

**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 PRETRIAL BRIEF**

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## **I. INTRODUCTION**

The Complaint alleges the Respondents violated Sections 5 and 12 of the Federal Trade Commission Act (“FTC Act”) in connection with their marketing of the Ab Force, an electronic muscle stimulation (“EMS”) “device” within the meaning of Sections 12 and 15 of the FTC Act.

The evidence in this case reveals that Respondents, through a false and deceptive multi-million dollar national advertising campaign, deceived thousands of United States consumers about the benefits of the Ab Force. Through the use of statements such as “the latest fitness craze” and images of well-shaped individuals applying the Ab Force belt to their abdominal area, Respondents represented that the Ab Force caused fat, inch, or weight loss; built well-defined abdominal muscles; and was equivalent to traditional exercise. Through verbal references to “those fantastic electronic ab belt infomercials on TV,” combined with images and graphics nearly identical to three other extensively-aired ab belt infomercials, Respondents prompted consumers to recall those infomercials’ core efficacy claims and attribute them to the Ab Force.

Respondents’ claims are false and unsubstantiated. Complaint Counsel’s evidence establishes that the Ab Force is incapable of causing the loss of fat, inches, or weight, and cannot cause users to obtain well-defined abs. The Ab Force also cannot duplicate the benefits of traditional exercise. Unfortunately, Respondents’ deceptive marketing campaign was highly successful and caused substantial economic harm to United States consumers. Respondents took in over \$19 million from their false and deceptive advertising.

## II. PERTINENT LAW

### A. Legal Standards under Sections 5 and 12 of the FTC Act

An advertisement is deceptive under section 5 of the Federal Trade Commission Act if it contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984), *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984); *see also* 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, 175. A representation is material if it "is one which is likely to affect a consumer's choice of or conduct regarding a product." *Deception Statement*, 103 F.T.C. at 182; *see also Thompson Medical*, 104 F.T.C. 648, 816-817 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Advertising claims are presumed to be material if they are express or if they pertain "to the central characteristics of the product," such as its purpose, safety, or efficacy. *Deception Statement*, 103 F.T.C. at 182.

Thus, ads that create incorrect consumer beliefs about the purpose or efficacy of a product are deceptive. In addition, ads that take advantage of preexisting consumer beliefs are deceptive. The Commission has recognized that companies "may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs." *See Stouffer Foods Corp.*, 118 F.T.C. 746, 810 n.31 (1994); *see also Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) ("That the belief is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive").

An objective claim for a product carries with it an implied representation that the advertiser possessed and relied upon a reasonable basis at the time that the claim was made.

*Thompson Medical*, 104 F.T.C. at 813 & n.37; *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 865-66 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *see also* Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984) ("*Substantiation Statement*"). Absent specific evidence indicating what consumer expectations would be, the Commission assumes that consumers expect a "reasonable basis" for product claims. A reasonable basis for objective product claims is determined by weighing six factors: (1) the type and specificity of the claim; (2) the type of product; (3) the consequences of a false claim; (4) the benefits of a truthful claim; (5) the ease and cost of developing substantiation for the claim; and (6) the level of substantiation experts in the field believe is reasonable. *Substantiation Statement*, 104 F.T.C. at 839-40; *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). The precise formulation of the "reasonable basis" standard is determined on a case-by-case basis.

Section 12 of the FTC Act prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, or cosmetics. 15 U.S.C. § 52.<sup>1</sup> A "false advertisement" is any advertisement that is "misleading in a material respect." 15 U.S.C. § 55; *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9<sup>th</sup> Cir. 1994). Any advertisement whose express or implied message is false, or if the advertiser lacked a reasonable basis for asserting that the representation was true, is considered a false advertisement, *Pantron I*, 33 F.3d at 1096 (citing *In re Thompson Medical Co., Inc.*, 104 F.T.C. at 818-19, and the dissemination of such an advertisement constitutes an unfair or deceptive act or practice in violation of Section 12. 15 U.S.C. § 52(b).

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<sup>1</sup> The Ab Force is a "device" for purposes of Section 12. *See* 15 U.S.C. § 55(d) (defining "device" as including "an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . (3) intended to affect the structure or any function of the body of man").

The evidence will show that Respondents lacked substantiation before making the challenged claims. Complaint Counsel must show that “the advertiser lacked a reasonable basis for asserting that the message was true.” *Thompson Medical*, 104 F.T.C. at 818-19. Once Complaint Counsel has established its *prima facie* case, the burden shifts to Respondents to demonstrate that they had in their possession and relied on at the time of the claim adequate substantiation.<sup>2</sup> *United States v. Alpine Industries, Inc.*, 353 F.3d 1017 (6<sup>th</sup> Cir. 2003).

**B. Legal Standards for Determining the Meaning of Ads**

“The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself.” *Kraft, Inc.*, 114 F.T.C. 40, 121 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). In *Thompson Medical*, 104 F.T.C. 648, 789 (1984), *aff’d* 791 F. 2d 189 (D.C. Cir 1986), *cert. denied*, 479 U.S. 1086 (1987), the Commission noted that it is “often able to conclude that an advertisement contains an implied claim by evaluating the content of the ad and the circumstances surrounding it.” [Emphasis added]. When the language of or depictions in an ad are clear enough to permit the Commission to conclude with confidence that a claim, whether express or implied, is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. *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). If, after examining all the elements of an ad and the interaction between them, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis, alone, will permit the Commission to conclude that the ad contains the claim. *Stouffer Foods Corp.*, 118 F.T.C. 746,

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<sup>2</sup> We do not address in this case the level of substantiation needed because Respondents admit they do not have substantiation directly relevant to the challenged claims.

