

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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In the Matter of )  
 )  
TELEBRANDS CORP., )  
a corporation, )  
 )  
TV SAVINGS, LLC, )  
a limited liability company, and )  
 )  
AJIT KHUBANI, )  
individually and as president of )  
Telebrands Corp. and sole member )  
of TV Savings, LLC. )  

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**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' POST TRIAL BRIEF**

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## I. SUMMARY

Respondents want to have it both ways: they can engage in “compare and save” advertising that repeatedly compares the Ab Force to ab belts advertised on infomercials on TV, but not be held responsible for what those infomercials say ab belts can do. They want to jump on the “bandwagon” of those same ab belts advertised on infomercials on TV, but they expect this Court to believe that consumers would not expect the Ab Force to have the same central characteristics as those ab belts. In their television ads, they say, “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV,” but they ask this Court to believe that none of the consumers who saw the Ab Force ads also saw those ab belt infomercials. They rely on industry publications such as the *J.W. Greensheet* to determine what products are popular and to convince retailers that their products are popular, but they ask this Court to believe the ratings in the *Greensheet* are totally unreliable.

Respondents state that they only made two claims for the Ab Force: it had the same technology as ab belts sold on infomercials on TV and it was cheaper. They admit that in “compare and save” advertising, the consumer must be told what the product is being compared to, but they ask this Court to believe that the consumer would not expect it to perform the functions of the other product. They explicitly compare the Ab Force to ab belts that sell for up to \$120, and they admit that the AbTronic was the ab belt that sold for \$120, but they claim that no consumers would expect the Ab Force to have the advertised attributes of the AbTronic. They say that statements in their radio ads (“Have you seen those fantastic electronic ab belt commercials on TV? They’re amazing, promising to get our abs into great shape fast without exercise.”) simply state “that other products made certain advertising claims related to exercise.” Respondents’ Post Trial Brief (“RPTB”) at 19.

In short, Respondents purposely and explicitly exploited consumer beliefs created by “those fantastic electronic ab belt infomercials on TV,” and now claim that they cannot be held responsible for pre-existing beliefs. Respondents are mistaken. The Federal Trade Commission Act (“FTC Act”) was designed to be flexible enough to encompass the various schemes ingenious entrepreneurs and their lawyers can devise to separate consumers from their money. The FTC Act is also flexible enough to allow this Court to impose remedies sufficient “to effectively close all roads to the prohibited goal, so that its order may not be by-passed with impunity.” *United States v. Ruberoid*, 343 U.S. 470, 473 (1952). Complaint counsel respectfully request this Court to close all roads to consumer deception by entering the notice order attached to the complaint in this action.

**II. RESPONDENTS VIOLATED THE FTC ACT EVEN THOUGH THEY MARKETED THE AB FORCE UNDER A "COMPARE AND SAVE" STRATEGY AND STUDIOUSLY ATTEMPTED TO AVOID MAKING ANY EXPRESS CLAIMS EXCEPT THAT IT USED THE SAME TECHNOLOGY AS OTHER AB BELTS AND WAS CHEAPER THAN OTHER AB BELTS.**

Respondents cannot avoid liability for violating the FTC Act simply by following a “compare and save” marketing plan that makes no express claims other than lower price and the same technology. The Commission deems an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to convey that message. *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Thompson Medical*, 104 F.T.C. 648, 788 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). An advertisement may convey numerous representations, and the same advertising elements may be amenable to more than one reasonable interpretation. *Kraft, Inc.*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7; Letter from James C. Miller, III, Chairman, Federal Trade Commission to Hon. John T.

Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983) ("*Deception Statement*"), reprinted in 103 F.T.C. 174, 178 (appended to *Cliffdale Assoc., Inc.*, 103 F.T.C. 110 (1984)). Thus, the representation(s) alleged in the complaint need not be the only reasonable interpretation(s) of the challenged advertising; an advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Kraft, Inc.*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7, 818; *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). "An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class . . . . A material practice that misleads a significant minority of reasonable consumers is deceptive." *Deception Statement*, 103 F.T.C. at 177 n.20. Moreover, evidence that consumers have actually been misled is not necessary; the likelihood of deception is the standard by which the advertising is judged. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3<sup>rd</sup> Cir. 1982); *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984), *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984). Even "[a] secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate." *Deception Statement*, 103 F.T.C. at 178 n.21.

It certainly would be reasonable for consumers who had seen infomercials for the AbTronic, the Fast Abs and the AB Energizer ab belts to interpret the Ab Force ads as saying that the Ab Force could do what the infomercials said those products could do. Respondent Khubani testified that he "only wanted to . . . say two things in that advertisement, and that was you're getting the same technology as the other EMS *ab belts* for a much, much lower price, and that's what I stuck to . . ." (Khubani Tr. 534) (emphasis added). According to Respondents, this testimony "demonstrates that, at bottom, this is a case about the use and effect of comparative



advertising when a product is promoted as a less expensive product that is technologically similar to others in the marketplace.” RPTB at 9. Complaint Counsel does not disagree with this statement; but it does believe that reasonable consumers take away more than just a price comparison when the seller asks them to compare its product to other products already on the market.

As Mr. Khubani himself said, in “compare and save” advertising, there must be a point of reference for comparison; otherwise the consumer doesn’t know “what you're comparing to.” (Khubani, Tr. 487). In the four Ab Force television ads, the radio, print, and Internet ads and one of the email ads, that point of reference was to those “fantastic electronic *Ab Belt infomercials* on TV.” (JX 2 through JX 5; CX 1 G; CX 1 H; RX 49; RX 51; RX 52). The other Ab Force email ad referred to “*Ab belts* sold by other companies on *infomercials*.” (RX 50). By referring to those Ab belt infomercials, Respondents necessarily relied on consumers perceiving that the Ab Force would do the same things those other ab belts claimed to do. If consumers did not, they would have no reason to buy the “cheaper” ab belt.

But now Respondents attempt to create a smoke screen, saying they were pointing to all devices that use EMS technology. Although the Ab Force ads referred to the technology used in “those fantastic electronic ab belts,” the focus was on *ab belts*, and not on the technology except to note that the Ab Force was the same as “those fantastic electronic ab belts.” None of the ads used the term “electronic muscle stimulation” or “EMS,” or offered any explanation of what the technology is or how it works. And none of the ads referred in any way - visually or verbally - to any product other than an ab belt. (JX 2 through JX 5; CX 1 G; CX 1 H; X 49; RX 50; RX 51; RX 52). In short, the point of comparison was to ab belts, not to EMS products generally.

It is not relevant, as Respondents have argued, that EMS products other than ab belts

were advertised before and during the time the Ab Force was advertised. As noted, the ads themselves, with their repeated references to ab *belts* belie any assertion consumers may have been thinking of those other non-belt EMS devices. Moreover, Respondents admit that the AbTronic, the Fast Abs and the AB Energizer infomercials were among the ab belt infomercials that Mr. Khubani was referring to when he wrote the advertisements. (Khubani, Tr. 273-274). They also admit that the comparison in the ads to ab belts that sell for up to \$120 was to the AbTronic. (Khubani, Tr. 276, 539). Furthermore, the evidence indicates that three ab belts infomercials - for the AbTronic, Ab Energizer, and Fast Abs - were the most heavily advertised ab belt infomercials, and that these three ab belts were heavily sold. Indeed, each of the Ab Force television commercials open with the following statement, "I'm sure you've seen those fantastic electronic ab belt infomercials on TV." This is an admission by Respondents that a substantial part of their audience has in fact seen "ab belt infomercials on TV."

Respondents also attempt to create a smoke screen by asserting that, at trial, Complaint Counsel tried to show that Mr. Khubani had only the infomercials for the AbTronic, Ab Energizer and Fast Abs in mind when he created the reference in Ab Force ads to "other ab belt infomercials." RPTB at 9. This is not correct, although it is true that Complaint Counsel did show at trial that Mr. Khubani had the infomercials for the AbTronic, Ab Energizer and Fast Abs in mind when he created the reference to "other ab belt infomercials" and that he thought the Ab Force was competing against other ab belts.<sup>1</sup> Of course, while Mr. Khubani's intent in

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<sup>1</sup> In an email dated February 2, 2002, Mr. Khubani stated that he initially had no intention of entering the product category that included the Ab Energizer. In the same email, he stated that the Ab Force was the 6<sup>th</sup> product to enter this category on television. (CX 61). According to Mr. Khubani, four of the five prior products to enter this category were the AbTronic, Ab Energizer, and Fast Abs belts as well a product by Emson. (Khubani, Tr. 261). At trial, he testified that the sixth was the Electrosage by IGI'A, although he noted he had not remembered it at the time of his deposition. (Khubani, Tr. 261). Because the AbTronic, Ab Energizer, and Fast

advertising the Ab Force is relevant in concluding what the ads communicate, his opinion as expressed at trial is not determinative of what his intent was and certainly is not determinative of what the ads communicated to consumers. As he said, “compare and save” ads must compare the product to something, and all the evidence taken from the ads themselves indicates they were comparing the Ab Force - visually and verbally - to other ab belts.

