753, 758 (2000); *Luce*, 469 U.S. at 41 (A motion *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer."). "Denial of a motion in limine does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000); *Knotts v. Black & Decker, Inc.*, 204 F. Supp.2d 1029, 1034 n.4 (N.D. Ohio 2002).

Complaint Counsel has not established that the evidence at issue is clearly inadmissible on all potential grounds. Advertising regarding EMS devices other than Ab belts may be relevant to consumer's perceptions of Respondents' Ab Force advertising and there is not a sufficient basis in the pleadings to limit evidence to ab belts as opposed to other EMS devices. Moreover, it is not clear when the Slendertone advertisement ran and whether it would have impacted consumer perceptions. The extent to which these devices differed from the Respondents' Ab Force is an appropriate subject of cross-examination. This ruling on the motion *in limine* does not imply a finding regarding the weight to be given to the evidence nor does it preclude appropriate objections during trial.

Complaint Counsel also moves to strike the declaration of Sternlicht attached to Respondents' Opposition to Complaint Counsel's Motion for Summary Decision. Complaint Counsel's motion for summary decision was denied in an April 13, 2004 Order which stated that Sternlicht's declaration was "not dispositive of any issue necessary for the determination of

Complaint Counsel's motion." Complaint Counsel's current motion to strike is therefore moot.

IV.

For the above-stated reasons, Complaint Counsel's Motion *In Limine* and Motion to Strike are **DENIED**. Specific objections to irrelevant, unreliable, or otherwise inadmissible evidence will be entertained at trial.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

April 26, 2004