798 citing *Kraft*, 114 FTC at 121 and *Thompson Medical Co.*, 104 F.T.C. at 789 (1984).

A respondent's intent is also relevant in determining the meaning of ads. "While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made." *Novartis Corp.*, 127 F.T.C. 580, 683 (1999), *aff'd.*, 223 F.3d 783 (D.C. Cir. 2000).

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." *Cliffdale Associates & Deception Statement*, 103 F.T.C. at 174, 176 n.8; *Thompson Medical Co. Inc.*, 104 F.T.C. at 790. "The Commission can also consider that opinions of expert witnesses as to how an advertisement may reasonably be interpreted." *Kraft*, 114 F.T.C. at 122. In fact, the Supreme Court has recognized that expert opinion based on personal knowledge and experience has a place in the framework of 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 at 150 (1999).

### **C. Legal Standards for Liability of the Various Participants**

Corporate respondents acting in concert to further a common enterprise each should be liable for the acts and practices of the others in furtherance of the enterprise. See *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1<sup>st</sup> Cir. 1973) (treating all defendants as single economic entity where dealings between defendants were not at arms length); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2<sup>d</sup> Cir. 1964) (common enterprise found where individuals were transacting an integrated business through a maze of interrelated companies). *Accord Martin v. Deiriggi*, 985 F.2d 129 (4<sup>th</sup> Cir. 1992); *Barber v. Kimbrells, Inc.*, 577 F.2d 216 (4<sup>th</sup> Cir.), *cert.*



*denied*, 439 U.S. 934 (1978); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 268-69 (6<sup>th</sup> Cir.), *cert. denied*, 400 U.S. 926 (1970).

As a matter of law, it has long been settled that corporate officers such as Mr. Khubani may be held individually liable for violations of the FTC Act if the officer “owned, dominated and managed” the company and if naming the officer individually is necessary if the order is to be fully effective in preventing the deceptive practices at issue. *FTC v. Standard Educ. Soc’y*, 302 U.S. 112, 119-20 (1937). Individual liability is justified “where an executive officer of the respondent company has personally participated in or controlled the challenged acts or practices” or if the officer held a “command position” over employees who committed illegal acts. *Thiret v. FTC*, 512 F.2d 176, 181-82 (10<sup>th</sup> Cir. 1975); *Rentacolor, Inc.*, 103 F.T.C. 400, 438 & n.8 (1984). An order against an individual is proper where there is a risk that controlling individuals can simply reorganize under a new corporate entity and thus evade the Commission’s order. *See Standard Educ. Soc’y*, 302 U.S. at 119. *Cf. Rentacolor*, 103 F.T.C. at 438.

### **III. SUMMARY OF COMPLAINT COUNSEL’S CASE**

#### **A. The Marketing and Sale of the Ab Force**

Respondent Telebrands Corp. (“Telebrands”) sells consumer products directly to consumers through telephone numbers and addresses contained in the advertising for the product. Respondent TV Savings, LLC (“TV Savings”) is a Connecticut limited liability company. The two companies operate in offices next to each other, and worked together as a common enterprise to market the Ab Force. Money was regularly transferred from one company to the other, pursuant to a Services Agreement between them. They were controlled and operated by the same individual, owner and chief executive Ajit Khubani. Respondent Ajit Khubani is the president, chief executive officer, chairman of the board, and sole owner of Telebrands and the sole

member of TV Savings. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of these two business entities, including the acts and practices alleged in the complaint.

Respondent Khubani testified at his deposition that he first got the idea for marketing an ab belt when he noticed the AbTronic mentioned in the *Jordan Whitney Report*, a publication that monitors the frequency of TV infomercial airings for the direct response industry. CX-110 at 28-29. Khubani then decided to market the Ab Force when he saw that ab belts were “one of the hottest categories to hit the market.”<sup>3</sup> *Id.* at 29. AbTronic, AB Energizer, and Fast Abs were three of the ab belts that were on the market at the time he decided to market Ab Force, and Khubani stated that he wanted Ab Force to have the same electrical output as Fast Abs and AbTronic. *Id.* at 34, 43-44. Having decided to market an ab belt, he was the primary person who created and developed the promotional materials, and he was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign.

Respondents began disseminating radio and print ads for the Ab Force in December 2001. Starting in January 2002, and continuing until April 7, 2002, Respondents also marketed the Ab Force on television. Respondents ran several versions of the TV campaign on a limited basis, and then ran one version for a longer period of time.<sup>4</sup>

Gross sales for the Ab Force, including accessories such as batteries and gels, exceeded

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<sup>3</sup> According to Mr. Khubani, Telebrands often markets products that are similar in function to a popular product being sold on TV, but at a lower price. CX-110 at 21.

<sup>4</sup> Respondents’ TV ads quoted in the complaint consist of two 60 second TV spots and one 120 second TV spot (CX-1-A, CX-1-C, CX-1-E). A fourth TV spot, 120 seconds in length, was not attached as an exhibit to the complaint.

\$19 million. Respondents sold a total of 747,812 units of the Ab Force. All three respondents worked together to market the Ab Force.