Respondents further state, “Complaint Counsel essentially argue that the only claims in existence at the time Mr. Khubani decided to enter the market with the Ab Force product were the claims made in the ads for AbTronic, Ab Energizer and Fast Abs.” RPTB at 12. This is incorrect. As explained above, whether or not consumers saw ads for other EMS products in addition to infomercials for the AbTronic, Ab Energizer, and Fast Abs is irrelevant.

Even if Respondents were correct that a substantial number of consumers compared the Ab Force with non-belt EMS products that did not make the challenged claims, the ads would still be deceptive because, as Respondents concede, some consumers would compare the Ab Force to the AbTronic, Ab Energizer, and Fast Abs belts and the claims made for those products.

As discussed below, Respondents’ smoke screen, however, is quickly and easily dissipated. Most reasonable consumers do not spend money simply because something is cheaper; they spend money because they want that item, based on what it does. If the seller’s advertising does not inform them of what its product does, but only refers them to the other “amazing” and “fantastic” similar products already being advertised on TV, reasonable consumers must rely on their perceptions of what those ads claim those products can do when deciding whether to buy the seller’s cheaper product. A reasonable consumer must compare

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Abs are ab belts, even Mr. Khubani concedes that most of the competitors of the Ab Force were ab belts.

more than just price; to decide to purchase an ab belt, the consumer must have some idea what an ab belt does. The evidence adduced at trial indicates that many consumers - and not just an insignificant minority - were likely to perceive the Ab Force did what the AbTronic, Ab Energizer, and Fast Abs belts claimed to do. It does not matter whether these consumers also thought of other EMS devices or even EMS technology when perceiving a primary message, because even a secondary message that is deceptive is a basis for liability.

**A. THE MARKETPLACE WAS SATURATED WITH SIMILAR AB BELTS AT THE TIME THE AB FORCE WAS INTRODUCED.**

**1. Similar AB Belt Products on the Market When the Ab Force Entered**

It is true that, at trial, Mr. Khubani stated that he considered a number of other EMS products being advertised on television and sold in the direct response market. (Khubani Tr. 445-474). However, only two of the products Respondents discuss in their Post Trial Brief were *ab belts* - the Slendertone Flex and Electrogym.<sup>2</sup> RPTB at 12. Generally, Mr. Khubani's testimony as to the non-belt products was that "they relied on the same EMS technology used by

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<sup>2</sup> Respondents ignore the evidence which they themselves produced pertaining to three other products that are belts, presumably because of the claims that were made for these ab belts. The television spot for the Smart Toner calls it "the fast, easy, sexy way to have the slim, sexy body you've always wanted." Smart Toner TV commercial (RX 75). The commercial further claims, "In fact, we'll guarantee you'll lose two inches from your waist in just two weeks, or your money back." (RX 75). It further states; "With sit-ups, you struggle to pull up most of your body weight. It takes forever. But Smart Toner uses electromagnetic impulses to massage and contract your muscles 100 times per minute. It does all the work for you." (RX 75). Testimonials in the spot claim loss of 15 pounds, "a big reduction in body fat," and "over two inches lost in the waistline." (RX 75). GymFitness ads also contain numerous claims that the product is an effective substitute for strenuous workouts at the gym. ("Sure, you can go to the beach and see men and women with beautifully conditioned bodies, with the six-pack abs and the sculpted muscles that make other people turn their heads and notice. . . . Well, Gym Fitness lets us keep our muscles healthy and well-conditioned even when we can't get to the gym.") (RX 76).

The videotape of the Slim Tron spot that Respondents provided starts near the end of the commercial, but the fragment that is available contains the following promise "If you don't lose at least three inches off your waist, send it back for a full refund." (RX 78).

the Ab Force, *e.g.*, they all used electrical stimulation to cause involuntary muscle contraction in the same manner as the eventual Ab Force product. (Khubani Tr. 452 – 455).” RPTB at 11. But, as noted, neither electrical stimulation nor EMS is mentioned in any of the Ab Force ads. Respondents offer no explanation as to why consumers viewing the Ab Force ads would know that it used EMS and that the other products described by Mr. Khubani used EMS or indeed what EMS would do for them.

Similarly, Respondents offered no explanation as to why consumers would think of these products in the same category as ab belts. Instead, they incorrectly stated that Complaint Counsel “introduced absolutely no evidence that these products would not be considered in the same category as AbTronic, Ab Energizer and Fast Abs, and their expert, Dr. Mazis, declined an invitation to offer an opinion on the subject. (Mazis, Tr. 136).” RPTB at 12. In fact, Dr. Mazis stated that people would probably establish a different category in their minds for products that looked different from the AbTronic, Ab Energizer and Fast Abs or that made different claims. (Mazis, Tr. 136).

Mr. Khubani did discuss two other ab belts, the SlenderTone Flex and the Electrogym. As to the SlenderTone Flex, he recalled only that it was advertised on QVC in the fall of 2001. (Khubani Tr. 446 - 447). There is no evidence as to whether it appeared on QVC once or more than once, and there is no evidence that it was ever advertised on infomercials. The recorded Slendertone Flex television spot produced by the Respondents bears the date of November 10, 2003. (Khubani, Tr. 447; RX 79). Mr. Khubani described this spot as “very similar” to the presentation for Slendertone Flex on QVC. (Khubani, Tr. 447; RX 79). The television spot for Slendertone Flex suggests that use of the product may be an effective alternative to exercise: “You mean I don’t have to do sit-ups anymore?” (Khubani, Tr. 447; RX 79). If Slendertone

Flex is relevant at all to the issues in this proceeding, it is evidence that all of the ab belt devices identified by the respondents contained some core claims similar to those in the advertisements for the AbTronic, AB Energizer and Fast Abs ab belts.

As to the Electrogym, Respondents point out that a long-form IGI'A commercial for another product contained an offer of a free Electrogym ab belt with the purchase of the other product, which they incorrectly identified as the Accusage. RPTB at 12. The Electrogym was actually featured in a long-form commercial for the IGI'A Electrosage (RX 72), not the Accusage (RX 74). In the Electrosage commercial, it was described as offering "a great workout." (RX 72; Khubani, Tr. 451). The commercial also pointed out that "other ab belts sell for over \$120." (RX 72; Khubani, Tr. 451). Finally, the fact that the Electrogym was offered as a free gift with the purchase of another EMS product such as the Electrosage indicates that IGI'A realized consumers would regard it as separate and distinct from its primary product in the commercial - *i.e.*, an ab belt and not simply an EMS massager. In fact, the announcer describes the Electrogym Deluxe Belt as "a totally unique system." (RX 72; Khubani, Tr. 451). In short, the IGI'A commercial treats the Electrogym as in a different category than its massage product.

## **2. Non-Belt EMS Products Available at the Time Made Representations Unrelated to the Challenged Claims at Issue.**

Respondents state, at p. 12 of RPTB, that Mr. Khubani testified that EMS products "made a number of representations, running the gamut from weight loss and exercise claims such as those purportedly found in the ads for AbTronic, Ab Energizer and Fast Abs, as well as representations that the products offered massage and toning benefits. (Khubani Tr. 471 - 472)." As noted, for the Ab Force ads to be found to be deceptive, it is not necessary that the weight loss and exercise claims be the *only* claims being made for EMS products at the time of the Ab

Force campaign. *See, e.g.*, Deception Statement, 103 F.T.C. at 178, n.21. *Kraft, Inc.*, 114 F.T.C. at 120, n.8. It is simply necessary that a significant number of consumers, acting reasonably, were likely to be deceived by the ads.

