

**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	)	<b>PUBLIC DOCUMENT</b>
	)	
AJIT KHUBANI,	)	
Individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
_____	)	

**RESPONDENTS' TRIAL BRIEF**

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## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

A review of the advertising being challenged in this case reveals that it is, at its heart, comparative advertising. Complaint Counsel does not and cannot dispute that in looking at the express claims made, the Ab Force advertising makes truthful comparisons of the Ab Force to similar electronic muscle stimulation ("EMS") products, and offers consumers the opportunity to buy that same technology at a much lower price than that offered by other advertisers. This is exactly the type of advertising that the Commission has lauded as "a source of important information to consumers and assists them in making rational purchase decisions." *Commission Statement of Policy Regarding Comparative Advertising*, August 13, 1979.

However, Complaint Counsel wants this Court to look past the express comparative claims regarding price and technology and the claim of "relaxing massage" and find that the Ab Force advertising violates Section 5 of the Federal Trade Commission Act by making a number of implied claims. Complaint Counsel's novel theory in this case is simply an argument for broader enforcement powers with regard to comparative advertising. If Complaint Counsel prevails, the implications for advertisers who engage in valuable comparative advertising will be profound.

Initially, Complaint Counsel advanced a novel "importation" theory that consumers who saw the Ab Force ads would think of certain other commercials and would attribute the claims made in those ads to the Ab Force. Complaint Counsel has since retreated from this position and now argues that the Court should make a determination that the claims are false based on the face of the Ab Force advertising and on the consumer survey conducted by Dr. Mazis which in no way supports the theory originally advanced.

The Court must be extraordinarily cautious in its approach to this case and in its review of the evidence in light of Complaint Counsel's changing position. As the Commission recognized in *In re Kraft*, 114 FTC 40 (1991), all precautions should be taken to "ensure that advertisers will not be deterred from conveying useful, accurate information to consumers." *Id.* at 63. This is particularly imperative where, as here, Complaint Counsel goes beyond what has been done before and seeks to broaden its enforcement power by enjoining Respondents' comparative advertising where the challenged claims were made not in the Ab Force ads, but in the ads for other products.

Complaint Counsel has argued that its case does not depend on reference to the ads for Ab Energizer, Abtronic and Fast Abs. But the evidence and testimony it will offer will invariably return to those ads, comparing the claims of those three commercials with the visual elements and language of the Ab Force ads. This evidence is, at best, not credible and, at worst, inadmissible.

First, the Court is being asked to determine that the Ab Force advertising contains the challenged claims on its face, but so far in this action, Complaint Counsel has argued that the challenged claims are made, at least in part, by reference to claims made in other advertising. In other words, Complaint Counsel wants this Court to go beyond what has been done in any other case before the Commission or any federal court, and make a facial determination based on factors outside the four corners of the Ab Force advertising. This Court should reject Complaint Counsel's invitation to make such a determination, particularly in light of Complaint Counsel's initial argument that the Ab Force ads made the challenged claims by association with other ads.

Second, this stratagem is matched by Complaint Counsel's overreaching with regard to Dr. Mazis' testimony. His "facial analysis" is the exact type of bare assertion that is routinely dismissed by federal courts as inadmissible and without credibility. Moreover, it was reached after Dr. Mazis read the Complaint provided to him by Complaint Counsel. In light of this, it is difficult to imagine how his facial analysis could be viewed as an objective, unbiased view of the advertising he was hired to challenge.

Dr. Mazis' survey is no less tainted by bias. As Dr. Jacoby will testify, Dr. Mazis' survey questions create a bias in participants partly because they were designed for people who wanted to lose weight and would thus be inclined to identify with one of the challenged claims. Additionally, the survey suffers from a number of fatal methodological flaws, not the least of which is Dr. Mazis' failure to identify any preconceptions in participants' minds and to screen for those preconceptions – even though Dr. Mazis, at the last minute, screened for and tossed out of the results participants who had seen a Federal Trade Commission ("FTC") news story on ab belts just prior to the survey. This inconsistent approach to his effort to "control" the survey serves as just one example of the unreliability of the survey results. Dr. Mazis also interprets the results bearing in mind a number of false or unproven assumptions that were fed to him by Complaint Counsel in anticipation of this action. Even if there were no flaws in the survey methodology, and even if Dr. Mazis did not make a number of assumptions and leaps without evidentiary foundation, the Court should recognize that the results show a difference between the test and control groups so low as to be nearly inactionable.

Against this backdrop, the Court should find in Respondents' favor and dismiss the Complaint. The implications of finding for Complaint Counsel in light of the weak and incredible evidence it will offer are significant and broad-ranging. If the Court finds for Complaint Counsel, then advertisers will be deterred from engaging in the "free flow" of comparative advertising, which, as the Supreme Court has stated, is "indispensable" to intelligent consumer decisionmaking. *Virginia Pharmacy Bd. v. Virginia Citizens Consumers Council*, 425 U.S. 748, 763 – 65, 96 S.Ct. 1817, 1826 - 27 (1976). If Complaint Counsel is permitted to prevail based on assumptions, flawed evidence and insupportable arguments, then advertisers will avoid the type of comparative advertising that the Commission itself deems valuable and the Supreme Court has found to be "indispensable." *Id.*

Considering the chilling effect a decision in favor of Complaint Counsel will have on advertisers' future use of comparative advertising, the Court cannot find in favor of Complaint Counsel unless it is confident that the evidence submitted clearly demonstrates that the advertising contains the challenged claims, and that Complaint Counsel's view of the case is supported by credible extrinsic evidence. But the evidence in this case will demonstrate that Complaint Counsel has not met its burden, and that the Ab Force advertising at issue is not false or deceptive. Consequently, the Court should decide the case in favor of Respondents and dismiss the Complaint in its entirety.

### **BACKGROUND**

Respondents Telebrands Corporation ("Telebrands") and its founder, President and CEO Ajit Khubani ("Khubani") are leaders in the field of direct response television advertising, and have been for over two decades. Telebrands typically markets consumer

products through direct response advertising, whereby consumers order by calling a telephone number or writing to an address featured in promotional material for the product advertised. Direct response television advertising is different from sales at retail in that advertisers can identify almost immediately the success of the product by tracking the sales to consumers—who typically order the product by calling a telephone number in response to a television commercial.

Telebrands sells a variety of products directly to consumers through direct response television advertising, either by program-length commercial (or “infomercial”) or by one- or two-minute “short-form” or “spot” commercials, and through print advertising, radio advertising, and internet and e-mail advertising.

*EMS Devices Advertised at the Time Ab Force Came onto the Market*

Electronic muscle stimulation (EMS) devices are applied externally to the skin and provide electrical stimulation to the muscles, causing them to contract. EMS devices are used widely in the clinical, therapeutic, and rehabilitation fields. In addition, there are a variety of medical and physical therapy applications for EMS devices.

Outside clinical settings, EMS devices available to consumers have additional beneficial uses. For example, a number of consumer EMS devices, including at least one EMS ab belt, have been reviewed and cleared by the FDA for the following indicated uses: toning, strengthening and firming abdominal muscles; for active recovery of muscles after exercise; for cosmetic uses; and for use to stimulate healthy muscles in order to improve or facilitate muscle performance.

In late 2001 and early 2002, there were many EMS devices, including EMS ab belts, being advertised and sold to consumers. Three of these EMS devices, Ab Energizer, AbTronic and Fast Abs, were challenged in 2002 by the Commission as having made false or unsubstantiated weight loss, fat loss, inch loss, exercise, and "six-pack ab" claims.