## **B. Marketing for Other Ab Belts**

Ab Force television advertisements reminding consumers “I’m sure you’ve seen those “fantastic electronic ab belt infomercials on TV,” caused consumers to recall infomercials for the AbTronic, AB Energizer, and Fast Abs ab belts. Through their advertisements, Respondents chose to define the universe of similar products as ab belts advertised via infomercials. Evidence from two independent monitoring services establishes that the infomercials for AbTronic, AB Energizer, and Fast Abs dominated the entire infomercial market before and during the time when the Ab Force was advertised. Infomercials for these three ab belts claimed users would lose weight, fat, and inches; gain well-developed abdominal muscles; and achieve all of this without engaging in strenuous exercise.

### **1. Advertisements for the AB Energizer, AbTronic and Fast Abs Ab Belts Claimed Loss of Weight, Inches of Fat; Well-Defined Abdominal Muscles; and that the Devices were Equivalent or More Effective than Regular Exercise**

The advertising for the AB Energizer, AbTronic and Fast Abs ab belts made express and strongly implied claims that consumers using the devices would lose weight, fat, and inches; gain well-developed abdominal muscles; and achieve all of this without engaging in strenuous exercise. Infomercials for all three of these ab belts contained extensive footage of well-sculpted male and female models, in skimpy exercise clothes and bathing suits, wearing the belts over their abdominal areas. These images were displayed on the screen while the infomercial hosts repeatedly represented that the devices caused weight, fat, or inch loss; built well-developed abs; and were an effective substitute for exercise. CX-96 (Complaint in *FTC v. Hudson Berkley with*

transcript of AbTronic Infomercial at Exhibit 2), CX-97 (VHS tape of AbTronic Infomercial), CX-98 (Complaint in FTC v Electronic Products, LLC with transcript of AB Energizer Infomercial at Exhibit 2) , CX-99 (VHS tape of AB Energizer Infomercial), CX-100 (Complaint in FTC v. United Fitness of America, LLC with transcripts of two Fast Abs Infomercials at Exhibits B and D), CX-101 (VHS tape of Fast Abs Infomercial), CX-102 (VHS tape of 2<sup>nd</sup> Fast Abs Infomercial).

**a. AB Energizer**

The AB Energizer television ads claimed, for example,<sup>5</sup> that ab belt was “absolutely incredible for people who want tighter abs and want to lose inches around the midsection” (CX-98, Ex. 2 at 29-30), and “with a touch of a button, you can go from flab to rock-hard abs” *Id.* at 22, 39, 50, 62). The advertising further stated that the “secret is AB Energizer’s electronic impulses that stimulate your abs so they contract and relax as if you’re doing a situp. **[ON SCREEN: Up to 700 Muscle Contractions 10 Minutes!]** Now you can get up to 700 muscle contractions in just 10 minutes and get the tone and definition you've always wanted.” *Id.* at 62, 63. And testimonialists who used the ab belt made claims such as “I’ve lost 40 pounds. I’ve gone from a waist 37 to a waist 34.” *Id.* at 30-31.

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<sup>5</sup> The claims included here are an illustrative sample and not an exhaustive summary of the claims made by the marketers of those devices. Those marketers’ representations are set forth in greater detail in the complaints filed in *Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (filed May 7, 2002) (AbTronic); *Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (filed May 7, 2002) (Fast Abs); and *Federal Trade Commission v. Electronic Products Distribution, LLC, et al.*, 02CV0888 H(AJB), (filed May 7, 2002) (Ab Energizer), CX 96, CX-98, CX-100.

**b. AbTronic**

The AbTronic infomercials claimed that ab belt was an “electronic dream machine that will show you immediate improvement without strenuous time-consuming workouts. You’ll develop that six-pack you’ve always wanted in the easiest way imaginable.” (CX-96 Ex. 2 at 13, 27, 38) The infomercial also included numerous testimonials, stating in essence that consumers who used the ab belt lost several inches on their waist (*Id.* at 19, 32-33), and stated “[y]ou’ll see how the AbTronic System gives you the results of 600 sit-ups in just 10 minutes without any effort” (*Id.* at 3-4).

**c. Fast Abs**

The Fast Abs infomercial made claims similar to those made in Ab Energizer and AbTronic advertisements. For example: “Do you want rock-hard abs without sweating in a gym for hours? Do you want to have toned muscles all over your body without lifting heavy weights? Well, now, you can. Introducing Fast Abs— the no-sweat, full body workout.” CX- 100 Ex. B at 3-4, 22. “The simple, fast, easy, effective tool to help tool and reshape your body and help get those washboard lean sexy abs is finally here. With Fast Abs, we’ll guarantee fast results with no sweat.” *Id.* at 52; CX-100 Ex. D at 54. “People everywhere are sitting back and relaxing while they firm up, slim down, and shed inches quickly.” CX-100 Ex. B at 4, 23, 54; CX-100 Ex. D at 4, 23-24, 45, 57. “You’ll drop four inches in the first 30 days. We guarantee it.” *Id.* Ex. B at 31, 59; *id.*, Ex. D at 32, 63. “In fact, just 10 minutes of Fast Abs is like doing 600 sit-ups. **[ON SCREEN TEXT: 10 minutes = 600 sit ups] [ON SCREEN IMAGE: woman struggling to perform a sit-up]**” *Id.* Ex. B at 11, 52.

## **2. AbTronic, AB Energizer and Fast Abs Infomercials Saturated the Media**

Infomercials for the AbTronic, AB Energizer, and Fast Abs ab belts saturated the airwaves shortly before and during much of the Ab Force campaign. Complaint Counsel will introduce evidence from editions of the *JW Greensheet*, a market report that compiles industry data and tabulates the top-ranked direct response commercials on a weekly basis, that an infomercial for one or more of these three ab belts was in the “top 50” every week for a 22 week period from September 15, 2001 through March 2, 2002. For ten of these weeks, one of these products was the “#1” infomercial, and for seven of these weeks, one of them was “#2.” For the week ending January 12, 2002, they were numbers 1, 2, and 3.