Nevertheless, the evidence indicates that consumers were unlikely to put the Ab Force in the same category as non-belt EMS products and were therefore unlikely to believe it performed the functions for which these products were advertised. Dr. Mazis cited four elements in the Ab Force commercials that would cause consumers to categorize the Ab Force with the AbTronic, AB Energizer, and Fast Abs. These four elements are: (1) references in Ab Force ads to the other ab belts infomercials on TV; (2) visual images of models with well-developed abs and slim bodies; (3) the physical appearance of the Ab Force product, which is similar to the other ab belts; and (4) the similarity of the name “Ab Force” to the names of the other ab belts. (Mazis, Tr. 59-60). Dr. Mazis testified that the Ab Force ads demonstrate a strategy to get consumers to think about their ab belt category beliefs and link Ab Force to that category. (Mazis, Tr. 59). According to Dr. Mazis, statements such as “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV” and “[t]he Ab Force is just as powerful and effective as those expensive ab belts sold by others” rely on viewers’ familiarity with infomercials for other EMS ab belts and exploit the beliefs that consumers have developed from exposure to information about them. (CX 58 at 9). Additionally, the similarities in the depictions of well-muscled men and trim women with well-defined abdominal muscles within the Ab Force ads as well as the ads for AbTronic, AB Energizer, and Fast Abs ab belts also contribute to categorization. Such visual images, he said, are more lasting in people’s memories than verbal messages. (CX 58 at 8; Mazis, Tr. 59). Moreover, Dr. Mazis testified that the similarity in physical appearance between the Ab Force and the other ab belts would cause people familiar with the other ab belts to

associate the Ab Force with their ab belt category beliefs. (Mazis, Tr. 60). Finally, Dr. Mazis opined that the similarities in the names of the four products, inasmuch as all of them refer to “ab” or “abs,” would also have an impact on consumers and cause them to associate Ab Force with their prior beliefs about ab belts. (Mazis, Tr. 108, 59-60; CX 58 at 8, 10). The non-belt EMS products referred to by Respondents obviously did not look like the Ab Force, their advertising would not be brought to mind by a reference to ab belt infomercials on TV, their names were not similar, and there is no evidence in the record that their ads were similar in appearance to the Ab Force ads.

Indeed, Dr. Mazis specifically testified that products that looked different and made different claims were likely to be thought of in a different category by consumers. (Mazis, Tr. 135-36). Respondents specifically admit that the ads for non-belt products shown at trial did not contain any of the claims challenged by Complaint Counsel in this case. RPTB at 13. Thus, it is unlikely that consumers put these products in the same category as ab belts. Indeed, as noted above, the fact that IGI’A offered a free ab belt (the Electrogym) in commercials advertising another EMS product (the Electrosage) is further evidence that ab belts were regarded as a separate category of goods.

**B. THE DECISION TO MARKET THE AB FORCE USING A "COMPARE AND SAVE" STRATEGY WAS NECESSITATED BY RESPONDENTS' SUBSTANTIATION THAT THE AB FORCE HAD THE SAME CURRENT OUTPUT AS THE ABTRONIC AND FAST ABS BELTS.**

Respondents admit that there was no substantiation for any claims other than “compare and save” (with the exception of "relaxing massage"), and certainly not for the claims challenged in the Complaint. Respondents state that

Mr. Khubani discovered that the manufacturer he was considering was also the manufacturer for two potentially competing products, the AbTronic and the Fast Abs



products. (Khubani Tr. 266). Mr. Khubani also learned that the Ab Force product would have the same current output as those competing products. (Khubani Tr. 266).

RPTB at 15. They then assert that he realized that he could sell the Ab Force using a "compare and save" strategy and

be truthful in comparing the Ab Force to similar products and in claiming that the price of the Ab Force was significantly lower. (Khubani Tr. 267). Another factor he considered in developing a marketing strategy was whether the claims he could make about the product were substantiated. (Khubani Tr. 479). Mr. Khubani was aware that the Ab Force was technologically comparable to other products on the market, and decided to make that a focus of the advertising. (Khubani Tr. 479). Consequently, Mr. Khubani drafted the test advertising as "compare and save" comparative advertising, whereby a reference was made to other products in the category with respect to technology, and a focus was maintained on the price advantage of the Ab Force. (Khubani Tr. 486 - 487).

RPTB at 15. Thus, the only products for which Mr. Khubani had evidence of technological comparability were the AbTronic and Fast Abs ab belts. Respondents, in contrast, provided no evidence that Mr. Khubani had evidence that Ab Force was technologically comparable to other EMS devices or that it even was technologically comparable to other EMS devices.

**C. RESPONDENTS' ADVERTISING CONVEYS EXPRESS CLAIMS COMPARING THE AB FORCE TO AB BELTS ADVERTISED ON INFOMERCIALS AND IMPLIED CLAIMS THAT THE AB FORCE WILL PERFORM THE CENTRAL FUNCTION OF THE PRODUCTS TO WHICH IT IS COMPARED .**

Respondents argue that the "final rollout" advertising "studiously avoided the challenged claims and instead focused on a comparative advertising message." RPTB at 16. They seem to conclude that therefore the advertising is not deceptive and that Respondents intended to convey nothing beyond the comparative price and technology claims although they never explain why consumers would pay good money for an item without some idea of what it does. Moreover, they criticize complaint counsel for focusing on the introductory statements which remain even in what they call the "final rollout"ads: "I'm sure you've seen those fantastic electronic ab belt

infomercials on TV.” They explain that this language (and presumably subsequent language noting that other ab belts sell for up to \$120) was “drafted in order to create consumer identification with the EMS ab product category and to highlight the price advantage of the Ab Force.” RPTB at 16. But, as Mr. Khubani noted, “compare and save” ads must compare the product to something, and these phrases compare the Ab Force to ab belts sold by infomercials on TV - *i.e.*, the AbTronic, Ab Energizer, and Fast Abs. And Respondents concede that the AbTronic was the only ab belt selling for \$120.

Respondents also assert that they were simply trying to create a "bandwagon effect" through the generation of excitement for the product. RPTB at 15. In fact, however, the product category about which they were trying to create excitement was comprised of the fantastic ab belts advertised on infomercials on TV. Having attempted to jump on the bandwagon, it behooves Respondents to deny that there were any consumers also on that bandwagon.

Finally, Respondents assert that Complaint Counsel pays “disproportionate attention to the language contained in ‘test’ advertising that was used to gauge whether the product should be marketed in the first place, and which was later revised prior to full roll out of the advertising and the product to the public.” RPTB at 16. They assert that “the evolution of the advertising away from the language most strenuously challenged by Complaint Counsel demonstrates that, at the very least, Respondents intended to avoid the claims asserted and present the products using a ‘compare and save’ strategy.” RPTB at 26. Respondents’ assertion, however, is inconsistent with Mr. Khubani’s own testimony, whereby he stated that the “test ad” and the “rollout ad” made the same claims. (Khubani, Tr. 496-97). Respondents also have conceded that they “made additional changes to the advertising after speaking with compliance counsel about the advertisements.” RPTB at 24-25. The evolution of the advertising simply indicates

that Respondents wished to avoid being charged with deceptive advertising and believed that the ab belt “bandwagon” was sufficiently popular that consumers would compare the Ab Force to the widely disseminated ab belt infomercials on TV and assume that it did the same things those infomercials claimed. Mr. Khubani thought consumers would “get” the comparison without more explicit claims, and he was right.

**1. The Initial Advertising**

**a. The “Test” Radio and Print Advertisements Made More Explicit Claims than Later Ads and Generated Orders**

Respondents’ “test” radio and print ads violated Sections 5 and 12 of the FTC Act. They concede that certain phrases in the radio and print ads were meant to be a “point of reference” for consumers. For example, the phrase in the radio ad – “They’re the latest fitness craze to sweep the country, but they’re expensive, selling for up to \$120 each.” – was “created to present a point of reference to other EMS ab products being sold on the market at the time. (Khubani Tr. 479).” RPTB at 17. And the phrase – “Have you seen those fantastic electronic ab belt commercials on TV? They’re amazing, promising to get our abs into great shape fast without exercise” – was meant to “serve as a reference point to consumers by providing a description of other EMS ab products on the market. (Khubani Tr. 487 - 488).” RPTB at 17.

Nevertheless, Respondents ask this Court to believe that consumers would not expect the Ab Force to be similar to the ab belts that were offered as a mere “point of reference.”

There is no evidence in the language of the test radio script or the print ad that Mr. Khubani intended to draw a comparison between Ab Force on the one hand and the claims made in the AbTronic, Ab Energizer and Fast Abs infomercials on the other. Rather, the evidence indicates that these points of reference were intended to draw a comparison between the Ab Force, and other EMS ab products on the market at the time, with the focus on price and technological similarity

RPTB at 19-20. How an advertiser could make a reference to the benefits touted by competitors

for their products as a point of reference, and ask consumers to buy its product because it is cheaper, without intending to “reference” the benefits, is a mystery that is unexplained.<sup>3</sup>

Similarly, Respondents criticize Complaint Counsel for focusing on the introductory language of the test radio ad, “which simply states that other products made certain advertising claims related to exercise.” RPTB at 19. But surely Respondents cannot expect this Court to believe that they thought consumers would think, “The manufacturer is telling us about desirable qualities possessed by other ab belts that this ab belt does not have.”

Finally, Respondents admit that the “test” radio advertisement generated 211 orders from consumers and the print advertisement generated 6,871 orders. RPTB at 20. These orders were placed by consumers who paid good money for an ab belt that was comparable to those “fantastic ab belts” sold on TV, and these orders are evidence of violation of the FTC Act by Respondents.