However, in addition to these EMS devices, there were many other EMS devices that the Commission never issued a Complaint against, and which made no claims about weight loss, exercise or other claims at issue in this case. These other EMS devices included Accusage, Electrosage, Electro-Gym, and the IGIA Mini Wireless Massage System. These products made toning and massage claims, and made none of the claims Complaint Counsel challenges in this action. Each of these products was advertised on television. Other television advertisements promoted EMS devices for cosmetic uses, including Derma Tone and Rejuvenique (which had also received FDA clearance).

In addition to these EMS devices, there were other numerous EMS devices that had been sold at the time of or prior to the Ab Force, at least one of which, Compex Sport, had also received FDA clearance to be marketed as a muscle toner and strengthener.

*Telebrands and Khubani Decide to Market the Ab Force Product*

In late 2001, Mr. Khubani began to consider marketing an electronic ab belt for sale to consumers. Mr. Khubani believed that these EMS devices were growing in consumer popularity and were being heavily marketed, because he had seen advertisements for such products on television, was aware that such ads were listed by commercial monitoring services as having aired, and was knowledgeable about the industry. He was also aware that Bio-Medical Research, Inc. had recently obtained a 510(k) clearance from the Food and

Drug Administration to market its ab belt product, the Slendertone Flex, as providing muscle toning, firming and strengthening. He was also aware that other similar devices had received 510(k) approval.

In light of the apparent popularity of EMS products, and their prevalence on television and in other media, Telebrands decided to enter into the marketplace with an electronic ab belt product. To that end, Telebrands contacted an overseas manufacturer, and with that manufacturer began to develop the ab belt product to be sold by Telebrands.

*The First Ab Force Advertisements: Initial Drafts*

In December 2001, Mr. Khubani began creating advertising for the Ab Force product. Mr. Khubani was aware that he could sell products with the same technology and same or similar power output to consumers for a significantly lower cost than that offered by other ab belt advertisers.<sup>1</sup> Against the backdrop of an apparently significant public demand for ab belt products, Mr. Khubani drafted Ab Force advertising that focused heavily on the cost savings over other products and the technological similarities between the Ab Force and other products on the market.

Before the Court can understand the evolution of the advertising in this case, it must understand Telebrands' typical approach to developing advertising, an approach that is common in the industry

Once Telebrands has developed or otherwise decided to market a product, it will run test advertising to determine whether the product likely will be successful in the marketplace.

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<sup>1</sup> Mr. Khubani learned from the manufacturer of the Telebrands ab belt product that the manufacturer also produced another EMS ab belt product, the AbTronic. The manufacturer informed Mr. Khubani that the Telebrands ab belt product would have the same output as two other ab belt products, the AbTronic and the Fast Abs.

Direct response advertising allows advertisers to directly and almost immediately see how well the public is accepting the product. Telemarketing companies that field consumers' orders can report the number of orders to the advertisers. Advertisers can then compare the volume of orders with projected costs, and use that information to decide whether to market a product.

Telebrands may "test" a product by placing print advertising, radio advertising or television advertising on for a limited time or to a limited number of markets.

If the initial "test" ads are successful, then Telebrands will engage in due diligence to ensure that the ads are in compliance with various laws and regulations. Specifically, Telebrands will have counsel review the advertising and will consider counsel's advice with regard to revising the advertising. As discussed below, Telebrands engaged in substantial due diligence with regard to the Ab Force advertising.

*a. The Radio Script and Print Ad*

The first advertisements Mr. Khubani drafted were test advertisements for radio and print media. Specifically, on December 18, Mr. Khubani drafted an Ab Force radio script for a 60-second radio commercial. Also on December 18, 2001, Mr. Khubani sent to Shail Prasad, who works with Telebrands on media placement, a draft copy of a print ad for the Ab Force product.

*b. The Draft Commercial Script*

At around the same time that Mr. Khubani had drafted initial copy for the Ab Force print and radio advertisement, he also made arrangements to create and shoot an Ab Force product television commercial. Specifically, Telebrands contacted Collette Liantonio, a

television commercial producer who Telebrands had worked with in the past. Telebrands hired Ms. Liantonio to shoot a 60 second and a 120 second television commercial for the Ab Force product. Prior to the commercial shoot, Ms. Liantonio briefly discussed the product with Mr. Khubani, informed Ms. Liantonio that he did not want to make any claims in the Ab Force commercials, other than price claims. Prior to the shoot, Ms. Liantonio never saw a prototype of the Ab Force product, nor any other ab belt commercial or product.

The commercial shoot date of Saturday, December 22, 2001, was ultimately scheduled. Ms. Liantonio's production company, Concepts TV Productions, Inc., arranged for the film crew and models to be used in the commercials, which were to be shot at the Telebrands office. Concepts TV Productions, Inc. also arranged for editing and other post-shoot production.

On the morning of the shoot, Ms. Liantonio presented Mr. Khubani with a draft, handwritten script that she had prepared the night before. The draft script contained her ideas as to possible language to be used and, although the script focused largely on a technological and price comparison of the Ab Force product to other ab belts, it also contained numerous explicit health claims, including promises that the Ab Force would help "flatten tummies" and would replace regular exercise.

On the morning of the shoot, Mr. Khubani reviewed the handwritten draft script provided by Ms. Liantonio. Mr. Khubani saw that the Liantonio draft contained numerous claims that Mr. Khubani did not want in the Ab Force advertising. He will testify that the script went well beyond the boundaries of what he wanted to claim in the advertising, which was that the Ab Force product was technologically similar to others on the market, but less

expensive. Knowing that the draft script was entirely unsuitable for his purposes, Mr. Khubani discarded the handwritten script and drafted a script of his own creation in his office prior to the shoot. That script was the script used in the initial "test" versions of the Ab Force commercials.

After the commercials were shot, Concepts TV Productions, Inc. edited and finalized the footage, creating a 60-second and a 120-second commercial. Those commercials were assigned production codes "AB-B-60" and "AB-B-120," respectively. In editing the initial Ab Force commercials, Concepts TV Productions, Inc. included several "jumpbacks" and stock footage shots for background. Several of these scenes included images of models using the Ab Force product and demonstrating the product causing muscle contractions. These demonstrations, which were included to show the product at work, were prominently featured throughout the ads.<sup>2</sup>

*Telebrands Tests and Then Revises the Ab Force Television Ads*

The 60-second and 120-second Ab Force commercials (AB-B-60 and AB-B-120) were broadcast beginning January 5, 2002. These commercials were cleared for broadcast only approximately 96 times on cable television beginning January 5, 2002. The 60-second Ab Force commercial (AB-B-60) generated a total of 2,392 orders for the Ab Force, or less than 1% of the total number of Ab Force orders placed through television advertising. The 120-second Ab Force commercial (AB-B-120) generated a total of 2,238 orders for the Ab Force, which is also less than 1% of the total number of Ab Force orders placed through

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<sup>2</sup> Complaint Counsel will likely focus on two or three stock footage images of models not demonstrating the product. Viewed in context of the ads themselves, these images are fleeting, staying on screen for less than a second each. Moreover, these images were not in all of the television ads.

television advertising. Both of these advertisements, which were broadcast on a limited basis to “test” consumer reception of the product, accounted for approximately 1.4% of total Ab Force orders generated through television advertising.