The frequency of the infomercials for these three ab belts is also established by figures provided by the Infomercial Monitoring Service (“IMS”), which records infomercials from national cable and satellite television channels, tabulates what is aired, and creates the IMS Top 25 Infomercial Ranking. Complaint Counsel will offer evidence provided by IMS that more than 5000 infomercials aired on cable for the AbTronic, AB Energizer, and Fast Abs ab belts before and during the Ab Force marketing campaign. AbTronic infomercials appeared 2,082 times, AB Energizer infomercials appeared 1,693 times, and Fast Abs infomercials appeared more than 1,272 times. In fact, in early 2002, infomercials for AbTronic, AB Energizer, and Fast Abs were among the most frequently-aired infomercials on cable television. From the week ending January 4, 2002, through the week ending February 8, 2002, IMS ranked one or more of these infomercials in the top ten every week.

**3. Television Advertisements for the Smart Toner, Gymfitness and Slim Tron Ab Belts Contain Claims of Inch, Weight, and Fat Loss; Well-developed Abs; and Effective Alternatives to Exercise.**

Respondents point to a number of other devices that purportedly were offered for sale during the relevant period of time in an effort to confuse the issues of what devices Ab Force ads referred to. As discussed in Part IV.A., most of the devices are not within the Respondents' own defined universe. Only four devices are within the universe, and three of them contained core claims similar to those in the advertisements for the AbTronic, AB Energizer and Fast Abs ab belts. To the extent that they were seen by consumers they support Complaint Counsel's theory that the Ab Force contained implied claims that users would lose inch, weight, and fat; develop well-developed abs; and was an effective alternatives to exercise.

**a. Marketing for the Smart Toner**

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.” *Id.* 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.” *Id.* at 3-4. Testimonials in the spot claim loss of 15 pounds, “a big reduction in body fat,” and “over two inches lost in the waistline.” *Id.* at 4

**b. Marketing for the GymFitness**

GymFitness ads also contain numerous claims that the product is an effective substitute for strenuous workouts at the gym. For example:

“Gym Fitness really works my muscles whether I’ve made it to the gym or not.”

GymFitness TV Infomercial, RX-76

“Whenever I show people how to do crunches, I explain to them that in order for it to work effectively the abdominal muscles have to contract properly. Half of the time they come back to me and I have to explain the right technique all over again. If they use Gym Fitness on a day they can’t work out at the Gym, they don’t have to worry about technique. All they have to do is put on the belt, turn the unit on and they can feel the muscles contracting. Even better they can see the results. There’s no doubt in my mind Gym Fitness works.” *Id.*

“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. But how many people can go through that kind of rigorous training? Most of us can’t spend hours a day working out. Well, Gym Fitness lets us keep our muscles healthy and well-conditioned even when we can’t get to the gym. Simply use it for 10 minutes two or three times a day. You’ll feel the difference. *Id.* (Emphasis added.)

“Gym Fitness doesn’t have any wires to attach. All the electronics are self-contained in one compact unit and that unit is attached to the belt. You just wrap it around the stomach, press the button and that’s it. There’s no way you can go wrong. In fact, you’ll immediately feel it working. You’ll feel those muscles contracting just as though you were doing a strenuous muscle workout. But you’re not working at all. Gym Fitness is doing all the work for you.” *Id.*

“It was like a personal trainer putting me through some heavy duty routines.” *Id.*

“I’ve had people ask me why I like Gym Fitness so much. They think because I’m a personal trainer, I’m going to want them to use traditional methods of exercise and body conditioning. But the purpose of training is isn’t to only make people sweat or make them feel pain. It’s also about getting results. We want to condition their muscles, get them into shape and encourage a healthy lifestyle. If there’s an easy way to accomplish that, what’s wrong with it?” *Id.*

### **c. Marketing for the Slim Tron Ab Belt**

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.” Slim Tron TV commercial, RX-78.

Complaint Counsel will also offer *JW Greensheet* evidence showing that the Slim Tron



commercial spot was ranked three times and had an average ranking of 30 in the Top Forty Direct Response Spots rankings from April 22, 2002 through May 20, 2002. The Slim Tron did not appear in any of the thirty-six Top Fifty Infomercial rankings during this period.

**C. Respondents Claimed that Ab Force Would Cause Weight, Inch, or Fat Loss; Build Well-developed Abs; and Be an Effective Substitute for Exercise.**

**1. The Depictions and Statements in the Ads Themselves Make the Challenged Claims**

The claims that Ab Force would cause loss of inches, weight and fat, build well-developed abs, and are an effective alternative to regular exercise are obvious on a facial review of the ads without reference to ads for other ab belts or the need for extrinsic evidence. First, the name “Ab Force” itself conveys the idea, as Mr. Khubani said, that “the product was designed to work primarily on the abdominal area.” Khubani Deposition, CX-110 at 37. Next, the images of trim models with well-developed abs, wearing the product around their mid-sections, the depiction of the product itself, and the name “Ab Force” are all factors that, as a matter of law, permit this Court to conclude that Ab Force ads contain claims that using the product results in trim waistlines and well-defined abs without exercise. Furthermore, the radio ad, for example, stated in part: “Have you seen those fantastic Electronic Ab Belt infomercials on TV? They’re amazing promising to get our abs into great shape fast - without exercise! The Ab Force is just as powerful and effective as the expensive ab belts on TV - designed to send just the right amount of electronic stimulation to your abdominal area Get the amazing electronic Abforce belt - the latest fitness craze for just \$10.” Script for Ab Force Radio Spot, CX-1-H.