**b. The Test Television Spots Made More Explicit Claims than Later Ads and Generated Orders**

Respondents’ “test” TV ads also violate Sections 5 and 12 of the FTC Act. It does not matter, even if it were true, as they now argue, that Mr. Khubani’s rejection of a script drafted by Ms. Liantonio that contained explicit claims demonstrates he had no intent to convey those claims. Proof of an advertiser’s intent to convey a claim is not a necessary element of a Section 5 violation. *Kraft, Inc.*, 114 F.T.C. at 121; *see Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); *Regina Corp.*, 322 F.2d 765, 768 (3d Cir. 1963). More importantly, the

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<sup>3</sup> The print ad explicitly says that “these are the same type of ab belts that you’ve seen nationally advertised, similar to those sold on television by other for as much as \$100 and more, but during this nationwide promotion, you can own the amazing Ab Force electronic ab belt for the unbelievable price of as low as just \$10. . . . So why would you want to buy a more expensive ab belt from the competition when the Ab Force is as low as just \$10?” (CX 1 G) (emphasis added).

evidence of his intent is to the contrary. For example, the “test” TV ads also refer to “the latest fitness craze,” and have visual images of exercise (a man doing crunches, without an ab belt, in the beginning of the 120-second spot, FX 3). Both spots have close-up images of a bikini-clad woman (without an ab belt) showing off her trim waist and well-defined abdominal muscles. (JX 2, JX 3). Accordingly, Mr. Khubani’s actions simply indicate his desire to avoid explicit claims in order to avoid being charged with false advertising.

It also is irrelevant that, as Respondents assert, Mr. Khubani “instructed Ms. Liantonio that the script should not contain any claims other than claims concerning price. (JX-6, Liantonio Dep. 56 – 57; Khubani Tr. 490 - 491).” RPTB at 20-21. Or that he rewrote her script, and the new script simply relied on “point-of-reference statements” rather than explicit claims. Price savings cannot be separated from what the product does; as Mr. Khubani said, the consumer must have something to “compare to.” And Respondents’ bare assertion that they were merely establishing “a point of reference for consumers by providing a description of the other EMS ab products on the market at the time, and would appeal to consumers by touting the price savings as the primary benefit of the Ab Force. (Khubani Tr. 486 - 489),” RPTB at 22, has no other support in the record. Rather, the evidence supports the contrary fact – the express comparison in each ad is to ab belts, not EMS devices. (JX 2, JX 3, JX 4, JX 5)

Respondents acknowledge that they were trying “to create excitement in consumers. (Khubani Tr. 491 - 492).” RPTB at 23. They were also trying to capitalize on the "bandwagon effect." Dr. Jacoby described the "bandwagon effect" as generating “interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby Tr. 373).” RPTB at 23. The record contains evidence of the popularity of ab belts, including the AbTronic, Ab Energizer, and Fast Abs based on sales and frequency of ad airings.

(CX 62, CX 72-95, CX 126; JX 6, ¶¶ 10, 11, 13, 15; JX 11, ¶ 3, 4, 5). Yet there is no such evidence as to the popularity of other EMS devices. Again Respondents incorrectly suggest they could “create excitement in consumers” on the basis of certain products but not be expected to offer the benefits consumers expected from those products.

The “test” TV ads generated about 4,630 orders from consumers. RPTB at 25, n.3. These orders also were placed by consumers who paid good money for an ab belt that was comparable to those “fantastic ab belts” sold on TV, and these orders are evidence the Respondents violated the FTC Act.

**2. The “Rollout” Advertising Compared the Ab Force to Other Ab Belts and Implied that It Offered the Same Benefits at a Lower Price.**

After speaking with compliance counsel, Respondents made changes to their advertisements. RPTB at 25. The television scripts were revised to change the phrase “latest fitness craze” to “latest craze.” (Khubani Tr. 495; compare JX-2 with JX-4; JX-3 with JX-5). The phrase “just as powerful and effective” was changed to “uses the same powerful technology as.” (Compare JX-2 with JX-4; JX-3 with JX-5). Finally, a superscript was imposed on the commercial, providing a brief visual reference to “RELAXING MASSAGE.” (Compare JX-2 with JX-4; JX-3 with JX-5). In addition, the radio advertisement was revised to remove the opening statement about other ab belts “promising to get our abs into great shape fast without exercise.” (Compare CX-1H and RX-49).

Respondents now state that the evolution of the language used in the ads demonstrates that they intended to avoid the claims challenged in the complaint. As noted above, proof of an advertiser's intent to convey a claim is not a necessary element of a Section 5 violation. *Kraft, Inc.*, 114 F.T.C. at 121; *see Chrysler Corp. v. FTC*, 561 F.2d at 363 & n.5; *Regina Corp.*, 322

F.2d, at 768. And more to the point, the statement is inaccurate – the evolution of the language is more likely to indicate that Respondents were advised that they could avoid being charged with deceptive advertising if they made implied claims rather than explicit claims. Mr. Khubani agreed that the later ads made the same claims as the earlier ads, which included express, unequivocal references to fitness. In addition, the later ads also included the visual images of a man (without an ab belt) doing a sit up and close-up images of a bikini-clad woman (without an ab belt) showing off her trim waist and well-defined abdominal muscles. (JX 4, JX 5). Accordingly, the “rollout ads” made the same challenged claims in violation of the FTC Act.

### **III. THE EVIDENCE SUPPORTS A FINDING THAT THE CHALLENGED CLAIMS WERE MADE ON THE FACE OF THE AB FORCE ADVERTISEMENTS.**

Notwithstanding Respondents’ assertions in their brief, Dr. Mazis’s facial analysis of the Ab Force ads is probative of the allegations of the Complaint. Respondents incorrectly assert that he relied on several “unproven and false” assumptions to reach his opinions, to wit: (1) that people who saw the infomercials for AbTronic, AB Energizer, and Fast Abs comprehended and retained the core claims conveyed by the ads and formed category beliefs about them (RPTB, 31); (2) that people who saw the Ab Force ads also saw the ads for AbTronic, AB Energizer, and Fast Abs based on the belief that the ads for these products were among the most frequently aired infomercials in the nation (RPTB, 31-32); (3) that consumers who saw both the ads for Ab Force and the ads for the other three ab belts made the association between the Ab Force and the ads for the other products.

Dr. Mazis offered his facial analysis based upon his expert opinion, and at the time he performed his analysis, it was necessarily based upon assumptions that remained to be established in the course of developing an evidentiary record in this matter. Dr. Mazis’s

assumptions were reasonable at the time and, indeed, they are confirmed by the evidence adduced at trial. The evidence clearly establishes that infomercials for the AbTronic, AB Energizer, and Fast Abs ab belts dominated the direct response TV market shortly before and during the Ab Force campaign. (CX 62, CX 77-95, CX 126; JX 6, ¶¶ 10, 11, 13). The evidence also clearly establishes that Respondents intended infomercials about those products to be “reference points” for their “compare and save” advertising. It is reasonable to assume, therefore, that the ads Respondents created reached their intended audience, *e.g.*, persons familiar with the infomercials for other ab belts. Otherwise, as discussed above, consumers would have nothing to “compare” to Respondents’ Ab Force to know if they would “save” money.

**A. DR. MAZIS PROPERLY LIMITED HIS REVIEW OF ADS FOR OTHER AB BELTS TO THOSE FOR ABTRONIC, AB ENERGIZER, AND FAST ABS.**

Respondents wrongfully argue that Dr. Mazis’s analysis should have included a review of advertising for other EMS ab belts that were being run before and during the Ab Force campaign. Dr. Mazis was correct in limiting his review to the infomercials for AbTronic, AB Energizer, and Fast Abs because, based upon frequency that they appeared on television, they were the most likely ads that could have impacted consumers beliefs. Thus, Dr. Mazis’s assumption is confirmed by the record evidence, which clearly establishes that infomercials for AbTronic, AB Energizer, and Fast Abs almost exclusively made ab belts the most heavily aired product category in the direct response TV market at that time. (CX 62, CX 77-95, CX 126, JX 6, ¶¶ 10, 13)). Respondents unsuccessfully attempt to portray a marketplace saturated with advertising for EMS devices other than ab belts that make other claims for their products. Dr. Mazis testified, however, that consumers would not include devices in their ab belt category of



beliefs unless they were relatively similar in appearance to the products most heavily advertised. (Mazis, TR. 135-36). Respondents only offered eight television commercials in evidence, and only five of them are for ab belts; the other products simply do not resemble the Ab Force. (RX 72; Towers, Tr. 302-03; RX 73; Towers, Tr. 299-300; RX 74; Towers, Tr. 300). Furthermore, there is no evidence that any of the five ab belt commercials were heavily advertised and thus, they were unlikely to influence consumer' ab belts beliefs. (Towers, Tr. 302 -05). To the extent that they did, however, they mostly conveyed core claims similar to those in the infomercials for AbTronic, AB Energizer, and Fast Abs. (RX 72; RX 75; RX 76; RX 78; RX 79).