Because the initial results for the test versions of the commercials were positive, Telebrands decided to proceed to a full marketing campaign for the product. Accordingly, as is its typical practice, Telebrands conducted a review the advertisements in-house and with its legal counsel and made production and editing changes to the commercials. As part of that review, changes were made to address a concern Telebrands had regarding the Food and Drug Administration (“FDA”). In early 2002, Telebrands became aware that Bio-Medical Research, marketer of the Slender Tone Flex EMS ab belt, had received a 510(k) approval from the FDA to market the Slendertone Flex, and was moving aggressively against any seller of EMS abdominal belts which had not received such approval, both by threatening private litigation and by lobbying the FDA for action against sellers of ab belts. Consequently, in order to insure that the advertising for the Ab Force product could not be misunderstood as making “structure, function” claims that could only be made for a product cleared by the FDA, Telebrands directed that the phrase “relaxing massage” be added to the two television spots.

As a result of the pre-"roll out" review, several changes were made. For example, the phrase "fitness craze" that appeared in the test ads was replaced with the words "latest craze." The statement that the Ab Force “is just as powerful and effective as those expensive ab belts sold by others,” was changed in the roll-out version to “The Ab Force uses the same powerful technology as those expensive ab belts.” The sales offer was revised

from one unit for \$10 in the test ads to two units for \$20 in the roll-out versions.

Specifically, Mr. Khubani made the following changes to the voiceover for the 60-second commercial:

<i><b>TEST AD LANGUAGE</b></i>	<i><b>ROLL-OUT AD LANGUAGE</b></i>
“They’re <b>the latest fitness craze</b> to sweep the country and everybody wants one!”	“They’re <b>the latest craze</b> to sweep the country and everybody wants one!”
“The <b>problem</b> is, they’re expensive, selling for up to \$120 each.”	“The <b>thing</b> is they’re expensive, selling for up to \$120 each.”
“We were able to <b>cut a special deal</b> with the factory and passing the savings on to you.”	“We were able to <b>cut a deal directly</b> with the factory and passing the savings on to you.”
“The Ab Force <b>is just as powerful and effective</b> as those expensive ab belts sold by others.”	“The Ab Force <b>uses the same powerful technology</b> as those expensive ab belts.”
“ <b>Designed to send just the right amount of electronic stimulation</b> to your abdominal area.”	“ <b>Capable of directing ten different intensity levels</b> at your abdominal area.”
“Don’t miss out on this opportunity <b>to join the latest fitness craze!</b> ”	“Don’t miss out on this <b>incredible</b> opportunity [ ]!”

Mr. Khubani made similar changes to the 120-second commercial:

<i><b>TEST AD LANGUAGE</b></i>	<i><b>ROLL-OUT AD LANGUAGE</b></i>
“They’re <b>the latest fitness craze</b> to sweep the country and everybody wants one!”	“They’re <b>the latest craze</b> to sweep the country and everybody wants one!”
“The <b>problem</b> is, they’re	“The <b>thing</b> is they’re expensive,

expensive, selling for up to \$120 each.”	selling for up to \$120 each.”
“We were able to <b>cut a special deal</b> with the factory and passing the savings on to you.”	“We were able to <b>cut a deal directly</b> with the factory and passing the savings on to you.”
“The Ab Force <b>is just as powerful and effective</b> as those expensive ab belts sold by others.”	“The Ab Force <b>uses the same powerful technology</b> as those expensive ab belts.”
“Using sophisticated electronic technology, the Ab Force is <b>designed to send just the right amount of electronic stimulation</b> to your abdominal area.”	“Using sophisticated <b>computer components</b> , the Ab Force is <b>capable of directing ten different intensity levels</b> at your abdominal area.”
“Don’t miss out on this opportunity <b>to join the latest fitness craze!</b> ”	“Don’t miss out on this <b>incredible</b> opportunity [ ]!”

In addition, changes were made to the specific sales offer by removing reference to a satisfaction guarantee; by including an offer of two Ab Force belts for just \$20; and by removing the statement that the Ab Force is not available in any stores and is being offered for a limited time only.

Once Mr. Khubani had made revisions to the script, Collette Liantonio was called in to direct additional re-shoot work on the revised commercials, and Concepts TV Products, Inc. again handled post-production. Those commercials were assigned production codes "AB-E-60" and "AB-E-120," respectively.

The rollout versions of the Ab Force 60-second and 120-second television commercials (AB-E-60) and AB-E-120) were broadcast beginning on January 19, 2002, and

ran until approximately April 7, 2002. Compared to the test advertising, which ran on cable and was cleared 96 times, the rollout versions of the Ab Force commercials ran on cable, satellite, and local affiliate stations, and cleared 11,508 times. This advertising generated the largest amount of sales, generating well over 95% of total orders.

Telebrands Revises Radio Script

At approximately the same time Mr. Khubani revised the television commercials, he made changes to the 60-second draft radio commercial script. Specifically, Mr. Khubani made the following revisions:

<b><i>DRAFT RADIO SCRIPT</i></b>	<b><i>REVISED RADIO SCRIPT</i></b>
“They promise to get abs into great shape fast – without exercise!””	Statement deleted in its entirety.
“They’re <b>the latest fitness craze</b> to sweep the country and everybody wants one!”	“They’re <b>the latest craze</b> to sweep the country and everybody wants one!”
“The <b>problem</b> is, they’re expensive, selling for up to \$120 each.”	“The <b>thing</b> is they’re expensive, selling for up to \$120 each.”
“We were able to <b>cut a special deal</b> with the factory and passing the savings on to you.”	“We were able to <b>cut a deal directly</b> with the factory and passing the savings on to you.”
“The Ab Force <b>is just as powerful and effective</b> as those expensive ab belts sold by others.”	“The Ab Force <b>uses the same powerful technology</b> as those expensive ab belts.”
“ <b>Designed to send just the right amount of electronic stimulation</b> to your abdominal area.”	“ <b>Capable of directing ten different intensity levels</b> at your abdominal area.”

Finally, Mr. Khubani changed several other statements in the radio ad regarding its deals with the factory, the lowering cost of electronic products, and the intensity of competition. Additionally, Mr. Khubani removed the statement a full money-back guarantee and made several other minor changes not at issue in this case.

As with the test television commercials, the radio advertisements generated very few sales. In total, the radio advertisements for the Ab Force generated 1,340 orders, which is approximately 0.4% of the total orders for the Ab Force product.

#### Internet and E-mail Advertising

In addition to the television, radio and print advertising for the Ab Force product, Telebrands created internet advertising and direct response advertising sent by e-mail to potential customers. The statements made on the internet and the e-mail advertising largely mirrored the statements made in the 60 second and 120 second television advertisements. At bottom, however, these advertisements were relatively weak, generating 2,663 orders, or less than 1% of the total orders for the Ab Force.

#### User's Manuals

In addition to advertising, Respondents also created two User's Manuals to accompany the product, one manual for the one-mode Ab Force, and another for the six-mode Ab Force. The User's Manuals for the Ab Force clearly and conspicuously inform consumers that the product is a massager that is intended for relaxation. In fact, the first two sentences of the User Manuals provide: "Ab Force is intended to provide a relaxing massage. Ab Force is not intended for medical use, for the treatment of any medical

condition or for any permanent physical changes.” The Ab Force User Manuals also state elsewhere:

- The function of the Ab Force Control Unit is described as allowing the user to “control the intensity of the **massage**”;
- The user is instructed to “relax as you get a relaxing **massage** according to Ab Force’s preprogrammed sequence”; and
- The Six “**massage** programs” used in the six-mode Ab Force are described.

These statements comport with the express claim found in the Ab Force that the product is intended to provide a "relaxing massage." If there were consumers who read the User's Manuals and saw the massage language but complained that the commercials for the product instead promised weight loss, fat loss, and the other challenged claims, Complaint Counsel has produced no evidence of those consumers.