As demonstrated by the tapes and transcripts of the Ab Force TV ads, two of them made the same reference to the “latest fitness craze” as the radio ad. CX-1-A , CX-1-B, CX-1-C, and CX-1-D. Equally important in the TV ads, however, was the use of visual images. As the

Complaint alleges, the television ads contain “(1) over a dozen depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions; and (2) two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles.” CX-1. One of them included a close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. Ab Force TV Spot, CX-1-B.

In *Kraft*, the Commission specifically noted that a claim can be communicated by visual images - in that case, the visual image of milk being poured into a glass up to a five-ounce mark to imply that a slice of Kraft singles had as much calcium as five ounces of milk. *Kraft*, 114 F.T.C. at 124. In this case, through the use of the name “Ab Force,” statements such as “the latest fitness craze” and images of well-sculpted individuals applying the Ab Force belt to their abdominal area, Respondents represented that Ab Force caused loss of fat, inches, or weight; built well-defined abdominal muscles; and was equivalent to traditional exercise. No extrinsic evidence is needed to reach this conclusion.

## **2. The Surrounding Circumstances Reinforce the Challenged Claims**

In addition, when the above factors are considered in the context of express references in the Ab Force ads to ads for other ab belts, the case for concluding that the claims alleged in the Complaint becomes even more compelling. In *Kraft*, the Commission noted how visual images can be used to make a claim by making a comparison to other products. The statement “imitation slices use hardly any milk” was accompanied by a visual showing “a small amount of milk being poured into the bottom of a glass.” *Id.* at 123. When compared to the image of a full glass of milk for Kraft singles, the images made a claim that Kraft has more milk. In this case, Respondents are not positioning their product as superior to competing products, but they are

intentionally drawing a visual and verbal comparison to the other ab belts. Indeed, Respondents admit, at p.1 of their Memorandum in Support of Respondents' Motion for Summary Decision, that the ads claim "(1) the product was technologically comparable to competitive electronic ab belts, (2) but was significantly cheaper." By asserting that the Ab Force is comparable to other ab belts, the ads are claiming that the Ab Force can perform the same functions that ads for the other ab belts claim are possible for their products.

As the Commission stated in *Thompson Medical*, it can also consider "circumstances surrounding" the advertisement. In this case, all the advertisements themselves refer explicitly to the surrounding circumstances by referring to "those fantastic Electronic Ab Belt infomercials on TV." Each of the TV ads then made some comparison of the Ab Force's power and effectiveness to the other ab belts advertised on TV. For example, one stated "The Ab Force is just as powerful and effective as those expensive ab belts sold by others." CX-1-A, CX-1-B. Another stated "The Ab Force is just as powerful and effective as those ab belts sold by other companies on infomercials." CX-1-C, CX-1-D. The most heavily-aired spot stated that "The Ab Force uses the same powerful technology as those expensive ab belts – capable of directing 10 different intensity levels at your abdominal area." CX-1-E, CX-1-F.

The evidence is clear as to the identity of the other products referred to in the Ab Force ads – AbTronic, AB Energizer, and Fast Abs. Infomercials for the AbTronic, AB Energizer, and Fast Abs were heavily aired shortly before and during much of the Ab Force campaign. As noted in section III.B.2. above, evidence as to the frequency of the infomercials for these three ab belts as discussed in Section I.B.2 supra, establishes that references to other ab belts direct consumers for advertising for AbTronic, AB Energizer and Fast Abs. The evidence is clear from an analysis of those infomercials, without the need for extrinsic evidence, that the core claims they made

were that users of the products could gain well-developed abs and lose inches, weight and fat, and that the products were alternatives to regular abdominal exercise such as crunches or sit ups.

Furthermore, in considering the surrounding circumstances of an ad, the Commission is entitled to consider evidence of intent of the ad's creators. *Novartis*, 127 FTC at 683. The evolution of the Ab Force ads demonstrates the Respondents' intent to promote the device to cause inch, weight or fat loss, develop well-sculpted abs, and be an effective alternative to exercise. Respondent Ajit Khubani has testified that he decided to enter the ab belt market after noticing a mention of the AbTronic in industry market reports (Khubani Deposition, CX-110 at 28-29) and after determining that ab belts, including AbTronic, AB Energizer, and Fast Abs, were "one of the hottest categories to hit the market." *Id.* at 34. In addition, the radio ad specifically stated "get into great shape fast - without exercise." CX-1-H. And one of the TV spots opened with a man exerting himself doing crunches. CX-1-C. Both demonstrate Respondents intended consumers to believe their ab belt was a substitute for exercise.<sup>6</sup>

Hence, the express references in the Ab Force ads to infomercials for competing ab belts, along with the claims of comparability to those products, compel consumers to think of those infomercials while viewing the Ab Force ads. Through their own action Respondents, therefore, have established those infomercials as part of the circumstances surrounding the Ab Force ads. Consequently, as part of a facial analysis, this Court and the Commission can determine what express or strongly implied claims the infomercials for these other products contain.