For the same reason, Dr. Mazis properly excluded word-of-mouth and retail packaging for the other eight EMS devices from his facial analysis. Respondents claim that advertising for these other devices “could have effectively filled the air with so much ‘noise’ about EMS ab products that it would have been impossible for consumers to understand or appreciate the ads for AbTronic, Ab Energizer and Fast Abs.” (RPTB, 36). It is highly unlikely, however, that there would have been word-of-mouth about products that were so sparsely advertised and retail packaging was also unlikely to cause an impact. Moreover, given the content of the ads for these five products, any word-of-mouth they generated would likely reinforce the beliefs created by the infomercials for AbTronic, AB Energizer, and Fast Abs.

As for Respondents' argument that Dr. Mazis had no way of knowing what word-of-mouth was generated about AbTronic, AB Energizer, and Fast Abs (RPTB, 36), Dr. Mazis testified at the hearing that word-of-mouth about these products likely would consist of the characteristics that were touted in the infomercials for the products. (Mazis, Tr. 169). While

Respondents and their experts might label this speculation, others would call it common sense.<sup>4</sup> It was reasonable for Dr. Mazis to assume that word-of-mouth generated by the infomercials for AbTronic, AB Energizer and Fast Abs would have consisted of what they purported to do, *e.g.*, cause loss of weight, inches, or fat and build well-defined abdominal muscles without the need for regular exercise.

**B. DR. MAZIS CORRECTLY ASSUMED THAT THE ADS FOR ABTRONIC, AB ENERGIZER, AND FAST ABS WERE AMONG THE MOST FREQUENTLY AIRED.**

Respondents futilely go to great lengths trying to establish that a basic assumption that Dr. Mazis made in the course of his facial analysis is without foundation. According to Respondents, “Dr. Mazis based his opinion on a false, or at the very least, unreliable assumption that the AbTronic, AB Energizer, and Fast Abs infomercials were ‘among the most frequently aired infomercials in the nation.’” It is true that at the time he conducted his facial analysis, he had to rely on allegations in the complaints against Telebrands, and the marketers of the AbTronic, AB Energizer, and Fast Abs ab belts. It is also correct that the ultimate reliability of Dr. Mazis’s facial analysis depended at least in part upon the accuracy of the allegations in the FTC’s complaints in these matters. However, the record evidence clearly establishes the accuracy of the Complaint’s allegation that infomercials for AbTronic, AB Energizer and Fast Abs were “among the most frequently-aired infomercials on cable television during the weeks and months in which they appeared.” (Complaint, ¶¶ 13,14,15;Cx 62; CX 77-95; CX 126;

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<sup>4</sup> Respondents and Dr. Jacoby would require Dr. Mazis to have “tested” the impact of word-of-mouth communication on consumer beliefs. (RPTB, 36-37). Several times throughout their attack on Dr. Mazis’s facial analysis they argue that he should have tested to prove the validity of his opinions. (*See, e.g.*, RPTB at 37-38, 47). The very nature of a facial analysis is to render an opinion based upon professional expertise and judgement in the absence of extrinsic evidence. To argue that testing should have been done to confirm opinions rendered in the course of a facial analysis is disingenuous.

Towers, 288-98).<sup>5</sup> Consequently, Dr. Mazis's assumption about the frequency that infomercials for these three products is confirmed and his reliance on the Complaints allegations in this regard does not invalidate his facial analysis.

**C. DR. MAZIS CORRECTLY ASSUMED THAT THE CONSUMERS WHO SAW THE AB FORCE AD ALSO SAW THE ADS FOR ABTRONIC, AB ENERGIZER, AND FAST ABS.**

Respondents next attempt to use information developed at trial concerning where and when 60 second and 120 TV spots air to attack Dr. Mazis's assumption that some of the people exposed to the Ab Tronic infomercials also saw the ads for AbTronic, AB Energizer and Fast Abs. (RPTB, 41-44). Underlying this argument is the general notion developed at trial that infomercials are not typically shown in prime time (defined by Dr. Mazis as 7:00 pm to 10:00 pm) and more typically run in periods before 7:00 pm or after 10:00 pm and on weekends (Mazis, Tr, 129-30). Respondents also rely on the fact that stations that do not carry infomercial advertising may carry TV spots. They argue that Dr. Mazis's lack of information as to what specific media and times were utilized by the marketers of AbTronic, AB Energizer, and Fast Abs invalidates his assumption that viewers of the Ab Force TV spots also saw infomercials for

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<sup>5</sup> Respondents claim that one of the bases for the fact that the infomercials for Ab Tronic, AB Energizer, and Fast Abs were the most frequently aired infomercials, the *J.W. Greensheets*, is not reliable to establish this fact. (RPTB, 3-4, 11, n.1). Their actual practices, however, reveal a reliance on the *Greensheets* that belie this assertion. The *J.W. Greensheet* is a television monitoring report published weekly by Jordan Whitney, Inc. ("Jordan Whitney") for the infomercial and direct-response television industry. (Khubani, Tr. 248). Mr. Khubani looks at the *J.W. Greensheet* report weekly to see the top selling products advertised via television infomercials and spots. (Khubani, Tr. 248, 525). Mr. Khubani also reads the *J.W. Greensheets* to see what advertisements are new or noteworthy, and receives tapes of new and noteworthy advertisements from Jordan Whitney. (Khubani, Tr. 525). Furthermore, Telebrands uses the *J.W. Greensheets* in its own business dealings with retailers, to encourage them to sell Telebrands products. (Khubani, Tr. 531, 546). Finally, *Response Magazine*, a publication targeted towards the direct response television industry, reprints Jordan Whitney's rankings. (Khubani, Tr. 245, 249).

AbTronic, AB Energizer, and Fast Abs.

The basic assumption underlying Respondents' argument is that television viewing habits of consumers are rigid and unchangeable. Respondents would have the Court accept the notion that people whose main television viewing time is, for example, during the prime time hours of 7:00 pm to 10:00 pm never watch TV during non prime time hours such as weekends or late night where infomercials are more likely to appear. Dr. Mazis is an expert on consumer behavior and marketing. He testified that consumers typically watch TV in multiple time slots; thus it is more than feasible that a person could see an infomercial for the AbTronic, Fast Abs, or Ab Energizer and also see an Ab Force advertisement on a different channel at a different time. (Mazis, Tr. 184-185). Again Respondents' attempt to discredit Dr. Mazis's well-reasoned analysis flies in the face of common sense. It is reasonable to assume, as Dr. Mazis did, that many consumers' television viewing hours are flexible enough to encompass both prime time and late night or weekend hours, providing an opportunity for exposure to any of the three ab belt infomercials and Ab Force spots. (CX 58 at 8; Mazis, Tr. 47-48). Moreover, Respondents' own TV ads assert that the people watching them have seen the infomercials when they state: "I'm sure you've seen those fantastic electronic ab belt infomercials on TV."

Respondents also argue that Dr. Mazis could not verify that viewers of the infomercials for AbTronic, AB Energizer and Fast Abs comprehended or retained the information in the ads. Dr. Mazis did testify however, based on his experience and knowledge of consumer behavior, that viewers of ab belt infomercials do not necessarily remember specifics of the ads they saw. Rather, the three ab belt infomercials produced general "category beliefs" about ab belts that would be triggered by Ab Force ads. (Mazis, Tr. 156-57). These beliefs included weight loss, inch loss, well-developed abs and effective alternatives to exercise.

The most convincing evidence that many viewers of the Ab Force spots were familiar with the infomercials for AbTronic, AB Energizer, and Fast Abs is that Respondents intended to reach consumers familiar with them. The evidence clearly establishes that Respondents intended infomercials about those products to be “reference points” for their “compare and save” Ab Force advertisements. (Khubani, Tr. 487, 491). Mr. Khubani is an experienced and savvy direct sales marketer who knew what he had to do to reach his intended audience. It is reasonable to assume, therefore, that the ads he created reached their intended audience, *e.g.*, persons familiar with the infomercials for the other three ab belts. As Dr. Mazis explained, marketers use media buying services to position their advertising in markets and in media where likely purchasers of the marketer’s product will see it. In order to reach the intended buyers, the buying service matches the demographics of the target audience for the marketer’s ads with the demographics of audience of the media outlets. (Mazis, Tr. 143-46). Regardless, therefore, of where or when Ab Force ads appeared as compared to media schedules for the AbTronic, AB Energizer, and Fast Abs infomercials, Dr. Mazis could correctly assume that many viewers of the former were familiar with the latter.