## **ARGUMENT**

### **I. COMPLAINT COUNSEL'S ORIGINAL THEORY OF THE CASE IS UNPROVEN**

Complaint Counsel alleges that Respondents engaged in false and deceptive advertising in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), by falsely claiming that the Ab Force product (1) would cause weight, fat and inch loss, (2) could be used to replace exercise, and (3) would cause the users to have "six-pack" abs.

Complaint Counsel has conceded that the ads do not make these claims expressly. Instead, Complaint Counsel presented this Court with a novel theory that the Ab Force ad makes the claims by causing consumers seeing the Ab Force ads to recall ads for three other

EMS devices – the Ab Energizer, Fast Abs and Abtronic ads – and thus making consumers believe that the Ab Force ads made the same claims.

This is the theory that Complaint Counsel presented to the Court in November 2003, before its expert, Dr. Mazis, conducted the survey that is central to Complaint Counsel's case. At that pre-hearing conference, Complaint Counsel promised to prove this theory through extrinsic evidence:

[R]espondents ... apparently believed they could avoid Commission action by not explicitly repeating the verbal claims in the infomercials to which they refer, and the main issue in this case is whether consumers got it, whether consumers thought, when they saw the Ab Force commercials, that they were being promised the same benefits as were being touted in the infomercials they were seeing daily, the trim wastes [sic], well defined abs and slim bodies in the Ab Force ads. Quite simply we can prove that consumers got it...."

Since that hearing, however, Complaint Counsel has backed off that theory. Instead, Complaint Counsel is expected to argue:

1. that the Respondents intended to make the challenged claims;
2. that the Court can determine facially that the advertising made the challenged claims;
3. that there is extrinsic evidence that the advertising made the challenged claims; and
4. that the challenged claims are false.

In making these arguments, however, Complaint Counsel will likely try to have its cake and eat it, too. Complaint Counsel may argue that it does not need to prove the theory, and then offer several assumptions as to why the theory has been proven. Complaint Counsel will argue that whether consumers made a connection between Ab Force and the three other ads is an "irrelevant" question, but then argue as a central issue that the Ab Force ads are actionable because consumers made that connection.

Before analyzing Complaint Counsel's present theory of the case, it is instructive to examine why Complaint Counsel's original theory could not be proven.

Complaint Counsel's consistently advanced theory has been that Respondents took advantage of information contained in advertisements, not for the numerous EMS products then available in the marketplace, but rather for three specific products – AbEnergizer, AbTronic, and Fast Abs – by making oblique references to advertisements in general and by reinforcing such references with depictions of attractive models. The alleged result of these references is that consumers viewing the Ab Force advertisements would recall preconceptions about ab belts formed by those three specific advertisements, and would therefore believe that the Ab Force ads adopted the claims made in those other ads.

In order to prevail on this theory, however, Complaint counsel must prove one of two things: Either that consumers' preconceptions could *only* have been impacted by the three other ads (for Ab Energizer, Abtronic, and Fast Abs), or, because there were numerous possible sources for consumers' beliefs about ab belts (as Complaint Counsel's own expert states there were), that consumers would discriminate among the numerous sources of information and make a connection between the Ab Force ad and the ads for Ab Energizer, Abtronic, and Fast Abs.

Two central facts prevent Complaint Counsel from establishing either proposition: (1) The advertisements for Ab Energizer, AbTronic and Fast Abs were not the only three sources of consumer beliefs, if any, about ab belts; and (2) Complaint Counsel cannot show that consumers seeing the Ab Force recalled only the three specific ads they cited.

Complaint Counsel's argument assumes that there were only three infomercials for ab belts being broadcast during the same time period Ab Force was advertised. That is simply not the case. The Ab Energizer, AbTronic and Fast Abs products were three of numerous EMS devices nationally advertised at the time the Ab Force came to market. Consequently, any preconceptions developed from advertisements of ab belts or EMS products generally, could as easily have been caused by advertisements other than of the three cited by Complaint Counsel. Indeed, Complaint Counsel admits that it is aware that just before or at the time the Ab Force was sold, there were thirty EMS devices on the market.

The evidence will show that, at the time the Ab Force was being advertised, there were numerous EMS device commercials being broadcast at the same time as those for Ab Energizer, AbTronic and Fast Abs. These products include Accusage, Electrosage, Electrofit Micro-Sage, Electro-Gym, the IGIA Mini Wireless Massage System and others. The ads for these products contained only massage and/or muscle toning claims. Additionally, each was advertised – either in infomercials, short-form commercials, or both – *repeatedly* during the months of September 2001 through March 2002, the period of time focused on by Complaint Counsel. Consequently, any argument by Complaint Counsel at trial that the three other ads cited in the Complaint were the only sources of any pre-formed beliefs that may have existed among consumers is completely unfounded.<sup>3</sup>

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<sup>3</sup> Not coincidentally, the ads for Ab Energizer, AbTronic and Fast abs were the only advertisements (of the numerous devices advertised at the time) to be previously challenged by the Commission as containing false claims. But the issue of whether these advertisements contained the claims made, and whether the claims were false and unsubstantiated, was never actually decided in any of these actions. Thus, Complaint Counsel's assertion that these "predicate" ads contain false and misleading claims has not been established as a matter of fact or law.

In addition to the various EMS devices being advertised nationally in infomercials and other television commercials, Dr. Mazis testified that consumers could have based their beliefs about ab belts on any of a number of "sources" separate and apart from television or other ab belt advertisements:

People can be exposed to information in a variety of ways. [P]eople could have exposure to the advertisements, but they could have gotten the information from other people who had seen the advertisements; they could have seen the products in retail stores; they could have, perhaps, seen the products in operation or somebody using them, for example. I mean, there's a lot of sources of information about these products. I mean, they were widely advertised. A lot of them were sold. We could assume that people were talking about them. So there's a lot—a lot of sources of information other than exposure to the advertisements directly.

Against this backdrop, and in light of its own expert's testimony, Complaint Counsel cannot simply assume that consumers were thinking only of the ads for Ab Energizer, Ab Tronic and Fast Abs when they saw the Ab Force commercial. The record in this case requires a finding of the exact opposite. Thus, Complaint Counsel cannot demonstrate that consumers necessarily thought of the three other ads when they saw the Ab Force ads.

Nor can Complaint Counsel show through extrinsic evidence that consumers made this connection. Complaint Counsel has absolutely no evidence that out of the numerous sources of consumers' preconceptions, the commercials for AbEnergizer, Ab Tronic or Fast Abs had any impact on consumers' perceptions of the Ab Force ads. As Dr. Mazis freely admits, he never asked any of the survey participants if they had seen one, some or any of the three ads:

**Q.** Did you ask the participants in the study in this case whether they had seen the three other abdominal belt infomercials?

**A.** No.

**Q.** Did you ask them if they had seen any of the infomercials?

A. No.

Q. So, of course, you did not ask them what they remembered of any advertising for the ab belts contained in the infomercials?

A. Correct.

Without asking these questions, there is absolutely no foundation for Complaint Counsel's core theory that consumers would recall the ads for Ab Energizer, AbTronic or Fast Abs after seeing the Ab Force ad. Neither Dr. Mazis nor Complaint Counsel know whether some or any of the survey participants had ever seen the three ads Complaint Counsel puts at issue. Instead, Complaint Counsel and Dr. Mazis rely on an assumption that participants in the survey saw the ads because they were top-ranked and, so their argument goes, widely disseminated. But this assumption does not establish the assumption that the survey participants were comprised of people who saw the three ads at issue, and that such people formed the belief that the Ab Force product made any or all of the claims made in the commercials for the other three products. Without this necessary proof, Complaint Counsel's core theory crumbles.