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<sup>6</sup> Respondents may assert that the evolution of the ads is evidence that they did not intend to make the alleged claims because they removed the express statements in the later ads. To the contrary, the evolution is evidence of intent. The first TV ads and the first radio ad that include statements such as "latest fitness craze" and "without exercise" were not just an ad agency's concept that did not receive Khubani's approval. The scripts for these ads were written by Khubani, and the ads did air and did prompt orders from consumers for the Ab Force.

Respondents have suggested that the analysis the Commission would have to make in this matter is “one step even further removed from the types of claims that are at the other end of the spectrum from express claims” (referring to the analogy posited in *Novartis*, 127 F.T.C. at 679). To the contrary, the exercise of relating one set of express referrals to another set of express performance claims is very close to the express claims side of the *Novartis* “implied claim” spectrum.

**3. Dr. Mazis’s Expertise and Experience Qualify Him to Render an Expert Opinion in this Matter That Is Reliable under Applicable FTC Precedent.**

Although extrinsic evidence as to the meaning of the Ab Force ads is not necessary, as we have demonstrated above, Complaint Counsel will offer such evidence in the form of a facial analysis by an expert in marketing and consumer behavior, Michael B. Mazis, Ph.D., Professor of Marketing at Kogod School of Business, American University. Dr. Mazis’s analysis confirms that the claims challenged in the Complaint were made. Such opinion evidence from qualified experts is admissible under FTC jurisprudence to assist in determining the meaning of ads. Dr. Mazis has an extensive background and experience as a researcher and university professor in consumer behavior and marketing. *See* Mazis Expert Report, CX-58 at 2-4; *See also* Mazis *Curriculum Vitae*, Tab A to CX-58. In addition, he has testified as an expert witness in numerous federal court cases and before administrative law judges involving ad interpretation. CX-58. In rendering his expert opinion in this matter, he is relying on his experience gleaned from years of research, conducting consumer-perception studies, and familiarity with academic literature. The Federal Rules of Evidence provide that an expert witness may rely on his experience as the basis for his testimony. F.R. Evid. 702. On the basis of his extensive background and experience in the field of consumer behavior and marketing, he is well-qualified

to render an opinion in this matter. Furthermore, as we will demonstrate, his opinion is relevant, material and reliable.

**4. Dr. Mazis's Facial Analysis Establishes that the Core Claims for Other Ab Belts Were Implied by the Ab Force Ads**

Dr. Mazis's facial analysis is set out in his Expert Report (CX-58) and his Expert Rebuttal Report (CX-103). He concluded that viewers of advertising for the Ab Force are likely to perceive that the product causes loss of inches around the waist and causes well-developed abs, and that such viewers may also perceive that Ab Force causes weight loss and is an effective alternative to exercise. *Id.*, at 4-5.

Dr. Mazis's opinion is based upon a well-established theory of consumer behavior—categorization theory. The theory has been tested and discussed in the appropriate community's literature. For example, a leading scholarly journal states, “according to the categorization approach, if a new stimulus can be categorized as an example of a previously defined category, then the affect associated with the category can be quickly retrieved and applied to the stimulus.” Mita Sujjan, “Consumer Knowledge: Effects on Evaluation Strategies Mediating Consumer Judgments,” *Journal of Consumer Research*, Vol. 12 (May 1985), CX-57 at 31.

According to Dr. Mazis, claims about inch loss and well-developed abs are communicated by elements within the four corners of the Ab Force ads, *e.g.*, pictures of trim, well-developed models wearing and using the belt and the name of the product itself, “Ab Force.” Dr. Mazis refers to these elements as “direct effects.” Expert Rebuttal Report, CX-103 at 2, and 5. Dr. Mazis is expected to opine that those who had not seen another ab belt infomercial would base their perceptions on what was in the commercial: the ab belt worn around the abdomen, trim people, fit, tight abs.

Dr. Mazis will further testify that the name Ab Force means that it works on your abdominals. Even Dr. Jacoby agrees that the name “Ab Force” itself means something to consumers and “it is very possible that consumers are making inferences from the name and the repetition and hammering of the name that they should be taking that name into account. . . .” Jacoby Deposition, CX-112 at 63-64.<sup>7</sup>

In addition to these direct effects, references within the Ab Force ads to infomercials for other ab belts may create consumer perceptions that the Ab Force can cause results claimed in the other belts’ infomercials. Dr. Mazis refers to these references to the ads for other products as “indirect effects.” Mazis Rebuttal Report, CX-103 at 2-3, 5, and 12. Dr. Mazis is further expected to testify that depictions of well-muscled men and trim women with well-defined abdominal muscles in Ab Force advertising are “direct effects” of said advertising and that consumers’ awareness of claims made in advertising for other EMS belts are “indirect effects.”

Dr. Mazis will testify that the direct and indirect effects are interrelated. Consumers who saw the previous ab belt commercials know something about ab belts and how ab belts work and that may have an impact on their perceptions of the Ab Force advertising. Consumers also “could have become aware of these other ab belts through exposure to advertising, discussions with other people who had seen advertising for other EMS ab belts, and point-of-purchase displays of EMS ab belts in stores.” Mazis Rebuttal Report, CX-103 at 3.