**D. DR. MAZIS PROPERLY RELIED ON THE CATEGORIZATION THEORY AS THE THEORETICAL BASIS FOR HIS ANALYSIS.**

Respondents offer a confused and convoluted argument in an effort to disparage Dr. Mazis’s reliance on the well-recognized theory of categorization as the basis for his conclusions about the messages that consumers likely received from the Ab Force TV spots. (RPTB, 44-48). When stripped of all the circular reasoning and repetitious rhetoric, their argument boils down to this: Dr. Mazis’s opinion that the facts in this case are fully consistent with the categorization theory should have been confirmed by extrinsic testing. They ignore the fact that the purpose of

a facial analysis is to render an opinion based upon professional expertise and judgement. Expert opinion based on personal knowledge and experience has a place in the framework of such an analysis pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993). *Kumho Tire Co. v Carmichael*, 526 U.S. 137, 150 (1999). More importantly it is recognized in FTC jurisprudence. *Cliffdale Associates & Deception Statement*, 103 F.T.C. at 174, 176 n.8 (When the Commission turns to extrinsic evidence to determine the meaning of an ad, the evidence can consist of “expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.”); *Thompson Medical*, 104 F.T.C. at 790; *Kraft*, 114 F.T.C. at 122 (“The Commission can also consider the opinions of expert witnesses as to how an advertisement may reasonably be interpreted...”)

To argue that testing should have been done to confirm opinions rendered in the course of a facial analysis is disingenuous. The standard that the Commission applies to facial analyses of advertising is whether they are “supported by opinions that describe empirical research or analyses based on generally recognized marketing principles or other objective manifestations of professional expertise.” *Thompson Medical*, 104 F.T.C. at 790, n.11 (Emphasis added).

The categorization theory is indisputably a “generally recognized marketing principle[],” and Dr. Mazis clearly demonstrated how consumers familiar with the infomercials for AbTronic, AB Energizer, and Fast Abs would likely interpret the Ab Force ads. Respondents’ argument that Dr. Mazis assumed facts that he should have confirmed by testing is specious. Dr. Mazis’s assumption that some consumers formed categories of belief based on viewing the infomercials for AbTronic, AB Energizer, and Fast Abs is strongly supported by the evidence that those infomercials were the most frequently aired infomercials during the period in which they

appeared and by the fact that Respondents chose to reference those infomercials in their ads. It is reasonable to assume, therefore, that many people who saw the infomercials formed a category of belief about ab belts based upon the core claims contained in them.

Respondents also argue that Dr. Mazis should have reinvented the wheel by reconfirming the work of Mita Sujan (author of the article that explains categorization theory) of simply demonstrating how the facts in the Ab Force promotion fit the theory that Sujan had already tested and confirmed. (RPTB, 46-47). Dr. Mazis's assumption that persons who had already formed an ab belt belief category associated the Ab Force with that category when exposed to Ab Force ads did not need to be confirmed. The Ab Force ads are transparent in this regard. Respondents deliberately and expressly invoked that belief category when they opened each of their ads with a direct reference to "those fantastic electronic ab belt infomercials on TV." Respondents made the link from Ab Force to ab belt category beliefs for Dr. Mazis.

**E. DR. MAZIS'S OPINION REGARDING THE DIRECT EFFECTS OF THE AB FORCE ADVERTISING IS REASONABLE AND PROBATIVE.**

In addition to the messages conveyed by the Ab Force ads through Respondents' express association of the Ab Force with infomercials for AbTronic, AB Energizer, and Fast Abs, which Dr. Mazis described as the "indirect effects," Dr. Mazis also described "direct effects" of the Ab Force ads. These direct effects created implied claims found within the four corners of the Ab Force TV spots and did not rely upon consumers' familiarity with advertising for other ab belts. These direct effects include use of fit, well-developed models, some of them wearing the ab belt while their muscles pulsate, and the name Ab Force, which Dr. Mazis said consumers may associate with abdominals as a force.

Respondents have two criticisms of Dr. Mazis's analysis of the direct effects of the Ab

Force advertising: First, it is based solely on his opinion, and second, there were legitimate reasons for using trim models and naming the product “Ab Force.”

As to the first criticism, Dr. Mazis was qualified on the record as “an expert in consumer response to advertising, including a facial analysis of advertising, advertising effectiveness, consumer behavior, marketing, and consumer research, including the design of surveys and the analysis of surveys. (Mazis, Tr.41). In the absence of any credible evidence as to why it is unreliable, his opinion as to what consumers likely perceive in advertising should be given considerable weight.

As to Respondents’ argument that they had other reasons not connected to efficacy claims for using trim models in brief attire and naming the product “Ab Force,” there can be unintended consequences of advertising that result in consumers perceiving claims that are false or unsubstantiated. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979). Furthermore, neither proof of intent to convey a deceptive claim nor evidence that consumers have actually been misled is required for a finding of liability. *Kraft, Inc.*, 114 F.T.C. at 121; *see Chrysler Corp. v. F.T.C.*, 561 F.2d at 363 & n.5; *Regina Corp.*, 322 F.2d at 768.

**IV. DR. MAZIS’S COPY TEST IS RELIABLE AND PROBATIVE AND ESTABLISHES THAT THE AB FORCE ADVERTISING MAKES THE CHALLENGED CLAIMS.**

Contrary to the allegations of Respondents, Dr. Mazis’s copy test identified a proper universe, posed questions to respondents in a non-leading manner, and effectively controlled for pre-existing beliefs of participants. Furthermore, the decision of Dr. Mazis to eliminate the



terminated questionnaires of 81 inattentive respondents from the study was justified.

**A. THE UNIVERSE FOR THE COPY TEST WAS PROPERLY DEFINED.**

Dr. Mazis properly defined the universe as anyone who had, in the last 12 months, purchased a product or used a service for weight loss, muscle toning or massage and also in the last 12 months purchased a product by responding to a direct response TV ad. Respondents' however, assert that his universe is too broad (RPTB, 53-55) pointing to Dr. Jacoby's opinion that the proper universe should have been limited only to those persons who purchased a weight loss, muscle toning, or massage product or service in response to a direct response TV ad. Respondents place great reliance upon the holding in *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259 (S.D.N.Y. 1990), where the court held that a universe comprised of women who had purchased frozen food entrees within the last six months and who had tried to lose weight through diet or exercise within the last year was over-inclusive because the first criterion should have been limited to women who had purchased a diet frozen food entree. There are several factors that distinguish the copy test at issue in *Weight Watchers* from the Mazis copy test.

First, the plaintiff's survey in *Weight Watchers* did not focus on consumers who had purchased the same type of product, but on consumers who had purchased any frozen foods or who tried to lose weight through exercise.<sup>6</sup> The court did not expressly state as such, but it obviously felt that there was not a sufficient link between consumers who had attempted to lose

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<sup>6</sup> Although the court criticized the plaintiff's survey universe, the court did give it some probative value. In contrast, the court gave no probative value to the defendants' study, designed by Dr. Jacoby. *Weight Watchers*, 744 F. Supp. at 1272 and 1275. The court suggests Dr. Jacoby designed an overly-broad universe – which included anyone who had ever purchased frozen foods, regardless of a desire to lose weight – as a way to construct the study specifically to disprove trademark confusion. *Id.* He similarly is designing his universe in this matter as a way to disprove Complaint Counsel's case.

weight through exercise alone and the diet frozen entrees at issue. *Id.*, at 1272-73. Purchasers who did not purchase a diet frozen food entree during the period in which they were trying to lose weight were unlikely to be potential purchasers of diet frozen entrees at all.

No such conclusion can be drawn about people who had purchased a product for weight loss, muscle toning, or massage in a venue other than direct response TV, but who had purchased other products through that venue. They are potential customers for that type of product<sup>7</sup> and they are potential customers using the DRTV medium. It is illogical to assume that persons who demonstrated an interest in weight loss, muscle toning, or massage and who had made purchases via direct response TV of products other than ones in those three categories would not be interested in such products in the future. To leave them out of the universe could have unnecessarily narrowed the universe.

Second, the purpose of the survey in *Weight Watchers* was different – to determine whether the Stouffer ads engendered actual confusion. *Id.*, at 1272. The court criticized the broad universe that went beyond diet frozen foods because survey “[r]espondents who are not potential consumers may well be less likely to be aware of and to make relevant distinctions when reading ads than those who are potential consumers. The ability to make relevant distinctions is crucial when what is being tested is likelihood of confusion.” *Id.*, at 1273. Obviously, an “actual confusion” survey must have consumers who have enough experience with the specific market to notice distinctions and similarities between two products. In contrast, the goal of the Mazis study merely was to determine whether consumers perceived the claims challenged in the complaint. (CX 58, at 10). Notwithstanding the Respondents’ repeated

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<sup>7</sup> Respondents do not challenge the definition of the product used in the copy test. (*See, e.g.*, RPTB, 53-54)

attempts to recharacterize the purpose of Dr. Mazis' study as an attempt to study whether consumers perceived the similarities among ab belt ads, the universe does not need to be as narrow in a more general "claim take away" study such as the study designed by Dr. Mazis.