## **II. THE EVIDENCE IN THIS CASE DEMONSTRATES THAT RESPONDENTS ACTIVELY SOUGHT TO AVOID MAKING THE CHALLENGED CLAIMS.**

This case is unusual because rather than this being a case where an advertiser has made advertisements progressively more troublesome, Respondents in this case started with no actionable claims and revised the advertisements to eliminate language to avoid the slightest potential concern. The evidence will demonstrate, with reference to four significant documents, that Respondents intended to avoid such claims and drafted and revised their advertising to conform to that intent.

The first document of significance is the first draft of the Ab Force radio advertisement. This document is significant for two reasons. First, it is the earliest document reflecting any claims. Second, the script shows that Mr. Khubani intended to make the advertising campaign one of "price point" comparison and technological similarity with other products. Indeed, the single reference to getting abs "into shape" is a claim attributed to other products.

The second document that is significant is the handwritten draft of a script for the television commercial prepared by Collette Liantonio, the producer/director of the television spot. The testimony is clear that it was prepared the evening of December 21, 2001, the day before the shooting of the two Ab Force commercials, and was brought to Mr. Khubani by Ms. Liantonio at the shoot at Telebrands the following day. Two things regarding this document are of substantial significance: (1) when compared with the December 18, 2001, Khubani draft radio spot, it is clear that Ms. Liantonio's draft includes the thoughts reflected in the earlier radio draft, but also includes the very claims (*e.g.* weight loss, rock hard abs, *etc.*) that the Complaint accuses Mr. Khubani of making in the Ab Force commercials; and (2) Mr. Khubani rejected and discarded her draft, explaining that he did not wish to make those claims, rewriting the entire script on the day of the shoot the script to be used in the production.

The third significant group of documents is the scripts used in the commercials that were rewritten by Mr. Khubani on the day of the shoot. Those commercials, which were tested but not "rolled out" by Respondents, contains two statements that are repeatedly quoted by Complaint Counsel's expert, Dr. Michael Mazis, in his Expert Report and

Rebuttal Expert Report (and, indeed, in the Complaint) – but were not included in the "roll out" version of the commercials that sold the huge majority of the Ab Force product. The "roll out" version of the commercial omits the word "fitness" before the word "craze" as well as the "just as powerful and effective" language which is repeatedly referred to by Dr. Mazis and the Complaint. The relative importance of the test version of the commercial and the "roll out" version of the commercial is emphasized by the fact that only less than three percent (3%) of the Ab Force orders placed in connection with the test ads.

The fourth and final group of significant documents is the group of revised scripts that were used in the roll-out advertising, and the revised radio ad. These commercials were revised well in advance of the inquiry by the Commission, and served to eliminate language that Complaint Counsel now challenges. The evidence will clearly demonstrate that the evolution of the advertising, which was not actionable to begin with, and moved further away from the line over a short period of time and without prodding by the Commission. The commercial message of the Ab Force ads is one that contains no claims other than those expressly made: similar technology to other products on the market at a much, much lower price. Ironically, there was an effort to include in the Ab Force commercials exactly the messages that the Complaint alleges – but that effort, by Ms. Liantonio, was firmly and decisively rejected by Mr. Khubani. There is, in short, no evidence that Respondents intended to include the claims identified in the Complaint and, as discussed below, there is likewise no evidence that purchasers of the Ab Force understood that those claims had been made.

### **III. THERE IS NO EVIDENCE SUPPORTING COMPLAINT COUNSEL'S ARGUMENT FOR A FACIAL ANALYSIS.**

In its Motion for Summary Decision, Complaint Counsel advanced, for the first time, the primary argument that this Court can somehow divine from the four corners of the Ab Force ads the implied advertising claims. Complaint Counsel is expected to press the same argument at trial.

In doing so, Complaint Counsel asks the Court to disregard the prominent, central express claims of the ads, parse out individual statements and depictions, no matter how fleeting, and find that the advertising on its face made the alleged implied claims.

Complaint Counsel cannot prevail at trial on this argument for two reasons. First, the relevant Commission decisions hold that a facial finding of implied claims may only be made where such an interpretation can be made convincingly, and where there is a sufficiently clear factual basis for doing so. Second, the few brief depictions and statements cherry-picked from the ads by Complaint Counsel are insufficient evidence of the existence of the asserted claims, particularly where express claims, conveniently ignored by Complaint Counsel, provide a different net impression.

#### **A. Analytical Framework**

For analytical purposes, the Commission often distinguishes between express claims and implied claims in evaluating what messages an ad can reasonably be interpreted as containing. *In re Kraft*, 114 F.T.C. 40, 120 (1987), *aff'd*, 970 F.2d 311 (7<sup>th</sup> Cir. 1992). Express claims directly state the representation at issue. *Id.* (citing *In re Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)). Implied claims are any claims that are not express. They range in a continuum from claims

that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.* (citing *Thompson Medical*, 104 FTC at 789).

The Commission will first look to the advertisement to determine whether the ad conveys express or implied claims. While express claims will be "self-evident," implied claims "may or may not be apparent." *Id.* at 121. *Id.* (citing Federal Trade Commission Policy Statement on Deception, appended to *In re Cliffdale Associates, Inc.*, 103 FTC 176-177 (1984)).

Because the Commission wants to ensure that "advertisers will not be deterred from conveying useful, accurate information to consumers," it will conclude that an advertisement contains implied claims in advertisements only where the "language or depictions are clear enough to permit [it] to conclude with confidence, after examination of the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances." *Id.* (citing *Thompson Medical*, 104 FTC at 789). If, "based on [an] initial review of the evidence from the advertisement itself, [the Commission] cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable." *Id.* (citing *Thompson Medical*, 104 FTC at 789; *In re Bristol-Myers Co.*, 102 FTC 21, 319 (1983), *aff'd*, 783 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

The cautionary notes sounded by the Commission against making overreaching facial interpretations are of particular importance in this case. Complaint Counsel is seeking a cease and desist order against Respondents not because of what was conveyed directly by the Ab Force advertisement, but because of claims made in other advertisements. Complaint Counsel will likely argue at trial that this is not at all the case, and that this Court can make a facial analysis based on selected, parsed elements culled from the Ab Force advertising. But the testimony and evidence offered by Complaint Counsel will return to the commercials for the Ab Energizer, Fast Abs and AbTronic products, drawing comparisons between those advertisements and the Ab Force advertisements. Because Complaint Counsel's arguments rely heavily on the advertisements for the commercials for those three other advertisements, a facial analysis would go far beyond what has been done in other cases.

This case simply is not *Kraft*, nor is it *In re StoufferFoods Corp.*, 118 FTC 746 (1994). In both of those cases, the Commission found that the advertisements could be facially interpreted as making the challenged implied claims. But in both cases, the Commission acknowledged that the elements building to that interpretation could be gleaned from the four corners of the advertising itself. *See, Stouffer*, 118 FTC at 801, 803 (focusing on several elements of the ads, including statements comparing "less than 1 gram" and "1000 milligrams," which were contained in the same ad, and holding that the challenged claims were made within the advertising); *Kraft*, 114 FTC at 123 – 125 (finding that the advertisement "viewed as a whole" made the challenged claims, based on a review of the language and elements contained in the challenged advertising). In the present case, Complaint Counsel's argument depends on looking to the advertisements for Ab Energizer,

Fast Abs, and AbTronic. Complaint Counsel will attempt to focus on those three ads, to the exclusion of the other ads that were on the market that included many of the same elements, but which did not make the challenged claims in this case. Because Complaint Counsel's argument depends on reference to the three other ads, and because that argument depends on an untested finding that consumers would make a connection between the Ab Force ads and the ads for those three other products, the Court should not find that the challenged claims were made on the face of the advertising.