Applying categorization theory that states consumers use existing knowledge of a product class to form impressions of new similar products, Dr. Mazis concludes that the Ab Force ads

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<sup>7</sup> Dr. Jacoby made his statement as an objection to Dr. Mazis’s use of the name “Ab Force” in a copy test questionnaire designed for this matter. In essence, he was concerned that consumers who participated in the copy test would take away certain claims just by the name itself. As discussed above, we agree the name itself conveys the challenged claims.

take advantage of the claims made in the other ads, exploiting consumers' existing beliefs about EMS ab belts that were developed from exposure to the numerous infomercials seen on television. Mazis Report, CX-58 at 8-9. Dr. Mazis further explains that studies have shown that "novices," who possess little product knowledge, are most likely to rely on existing categories to form such impressions[.]” Mazis Rebuttal Report, CX-103 at 3-4. Thus,

Extensive advertising for EMS ab belts, the appearance of the belts, and the term “ab” or “abs” in their brand names acquaint consumers with the uses of an ab belt and enable them to establish an “ab belt category” in their memories. Upon seeing advertising for Ab Force, which refers not only to the other ab belts and [sic] but also to a brand with a similar name and appearance as other ab belts, “novice” consumers are likely to place Ab Force” in the ab belt category. They are also likely to associate the characteristics of other ab belts with the Ab Force. *Id.* at 4, par. 3.

Dr. Mazis’s observation is supported not just by consumer behavior research, but also real life. Respondents’ own experiences reaffirm the categorization theory. An inbound telemarketing company receiving calls for the Ab Force campaign sent two emails to a media placement consultant asking for answers to frequently-asked questions. CX-43 and 44. One of the questions “customers usually ask” was “[h]ow does [Ab Force] differ from other ab electronic exercising machines?” *Id.* In other words, prospective purchasers already had placed Ab Force in the same category as other ab belts advertised on TV and wanted to know if there were any differences.

As we have already discussed, Complaint Counsel will demonstrate that the infomercials for AbTronic, AB Energizer, and Fast Abs, were, as the Complaint alleges, heavily advertised during the period immediately preceding and coinciding with the Ab Force marketing campaign. Dr. Mazis will testify that “the broadcast of infomercials for AbTronic, AB Energizer, and Fast Abs is likely to have had an impact on consumers’ perceptions of the Ab Force infomercials



especially since the ads for Ab Force specifically referenced “those fantastic electronic ab belt infomercials on TV” Mazis Expert Report, CX-58 at 7-8. Consequently, viewers of the Ab Force ads are likely to perceive claims that using Ab Force results in well-defined abdominal muscles and in a loss of inches around the waist and may also perceive claims that using the product leads to weight loss and that it is an effective alternative to regular exercise. *Id.* at 9-10.

Also supporting Dr. Mazis’s categorization theory is the undisputed fact that the Ab Force ads compare themselves to the other “ab belts” seen on TV and use images of their belts over well-sculpted abdominal muscles, as the other ab belts’ ads did. Obviously Respondents expected and intended consumers, through these comparisons and images, to categorize the Ab Force belt with other ab belts advertised on TV. Otherwise the price comparison Respondents admit to making would be meaningless to consumers.<sup>8</sup> Furthermore, the infomercials for the AbTronic, Ab Energizer, and Fast Abs were so widely distributed, it would be nonsensical to assume that no one in the population had seen them and formed ideas of ab belts.

##### **5. Consumer Survey Evidence Also Shows the Ads Convey the Challenged Claims**

In addition to Dr. Mazis’s facial analysis of the ads, Dr. Mazis designed and conducted a mall intercept consumer survey (“copy test”) that confirms the ads convey the challenged claims to consumers, which he will describe in his testimony. The methodology and results of the test are set forth in the Mazis Expert Report. CX-58 beginning at 10. A sixty-second spot for Ab Force (Ex. E of the Commission’s Complaint (CX-1-E)) (“the test ad”) was tested against a

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<sup>8</sup> The very fact the Respondents paid money to produce and place these ads on TV and radio is evidence of their intent and expectation for consumers to categorize the Ab Force belt with other ab belts advertised on TV. It is not rationale behavior to pay money for ads that have no meaning and do not attempt to persuade consumers to purchase their product.

control ad which was cleansed of visual images of the models and, except for one image of the Ab Force itself, being worn around a closely cropped picture of a male torso, images of the belt itself. Also cleansed from the control ad were all references to the other ab belts and infomercials for them. *Id.* at 13. As Dr. Mazis explained, “the purpose of the survey was to determine whether the entire Ab Force advertisement misled consumers rather than isolate the effect of any one element.” Mazis Rebuttal Report, CX-103 at 7 [Emphasis in original]. U.S. Research, a firm that specializes in such research, provided the mall intercept facilities and personnel and conducted the survey under the supervision and guidance of Dr. Mazis.

As in all randomized controlled experiments, the subjects were assigned to the test group or the control group at random. This is done because “[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.” *See* David H. Kaye and David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE. (Federal Judicial Center, 2d ed., 2000), at 93. One hundred eighty-two (182) Respondents viewed the control ad, and 220 Respondents viewed the test ad. Both groups were asked the same set of questions. Respondents were first asked an open-ended question to assess what they took from the commercial, “What does the Ab Force commercial say, show, or imply about Ab Force?” Over twenty-two percent (22.3%) of the test ad respondents and nearly twelve percent (11.9 %) of the control ad respondents said that the advertisement claimed using the Ab Force results in well-developed abdominal muscles, in loss of weight, or inches or in an improved physique. Dr. Mazis found the two percentages to be significantly different at the 99% confidence level. Mazis Expert Report, CX-58, at 19.

Respondents were then asked a series of close-ended questions to measure whether they

perceived claims for various attributes of the Ab Force challenged in the Commission's Complaint (weight loss, fat loss, inch loss, well-developed abs, and alternative to exercise), the three additional questions were control questions (stomach ulcers, nausea, and blood pressure) to disguise the purpose of the study and control for yea sayers. The order of the questions was rotated to avoid order bias. *Id.* at 19-20.