Finally, in *Weight Watchers*, the Court found other problems with the copy test universe including the fact that some respondents had mistakenly been included in the universe who did not qualify even under the criteria the court found to be over inclusive. *Id.* at 1272-73. It was the cumulative effect of all of these deficiencies in defining the universe as well as other flaws in analyzing the data that caused the court in *Weight Watchers* to accord "very little weight to the [copy test] results." *Id.* at 1274.

Accordingly, given that Dr. Mazis had to find purchasers willing to buy products via direct response TV as well as potential users of weight loss, muscle toning or massage products or services, it was appropriate in this case to define the universe as he did.

**B. THE CLOSE-ENDED QUESTIONS POSED IN THE REPORT WERE PROPERLY CRAFTED TO ELIMINATE YEA-SAYING.**

Respondents also allege that the wording of the close-ended questions comprising Question 6 of the main questionnaire (CX-58, Exhibit D) were leading because they were framed only in the affirmative. (RPTB, 56). The questions were not leading because respondents were instructed before the questions were posed as follows:

I'm going to read you a list of statements. Some, all, or none of these statements may have been implied by or made in the Ab Force commercial.

For each statement that I read, please tell me:

YES, it is implied by or made in the Ab Force commercial,  
NO, it is not implied by or made in the Ab Force commercial, or  
You DON'T KNOW or you have NO OPINION.

(CX 58, Exhibit D, Question 6).

In addition the respondents had a card placed before them on which all three possible answers were listed. Hence, all three possible answers to the each question were read and shown to the respondent before the question was asked. (CX 58 at 15, 16; CX 58, Exhibit D; Mazis, Tr. 95-96). Consequently, respondents were free to choose among the three responses the answer that corresponded to their beliefs without any suggestion that there was a correct answer that the surveyors were seeking. Dr. Jacoby testified that he would have posed the questions in a manner that equally emphasizes affirmative, negative, and neutral responses (Jacoby, Tr. 390). However Dr. Mazis's method of asking the questions gives equal emphasis to all possible responses. The difference between the two methods is *de minimis* and resolves itself to personal preference between two equally effective methods of avoiding asking leading questions.

In addition to properly posing the questions, other measures were included to control for yea saying. Control questions were used to mask the intent of the study and to screen for yea sayers. The questions rotated the order in which the questions were read to respondent, thereby controlling for order bias.<sup>8</sup> (Mazis, Tr. 92; CX 58 at 14). Even the considerable divergence in the responses to the closed ended questions negates the possibility of yea saying due to leading questions. Compared with 48.1% of the control group who perceived a "well-defined abs" claim and 42.4% who received a "lose inches around the waist" claim only 28.6% of the control group perceived an "alternative to exercise" claim, 28.1% perceived the "lose weight" claim, and 19.0% took away a "removes fat deposits around the waist" claim. This divergence suggests that rather than yea saying to leading questions, respondents were discriminating among questions, proving that the questions were unbiased.

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<sup>8</sup> Order bias is also known as "yea saying" to leading questions and the "halo effect." *Stouffer Foods Corp.*, 118 F.T.C. 746, 806 (1994).

**C. DR. MAZIS PROPERLY CONTROLLED FOR PRE-EXISTING BELIEFS OF THE SURVEY RESPONDENTS.**

By alleging that Dr. Mazis did not properly control for respondents pre-existing beliefs about ab belts (RPTB, 57-61), Respondents have created a straw man in their attempt to disparage Dr. Mazis's copy test. They rely on Dr. Jacoby's spurious argument that random assignment and the use of a control group is insufficient to filter out pre-existing beliefs of copy test respondents. According to Dr. Jacoby, Dr. Mazis should have screened for pre-existing beliefs or included a question at the end of the main questionnaire that would have permitted a measurement of such "noise."<sup>9</sup>

Imposing such a requirement is in direct opposition to the information provided by the Federal Judicial Center on proper copy test methodology:

By adding an appropriate control group, the survey expert can test directly the influence of the stimulus. In the simplest version of a survey experiment, respondents are assigned randomly to one of two conditions. For example, respondents assigned to the experimental condition view an allegedly deceptive commercial, and respondents assigned to the control condition either view a commercial that does not contain the allegedly deceptive material or do not view any commercial. Respondents in both the experimental and control groups answer the same set of questions. The effect of the allegedly deceptive message is evaluated by comparing the responses made by the experimental group members with those of the control group members. If 40% of the respondents in the experimental group responded with the deceptive message (e.g., the advertised product has fewer calories than its competitor), whereas only 8% of the respondents in the control group gave that response, the difference between 40% and 8% (within the limits of sampling error) can be attributed only to the allegedly deceptive commercial. Without the control group, it is not possible to determine how much of the 40% is due to respondents' preexisting beliefs or other background noise (e.g., respondents who misunderstand the

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<sup>9</sup> This is not the first time Dr. Jacoby has over-emphasized "noise." In *Weight Watchers*, the court discussed Dr. Jacoby's use of control ads to adjust for such noise, concluding that he controlled the outcome of the study by use of the control ads. *Weight Watchers v. Stouffer*, 744 F. Supp. at 1275. The court continued, noting his concern for noise contradicted previous testimony he provided in *Quality Inns Int'l, Inc. v. McDonalds Corp.*, whereby he estimated the extent of the noise would never "rise above a few percentage points." *Weight Watchers v. Stouffers*, 744 F. Supp. at 1276, n.10 (citing *Quality Inns v. McDonalds Corp.*, 695 F. Supp 198, 219 (D. Md 1988)).

question or misstate their responses). Both preexisting beliefs and other background noise should have produced similar response levels in the experimental and control groups.

Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229 at 257-58 (Federal Judicial Center, 2d ed., 2000) (Emphasis added).

Consistent with this advice, the Mazis study utilized the test ad/control ad method to account for responses that come from sources other than the ad's communication. (CX 58 at 12-15, CX 104, CX 105; Mazis, Tr. 77-79, 83, 84, 90-94, 102, 146, 152-154; Jacoby, Tr. 407). The test ad was a sixty-second Ab Force spot that was the most frequently aired of four spots produced for Respondents. (Mazis, Tr. 83; CX 58 at 12-13). The control ad was created by Dr. Mazis and consisted of a 120-second Ab Force ad that he pared down to 60 seconds by eliminating all references to other ab belts and ab belt infomercials as well as nearly all images of well-developed models in brief attire and images of the ab belt itself. (Mazis, Tr. 83-84, 146; CX 58 at 12-13). The results of this procedure produced a set of responses to a single open-ended question and five close-ended questions, and these responses were compared (*e.g.*, test ad responses were subtracted from control ad responses) to produce the "net takeaway" from the Ab Force TV spot.

As Dr. Mazis properly observed, "The use of a control group is an attempt to essentially remove preexisting beliefs as a possible cause of the results we see." (Mazis, Tr, 157). This is entirely consistent with the Commission's view of the function and effect of control groups:

"A control group is a group of participants who see a stimulus different from the challenged ad – *i.e.*, a 'cleansed' . . . ad that does not convey the hypothesized . . . claim. The control group is then asked the same series of questions as the test group. The control group's . . . answers are subtracted from the . . . results obtained from viewers of the challenged ad to control for purported preexisting belief." *Stouffer*, 118 F.T.C. at 807, n.25. (Emphasis added).

It is the function of a control ad in copy test methodology, therefore, to filter out preconceived beliefs and other “noise,” and additional screening is not necessary.

Respondents have no basis for their contention that survey participants with preconceived notions about ab belts may be disproportionately represented in the copy test and, therefore, could have skewed the results. Dr. Mazis explained that since the sample size was large enough, the test group and the control group would be approximately equal with respect to any such influences. (Mazis, Tr. 154). He further opined that random assignment between the test group and the control group serves to equal out factors that are not otherwise controlled for such as age or income (Mazis, Tr. 90), or prior exposure to ab belt ads (Mazis, Tr. 152, 153, 154). Dr. Mazis testified that researchers cannot possibly control for all of the factors that affect consumers’ perceptions, but that random assignment between the test group and the control group effectively addresses that problem. (Mazis, Tr. 153).<sup>10</sup>

The control that Dr. Mazis used was reliable and, combined with random assignment of respondents between the test group and the control group, its use assured that the difference between control group results and test group results accurately reflected consumer takeaway from the four corners of the test ad. Hence, it was not necessary to screen for persons who had seen previous ab belt infomercials as Dr. Jacoby insisted.