**B. Complaint Counsel has Impermissibly Parsed the Ads in Arguing for a Facial Interpretation**

Complaint Counsel has already admitted that the alleged claims are not express claims. Complaint Counsel may insist that the Court can view the advertisements and reach the conclusion that the various alleged claims are impliedly made based on select (1) references to "other ab belt infomercials," (2) visual depictions of attractive men and women, and (3) discrete, throw-away statements singled out by Complaint Counsel. At the same time, however, they ask the Court to ignore the overwhelming express claims of (1) price comparison, (2) technological similarity, and (3) the benefit of a "relaxing massage."

The evidence will demonstrate that Complaint Counsel's descriptions of the ads are not complete. First, few of the depictions and statements identified by Complaint Counsel were made in the most significant ads. For example, the single reference to "fitness craze" is found only in the initial radio ad and the test television commercials. These ads ran for a short period of time and generated few orders before that phrase was removed when the ads were revised to change the sales offer. Similarly, the statement in the first radio ad that other

products promise great abs without exercise was found only in the briefly run and unsuccessful initial radio ad. Again, this phrase was later removed when the ad was revised to change the offer. Moreover, a comparison of the television ads reveals that not all of the television commercials contained the same visual depictions challenged by Complaint Counsel. Accordingly, most of the advertisements before the Court – and certainly the advertisements that generated over 95% of all product orders – do not contain elements cited by Complaint Counsel. And yet, Complaint Counsel improperly suggests that all of the elements identified are in each of the Ab Force ads before the Court.

Complaint Counsel's approach goes against the Commission's stated principle that it will look "to the overall common sense net impression" of an ad to discern claims, *Removatron v. FTC*, 884 F.2d 1489, 1497 (1<sup>st</sup> Cir. 1989), Complaint Counsel takes individual elements and argues a strained interpretation of each that defies common sense.

### **1. The visual depictions of attractive men and women**

The ads contain various visual depictions of attractive men and women for a number of reasons having nothing to do with weight loss, exercise or the other claims alleged. First, the hallmark of the Ab Force product is that it causes muscles to contract through electrical stimulation. The common sense way to convey this feature quickly and effectively is to demonstrate the product in use, as Complaint Counsel's own advertising expert admitted:

**Q.** [...] Was [the Ab Force] causing the muscles to move?

**A.** Yes, it appeared that was happening.

**Q.** And did that seem to be a featured point in the advertisement?

**A.** Yes.

**Q.** Do you have an opinion as to whether that demonstrated movement of muscles is more effectively done with a model who is trim and muscular compared to a model who is not trim and muscular?

A. Yes.

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Q. The question is, assuming that you wished to demonstrate movement of muscle, would you be able more effectively to do that using a trim and muscular person whose muscles are close to the skin or a less trim and non-muscular person whose muscles may be shielded from the skin by a wall of fat?

A. I assume the former.

Q. So assuming the purpose of the demonstration was merely to show muscle contracting or muscle movement, you would agree, then, that you would be more easily able to do that using a trim and muscular person?

A. Yes, I believe so.

In addition, Complaint Counsel's other expert – its physical therapy expert – also agreed in his report that muscle contractions would be more visible on a trim person: "To be able to see a more defined [abdominal muscle], a person must minimize the amount of subcutaneous fat under the skin."

It is not surprising, then, that trim people were used to demonstrate the product or that their midribs were uncovered to show the product in use. In light of this, it is hardly unusual that the producer would request that models arrive on set with "great abs" and noting that "seeing your abs is important."

Second, a casual scan of commercial television will reveal the basic fact that advertisers almost always employ attractive, fit people in their commercials. Evidence will show that the inclusion of attractive people was commonplace because it appealed to viewers. If Complaint Counsel is right, then the use of attractive, thin, well-muscled models in many commercials would imply the claim that the advertised product results in weight loss. This is absurd.

Finally, Complaint Counsel has argued that in one of the test commercials for the product, the commercial "started with a close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench." Evidence will show that this characterization is misleading because it implies that there was a lingering shot of a man performing exercise. In actuality, the shot of a bare-chested man appears once, mid-way through the advertisement, and is a less than two-second shot of an extreme close-up of a man's torso. Whether he is performing a crunch, as Complaint Counsel insists, is indeterminate. The exercise bench, if that is indeed what is shown in a tiny portion of the shot, is certainly not easily identifiable. Moreover, the two-second shot serves as mere background to the prominently featured spokesperson, who at the time is discussing the price offer. It was drawn from stock footage and was included in the commercial by Concepts TV solely as "window dressing" background.

It is telling that Complaint Counsel repeatedly points to these fleeting images out of the television commercials (to the extent they are contained in the commercials at all) as proof of the asserted claims, but has dismissed out of hand the explicit reference to "Relaxing Massage", which was in script on the screen, as too brief and barely noticeable. Why the explicit, written, on-screen "relaxing massage" claim is less noticeable than the fleeting images highlighted by Complaint Counsel, from which a benefit of the product is allegedly implied, is never addressed. Complaint Counsel's positions make no sense.

## **2. Advertisement statements**

In addition to the visual depictions, Complaint Counsel has cited the following discrete verbal statements as conveying the panoply of alleged claims: (1) a reference to

"fitness craze" in early test ads that were revised a few days later; (2) a reference to "exercise" in one test ad that was revised a few days later; (3) a technological comparison of Ab Force as being "just as powerful and effective" as other products, which appeared in early test ads that were revised a few days later; and (4) the name "Ab Force."

Notably, each of these statements (except for the name) appeared only in first versions of the radio and television ads, which were created in late December 2001 and which were revised by early January 2002. These ads ran very briefly and generated few orders. The inclusion of these throwaway statements hardly creates the host of claims alleged by Complaint Counsel, but their exclusion from the most successful and most widely disseminated of the ads makes Complaint Counsel's interpretation even less likely.

The inclusion of the statements "fitness craze" and "just as powerful and effective as other ab belts" in the early television ads does nothing to diminish the overwhelming statements concerning price advantage and technological comparison of the products, or the claim that the product provides a relaxing massage. Moreover, as with the visual depictions, these statements have a common sense meaning that has nothing to do with the claims asserted.

First, noting that ab belts are the "latest fitness craze" in the test ads only conveys the idea that ab belts being advertised are being advertised as "fitness" products, whether as muscle toners, massagers, or whatever use others claim. It does not necessarily follow from this description of the craze that consumers will likely reasonably interpret that statement as conveying the promises alleged. This is true also of the short-lived radio ad, that noted that other products were promising the benefits of exercise.

Second, within the context of the other statements being made about the technological advances permitting the product to be brought to market, the statement "just as powerful and effective" can only be interpreted as a statement comparing the technological similarities between the products on the market and the Ab Force. Mr. Khubani knew Ab Force had the same power output as other ab belts on the market. The advertisement statement reflects that knowledge.

Finally, Complaint Counsel's parsing of the name "Ab Force" is strained and unpersuasive. The inclusion of the term "Ab" is unremarkable, given the fact that the product was designed to be used primarily on the abdomen. The inclusion of that descriptive term should not be interpreted as supporting the claims asserted by Complaint Counsel. The use of the term "force" does not, as Dr. Mazis speculates, lead inexorably to the perception that "it makes abdominals a force which...might mean it makes them really great." Dr. Delitto's report makes clear that he was interpreting and using the word "force" to mean effective power output. This is a common-sense interpretation of the name, particularly given the fact that this is an electronic stimulation device. Dr. Mazis' speculative interpretation makes no sense.

There is evidence that consumers viewed these elements with common sense and plain meaning, and did not reach the same impression Complaint Counsel now advances. The Ab Force User's Manual for both models of the Ab Force that were sold (a one-level mode model and a six-level mode model), repeatedly state that the product was to be used only for a "massage" or a "relaxing massage." If consumers thought this was a weight loss or

exercise product as Complaint Counsel argues, it has failed to offer evidence that people reading these claims realized they were misled and demanded refunds.

Because the Court cannot facially interpret the Ab Force ads as making the claims alleged, Complaint Counsel must establish consumer perceptions through the use of extrinsic evidence. However, as discussed below, the evidence offered is not even admissible, let alone credible, extrinsic evidence of consumer perceptions.

**IV. COMPLAINT COUNSEL HAS OFFERED NO ADMISSIBLE, LET ALONE RELIABLE, EXTRINSIC EVIDENCE THAT CONSUMERS PERCEIVED THE AB FORCE ADS AS MAKING THE ADVERTISING CLAIMS ALLEGED.**

If, as here, the advertisements cannot be facially interpreted as convincingly making the claims alleged, then the burden falls squarely on Complaint Counsel to provide extrinsic evidence that consumers interpret the advertisements as making the claims alleged. 16 C.F.R. § 3.43(a). Complaint Counsel cannot meet that burden.

**A. Complaint Counsel had the opportunity to provide the best evidence of consumer perceptions, but ignored it instead.**

There can be no question that the very best evidence of consumers' perceptions of the Ab Force ads – the perceptions of actual consumers who purchased the product after seeing the ads – could easily have been obtained, but Complaint Counsel decided not to use it. Complaint Counsel declined to seek any evidence from actual consumers, whose names, addresses and telephone numbers were provided in over 24,000 pages of information produced by Respondents.

Dr. Mazis and Complaint Counsel discussed the possibility of interviewing actual consumers, but Complaint Counsel dismissed the idea out of hand over concerns there was not enough time:

**Q.** Are you aware that the FTC staff is in the – is in possession of the names, addresses and telephone numbers of all or substantially all the purchasers of the Ab Force belts?

**A.** There was something mentioned to me about that, but I never learned the exact details of that. I knew there was some database that was available, but I – I have never seen the database, and I really have not gotten into it in detail.

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**Q.** Did they ever propose to you the desirability of contacting actual purchasers of the product to determine why they had purchased the product?

**A.** It was something that was mentioned, but it wasn't discussed in much detail.

**Q.** By whom was it mentioned?

**A.** Walter Gross.

**Q.** What was your response to Mr. Gross' mentioning of that?

**A.** I – I think I said we – we could do a study of those people, but that's all I can recall.

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**Q.** Was it after you had arranged for the study that was conducted by Mr. Kloc [of U.S. Research]?

**A.** Yes.

**Q.** Was it after you had seen the results of that study?

**A.** Yes.

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**Q.** I think – was the exact quote from your testimony that "we could do a study of those people"?

**A.** Well, he – he raised the issue, and then I said we – we could do a study of those people. But it just didn't – it just never – it never went beyond that. It was – I think if I'm recollecting now, I think it had to do with something that could be done as part of the rebuttal expert report. That was – that was all I could remember, but it – I mean, it didn't get too far because one of the things is there just wasn't a lot of time to do it. So I said, well it's something we could do but there really isn't – you know, there really isn't time to do that.

Because Complaint Counsel decided not to make any effort to determine the perceptions of actual consumers, Complaint Counsel attempted to determine indirect evidence of consumer perceptions, through the use of a mall-intercept survey. However, as discussed below, this second-best method is so riddled with flaws as to make its results utterly worthless.

**B. The opinions of Dr. Mazis are so unreliable that they are not even admissible -- let alone credible -- extrinsic evidence of consumer perceptions.**

Complaint Counsel relies on the expert opinions of Michael Mazis, Ph.D. As discussed fully in Respondents' cross-motion for summary decision, his opinions are based on an impermissible, so-called "facial analysis" and a fatally flawed consumer survey.

Because his opinions lack a reliable foundation, those opinions are inadmissible under Commission rules and federal court decisions concerning the admissibility of expert testimony, a motion currently pending before the Court. As Respondents have argued, there is no admissible extrinsic evidence to support Complaint Counsel's motion.

**1. Dr. Mazis' so-called facial analysis has no reliable foundation.**

In arguing that a facial interpretation of the Ab Force ads is permissible, Complaint Counsel cites heavily to the so-called "facial analysis" conducted by Dr. Mazis. As discussed in Respondents' cross-motion, however, Dr. Mazis' personal interpretation of the ads cannot be viewed as reliable or admissible, for two reasons.

First, Dr. Mazis' personal impressions are based on no reliable data. Dr. Mazis admitted in his deposition that except for two sentences concerning the consumer survey, none of his "facial analysis" is based on testing or other empirical data. Instead, Dr. Mazis purports to base his personal interpretation of the Ab Force ads on his "expertise" in the field. But Dr. Mazis admitted that he is no more of an expert than any consumer on the street. His claim to be able to "try[] to make some assessment" about consumers "in general" is not based on any relevant experience and is, in and of itself, irrelevant to determining what consumers' perceptions of the Ab Force advertising would be.

Second, Dr. Mazis' impressions are inadmissible because they are the product of bias and assumption. He formed his "facial analysis" opinions only after reviewing the Complaint and discussing his employment with Complaint Counsel. Moreover, his interpretation depends largely upon assumptions about what is said in other infomercials, not what is said within the four corners of the Ab Force ads themselves. He assumes that consumers would have seen the ads for Ab Energizer, AbTronic and Fast Abs, and therefore concludes that "the four EMS ab belts would appear to consumers to be substantially similar and to produce comparable results."<sup>4</sup> He also concludes that "the broadcast of [those three

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<sup>4</sup> Dr. Mazis tries to give his facial analysis the sheen of reliability by pointing to "categorization theory." As Dr. Jacoby will describe, there is nothing inherently wrong with "categorization theory," but that theory only works if consumers have developed a

advertisements] is likely to have had an impact on consumers' perceptions of the Ab Force infomercials...."

This interpretation of what is contained in the Ab Force ads is nothing more than a series of biased assumptions rendered upon the information fed to him by Complaint Counsel. This is exactly the kind of immeasurable, subjective "say-so" evidence criticized by courts as inadmissible. *See, e.g., O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106 (7th Cir), *cert. denied*, 512 U.S. 1222 (1994).

**2. Dr. Mazis' consumer survey is fundamentally flawed and inadmissible.**

The only purportedly empirical extrinsic evidence offered by Complaint Counsel of consumers' perceptions of the Ab Force advertising is a mall intercept survey. As discussed in Respondents' Motion for Summary Decision, however, that survey suffers from a number of flaws that preclude a determination that the survey is a reliable measure of consumers' perceptions of the ads at issue. Perhaps Complaint Counsel recognizes the infirmities so obvious in the study since they barely mentioned it in their motion for summary decision.

**a. Ineffective Controls**

The failure to adequately control for pre-formed beliefs in a case such as this renders 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

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categorical knowledge that they can then apply in the future. In the article cited by Dr. Mazis, the researcher tested the theory by first asking potential participants to describe what they knew about different types of cameras. Those who had preconceptions about cameras were included in the study, while those who did not were excluded. Dr. Mazis, however, made no effort to test whether consumers seeing the Ab Force ad had preconceptions, because he did not ask that question in his survey. Thus, his belief that "categorization theory" is at work in this case is pure, unadulterated speculation.