The results not only accurately reflect the net takeaway of challenged claims from the Ab Force ad, but also a very high level of “noise” created by the infomercials for the other three ab

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<sup>10</sup> Dr. Mazis’s explanation is consistent with advice in David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83 at 93 (Federal Judicial Center, 2d ed., 2000) (“[c]hoosing at random tends to balance the groups with respect to possible confounders” and therefore the groups are “likely to be quite comparable - except for the treatment.”).

belts, the very noise that Respondents were exploiting by referring to the other ab belts and their infomercials in the Ab Force ads. If it could have been known at the outset, before the copy test was designed, that the noise level would have been so high, it would have been interesting, but not crucial, to have included a question to determine the source of the noise. It is likely that any such inquiry would have produced results that bolstered Complaint Counsel's contention regarding the intense impact of the infomercials for AbTronic, AB Energizer, and Fast Abs. Dr. Mazis, however, could not have known, until the results were analyzed, the extent of the noise level, and while such information would have been of interest, not seeking it was irrelevant to the accuracy and reliability of the study.

Respondents also try to make something of the fact that Dr. Mazis eliminated 41 survey respondents from the study who had been exposed to very recent television publicity linking ab belts to an FTC action involving weight loss products. (RPTB, 61-64). Dr. Mazis's decision to screen for such persons is not a relevant factor in considering the issue of whether he properly controlled for preexisting beliefs in general. As Dr. Mazis testified, "it was a big news story [it] appeared on all the networks." (Mazis, Tr. 156), and he was acting out a measure of prudence. (Mazis, Tr. 154-56). It was the fact that these stories might be fresh in the minds of consumers who saw them just a few days earlier that prompted a measure of caution. It had nothing to do with the fact that respondents whose preconceived notions concerning ab belts might be disproportionately represented in the test group and control group. As Dr. Mazis testified, leaving them in probably would not have changed the results because they would have been equally distributed among the two groups. (Mazis, Tr. 155).

Finally, Respondents also have no basis for their contention that the relatively high number of respondents in the control group who perceived claims challenged in the complaint



was proof that the alleged biased survey instrument created the high noise level. Common sense tends to support Dr. Mazis's conclusion that these numbers were "likely due to the association of Ab Force with other EMS ab belts resulting from name similarity, physical similarity, of the ab belts, and/or recall of prior advertising." (CX 58 at 20). Moreover, the control ad in this matter was well-cleansed of triggering words and images and, like noise levels, the effect of biased and leading questions is balanced out by random assignment. Thus, even if some bias occurred, it was netted out in the difference between the test group responses and the control group responses.<sup>11</sup> Accordingly, regardless of whether the noise level produced in this survey was the result of preexisting beliefs created by the pervasive ad campaigns for AbTronic, AB Energizer, and Fast Abs, yea saying, or a combination of both, the process that Dr. Mazis followed was entirely consistent with the prevailing wisdom in the field of survey methodology and produced an accurate percentage of the net takeaway.

**D. DR. MAZIS PROPERLY EXCLUDED FROM THE SURVEY ANALYSIS 81 RESPONDENTS WHO COULD NOT REMEMBER THE NAME OF THE PRODUCT AFTER VIEWING THE AB FORCE TV SPOT TWICE.**

Respondents are misguided in their allegation that excluding from the copy test computations survey respondents who could not remember the name of the Ab Force immediately after viewing the commercial was not consistent with sound copy test methodology. (RPTB, 66-69). In Dr. Mazis's copy test, survey respondents who were unable to identify the brand name of the Ab Force product were not asked any of the subsequent questions and were eliminated from the study. (Mazis, Tr. 93; CX 58 at 14-15). These survey respondents had just finished viewing a sixty-second TV commercial twice where the word Ab Force had been used fourteen times over

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<sup>11</sup> The Commission has observed that it "does not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably probative." *Stouffer*, 118 F.T.C. at 799.

the two viewings. (Mazis, Tr. 146). Dr. Mazis testified that excluding inattentive survey respondents from further participation in the study is common practice because such people who cannot remember the brand name of a product featured in a commercial they have just seen twice would probably be unlikely to buy the product. (Mazis, Tr. 94, 102). Furthermore, inattentive survey respondents were unlikely to give meaningful responses to the ensuing questions. (Mazis Tr. 94). Even Dr. Jacoby conceded that consumers so inattentive that they could not remember the name of the product immediately after viewing the commercial twice might not be able to remember the telephone number needed to purchase the product. (Jacoby, Tr. 407). Since a primary goal of copy testing is to define a universe of likely purchasers of the tested product, it is reasonable to conclude that such inattentive people should not be a part of the survey universe, but, unlike other screening criteria that were a part of a separate screening questionnaire, it was not possible to screen these people out until they had actually viewed the commercial.

Moreover, there is precedent in FTC law for following such a procedure. In *Kraft*, respondents to a copy test questionnaire who could not remember the advertised brand name or answered “don’t know” when asked to restate the points in the ad were not included in the calculations of percentages. The ALJ rebuffed Kraft’s attempt to have the survey findings suppressed.<sup>12</sup> *Kraft* 114 F.T.C. at 70, n. 2. Federal court decisions in trademark infringement cases under the Lanham Act have found removing respondents from survey denominators is permissible when valid reasons exist. *Wuv’s International, Inc. v. Love’s Enterprises, Inc.*, 1980 U.S. Dist. LEXIS 16512, \*62 (D.Colo. 1980) (Where 23 out of 403 survey respondents were excluded from survey results because they were unfamiliar with one of the restaurant chain

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<sup>12</sup>I n his initial decision, the ALJ agreed with Complaint Counsel’s expert that the number of such respondent’s was not large enough to affect the results of the copy test.

litigants, the court said “[i]t stands to reason that consumer confusion, if any, indicated on the part of the restaurant-going individuals ignorant of ‘Love’s’ restaurants is irrelevant.”); *American Home Products v. Proctor & Gamble Co.*, 871 F. Supp. 739, 761 (D.N.J. 1994) (“It is clear that in a false advertising action, survey results must be filtered via adequate control mechanisms to screen out those participants who took away no message from the ad.”); *see also Liggett Group, Inc., v. Brown & Williamson Tobacco Corp.*, 1987 U.S. Dist. LEXIS 14785, \*30 (M.D.N.C. 1988) (In an action for trademark infringement, the Court stated that, “The test [for level of confusion] is whether the similitude in the labels would probably deceive a purchaser who exercises ordinary prudence, not the careless buyer who makes no examination.”).

Respondents refer to Dr. Jacoby’s attempted to illustrate the effects of excluding respondents after screening for the universe. (RPTB, 67-68). He created a hypothetical where 98 out of 100 respondents in a copy test could not remember the brand name of the product advertised. Dr. Jacoby’s example is ridiculous. In such a situation where only two qualified respondents are left, the data would not even be analyzed because the remaining survey universe was too small. In Dr. Mazis’ survey, 389 questionnaires were included in the final data tabulations. Dr. Mazis stated that this was consistent with generally accepted procedures in the field. (CX 58 at 18).

Respondents also argue that excluding these inattentive respondents resulted in exaggerating the difference between the control group and the test group percentages and had the effect of “stacking the deck” by artificially raising the purported level of deception. (Jacoby, Tr. 366, 392; RX 40, ¶ 56). The argument is specious. If the 81 respondents were appropriately excluded – and they were – there was no exaggeration and the actual level of deception was not raised, artificially or otherwise.

**V. CONCLUSION**

The evidence in the hearing demonstrated that Respondents have violated Sections 5(a) and 12 of the FTC Act through their dissemination of false and unsubstantiated claims. The relief sought in the Complaint is reasonable and necessary to remedy the harm caused by the Respondents' violations of law.

Respectfully submitted,

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Dated: June 15, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of June, 2004, I caused *Complaint Counsel's Reply Findings of Fact And Conclusions of Law* and *Complaint Counsel's Response to Respondents' Post Trial Brief* to be filed and served as follows:

(1) the original and one (1) paper copy filed by hand delivery and one (1) electronic copy via email to:

**Donald S. Clark, Secretary**  
Federal Trade Commission  
600 Penn. Ave., N.W., Room H-159  
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery and one (1) electronic copy via email to:

**The Honorable Stephen J. McGuire**  
Chief Administrative Law Judge  
600 Penn. Ave., N.W. Room H-112  
Washington, D.C. 20580

(3) one (1) paper copy by hand delivery and one (1) electronic copy via email to:

**Edward F. Glynn, Jr., Esq.**  
**Theodore W. Atkinson, Esq.**  
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