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.* 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. Therefore, Dr. Mazis has no idea whether there was a disproportionate number of survey participants in the control group or in the test group 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." 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.

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 [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.

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**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.

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. 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. He made 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. 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' previous efforts to explain this all away. First, as Dr. Jacoby will describe, 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. Indeed, if simple "probabilities" took care of any issues of preconceptions, there would

never be a mention in the caselaw 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 "cleansed" 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" (*compare*, Exh. 30, Test Advertisement to Exh. 31, Control Advertisement), and still contained images of trim women and well-muscled men (*Id.*).

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. 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, loudly telegraphs 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.

**b. Other Survey Flaws**

In addition to the use of an ineffective control, Dr. Jacoby has identified and will describe a host of reasons why the survey is otherwise flawed. Those reasons include (1) the problem of "confounding", (2) problems with the sample universe, and (3) problems related to dropping survey participants.

As discussed above, there are fundamental flaws that preclude a finding that the extrinsic evidence establishes Complaint Counsel's case. Because there is no reliable extrinsic evidence, and because this Court cannot make a facial interpretation of the Ab Force advertising from the four corners of the ads themselves, Complaint Counsel cannot meet its burden of establishing the threshold issue that the challenged claims were made in the Ab Force advertising, and therefore the Complaint should be dismissed.

**V. ISSUES REGARDING SUBSTANTIATION.**

Complaint Counsel has offered the testimony of Dr. Anthony Delitto, a physical therapist, on whether the alleged advertising claims were substantiated by reliable scientific evidence. Specifically, Dr. Delitto was asked to determine "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 Ab Force will cause greater definition of abdominal musculature
- c. Use of Ab Force can be an effective alternative to volitional exercise

- d. That the evidence provided offers a reasonable basis for the above-mentioned claims"

(Delitto Expert Report, ¶ 13).

These opinions, of course, are relevant only if the alleged claims were actually made. As discussed above, the alleged claims were not made, either explicitly or implicitly in the Ab Force ads. Accordingly, Dr. Delitto's central opinion that there is no evidence to substantiate these claims is irrelevant.

However, Respondents have ample reason to believe that Complaint Counsel (through Dr. Delitto) will attempt to establish the patently false notion that the Ab Force product is incapable of providing any benefits to consumers whatsoever. This argument is completely wrong, because, like other EMS devices, the Ab Force is capable of providing numerous benefits to users.

If Complaint Counsel attempt to establish that the Ab Force provides no benefit, then Respondents are prepared to respond. There is absolutely no question that electronic muscle stimulation devices offer a variety of useful applications to users of those devices. This is a point on which Dr. Delitto and Complaint Counsel's proposed witness Mr. Robert Gatling both agree. Indeed, the Ab Force can provide benefits that have nothing to do with weight loss, fat loss, loss of inches or the other benefits allegedly claimed in the ads. According to Eric Sternlicht, Ph.D., the Ab Force product is capable of providing a variety of benefits, including: (1) training, massaging and assisting in the recovery of abdominal muscles of the torso; (2) toning and firming muscles; and (3) as is expressly claimed in the Ab Force advertising itself, producing a relaxing massage.

Dr. Sternlicht will testify that, in general, the current scientific literature shows electrical muscle stimulation to be a viable form of activity used widely in the clinical, therapeutic, and rehabilitation fields. EMS has been extensively studied on healthy, diseased and injured animals and human subjects, and a number of studies have examined the efficacy of electrical muscle stimulation as a training modality in healthy, trained subjects. In addition, there are a variety of medical and physical therapy applications for EMS devices.

He will also testify that outside of the clinical setting, EMS devices have additional beneficial uses. Indeed, other evidence establishes that at least four consumer product EMS devices have been cleared by the FDA for toning, strengthening and firming abdominal muscles. One EMS device, Rejuvenique (which was advertised during the same time period the Ab Force, Ab Energizer, AbTronic and Fast Abs advertisements ran) received 510(k) FDA clearance for "cosmetic uses." The Compex Sport, another EMS device, received 510(k) FDA clearance for use "to stimulate healthy muscles in order to improve or facilitate muscle performance." A third product, Slendertone Flex, received 510(k) FDA clearance for "the improvement of abdominal muscle tone, for strengthening of the abdominal muscles and for the development of a firmer abdomen."

Notably, Dr. Delitto never says that the Ab Force doesn't provide some benefit, nor do Dr. Delitto's opinions explicitly contradict the fact that the Ab Force is capable of providing the benefits identified by Dr. Sternlicht. However, Complaint Counsel has implied that Dr. Delitto's testing establishes that there is no benefit from use of the Ab Force.

But Dr. Delitto's testing in no way demonstrates that the Ab Force does not work, or that it offers no benefits. With regard to the alleged exercise claim, Dr. Delitto opined that a factor in developing well-defined abdominal muscles is increased muscle size. He further stated that muscle strengthening, which is necessary to increased muscle size, would occur where the contractile forces were half of that necessary for someone to do a sit-up (or leg lift, as it were) on their own. From his testing Dr. Delitto found that the Ab Force was not powerful enough (when used on the abs) to cause "muscle contraction of the abdominalis sufficient to cause any movement of the proximal attachments of the Rectus Abdominis muscle," or (when used on the thigh) sufficient enough to "lift the leg through the air against gravity." In other words, the Ab Force did not possess electrical stimulation sufficient to cause a user to bend or "double up" as if in a sit-up or lift their leg against its own weight.

However, this is not the same thing as saying that the Ab Force causes no muscle contraction when used on the abdomen or thigh. Indeed, Dr. Delitto admitted in his report that there was an electrically stimulated muscle contraction, just not of sufficient magnitude to cause the type of strong contraction one would experience while exercising. Dr. Delitto further appears to concede that the Ab Force is, in fact, capable of massaging the abdominal muscles. Dr. Delitto also opines, in his recently submitted multi-page "correction to the record," that the Ab Force is not the same product as the Slendertone Flex, which has received 510(k) approval. Again, however, this is not to say that the Ab Force does not provide any benefits. Nor is it evidence that the Ab Force cannot provide benefits similar to those offered by Slendertone Flex, an implication that is flatly contradicted by Dr. Sternlicht.

The Delitto Report misses the mark by selectively targeting certain advertising claims allegedly made by marketers of three other EMS abdominal belts and represents nothing more than a regurgitation of the claims advanced by Complaint Counsel. For this reason, it cannot be relied on as providing any useful information regarding the issues before the Court because:

- a. The Ab Force can tone, firm and strengthen the abdominal muscles;
- b. The Ab Force can relax and massage the abdominal muscles;
- c. The Ab Force can increase blood flow and promote active recovery of muscles after exercise; and
- d. It is well established that EMS devices can be used for a wide range of other medical and non-therapeutic purposes.

Consequently, any notion implied by Dr. Delitto's testimony that the Ab Force has no benefits and cannot provide some or all of the benefits described herein is baseless.

### **CONCLUSION**

For the foregoing reasons, the Court, after examining the evidence to be presented at trial, should find in favor of the Respondents and dismiss the Complaint in its entirety.

Dated: April 26, 2004

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2004, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing Respondents' Trial Brief 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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Washington, D.C. 20580  
E-mail: [secretary@ftc.gov](mailto:secretary@ftc.gov)

(2) two (2) paper copies 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 hand delivery and by e-mail 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.

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Theodore W. Atkinson