The results showed that nearly two-thirds (65.4%) of the test ad respondents and almost half (48.1%) of the control ad respondents agreed that the ad they saw communicated that "using the Ab Force results in well-defined abdominal muscles." *Id.* Moreover, nearly three-fifths (58.1%) of the test ad respondents and over two-fifths (42.4%) of the control ad respondents perceived a claim that the Ab Force "causes users to lose inches around the waist." *Id.*

As to a claim about weight loss, 43.0% of the test ad respondents compared to 28.1% of control ad respondents agreed that the ad they saw communicated that the Ab Force "causes users to lose weight." Nearly forty percent (39.1%) of the test ad respondents and nearly thirty percent (28.6%) of the control ad respondents agreed that the claim that "using Ab Force is an effective alternative to regular exercise." Finally, as to whether "using Ab Force removes fat deposits, approximately one-fifth of each group of respondents (22.9% test, 19.0% control) agreed that the commercial they saw made the claim. *Id.* at 20.

The takeaway from the control ad for the claims challenged in the Commission's complaint ranges from a high of 48.1% to a low of 19.0%. Thus, in an ad that was cleansed of virtually all visual depictions of trim muscular models, and all verbal references to other ab belts, leaving only the name of the product and one brief pictorial depiction of the belt itself, claims that use of Ab Force causes loss of inches, weight, and fat, results in well-defined abs, and is an effective alternative to regular exercise were still perceived by substantial portions of

respondents. As Dr. Mazis opines, “The relatively high ‘take away’ was 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.” *Id.* at 20.

Notwithstanding the very high takeaway from the control ad used in the copy test, net takeaway (the difference between the test ad takeaway and the control ad takeaway) was still high enough to demonstrate that the Ab Force ad communicated four out of five of the challenged claims at a significantly higher level than the control ad. Net takeaway for the “well-defined abdominal muscles” question was +17.3%; for the “lose inches around the waist” question, +15.7%; for “causes users to lose weight” question, +14.9%; and for the “alternative to exercise” question, +10.5%. Only the “removes fat deposits” question fell within the range that would not be significant. *Id.* at 21, Table 2. Moreover, there was also a +10.4% difference between test ad respondents and control ad respondents to the open-ended question about what the Ab Force ad said, showed, or implied. See *Id.* at 19, Table 1 (Difference between 22.3% and 11.9%).<sup>9</sup>

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<sup>9</sup> Although there is indisputably a point where differences are so low as to be *de minimus*, there is ample authority in cases involving FTC law and analogous trade mark infringement actions under the Lanham Act that supports the proposition that a net difference between 10% and 15% is sufficient to support an allegation of trade mark infringement. *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6<sup>th</sup> Cir.), 414 U.S. 1112 (1973) (Where Firestone’s own consumer survey revealed that 15.3% perceived “Safe Tire” to mean every tire was ‘absolutely safe’ or ‘absolutely free from defects,’ the court stated that it was “hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public.”); *Mutual of Omaha Insurance Co. v. Novak*, 836 F.2d 397, at 400 (8<sup>th</sup> Cir. 1987) (10%); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803 at 817 (8<sup>th</sup> Cir. 1969) (11%); *James Borough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266 at 279, n.23 (7<sup>th</sup> Cir. 1976) (referring to a prior case showing 11%); *Jockey International, Inc. v. Burkard*, 185 U.S.P.Q. (BNA) 201, at 205 (11.4%); *McDonough Power Equip. Inc. v. Weed Eater, Inc.*, 208 U.S.P.Q. (BNA) 676, at 683, 684, and 685 (Trademark Trial & App. Bd. 1981) (11%); *Goya Foods, Inc., v. Condal Distributors, Inc.*, 732 F. Supp. 453, 456-57 (S.D.N.Y. 1990) (9%); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*, 365 F. Supp. 707 at 716, *modified and aff’d*, 523 F.2d 1331 (2<sup>nd</sup> Cir. 1975) (8.5%); *compare, Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, n.15 (4<sup>th</sup> Cir. 1996) (“We may infer from case law that survey evidence

**D. Ab Force Does Not Cause Weight, Inch, or Fat Loss or Build Well-developed Abs, and It Is Not an Effective Substitute for Exercise**

Respondents' claims that Ab Force will cause loss of weight, inches, or fat; build well-developed abs; and is an effective alternative to exercise are false. As Complaint Counsel will demonstrate through the testimony of Dr. Robert Gatling, an official from the United States Food and Drug Administration ("FDA"), that agency, which has jurisdiction over EMS abdominal belts marketed to "affect the structure or function of the body" has not approved the Ab Force device for these purposes. With limited exceptions, prior to being marketed in the United States, FDA requires such devices to receive FDA "premarket approval," which is a determination from the FDA that the device is substantially equivalent to a legally marketed device. FDA's import alert (IA #89-01), entitled, "Electrical Muscle Stimulators and Iontophoresis Devices," states that electrical muscle stimulators are misbranded when any of the following claims are made: girth reduction; loss of inches; weight reduction; cellulite removal; bust development; body shaping and contouring; and spot reducing. The FDA considers devices making these claims misbranded in violation of the Federal Food, Drug, and Cosmetic Act because to date no devices have been approved to make these claims.<sup>10</sup> In addition, the evidence will show that in May of 2002, FDA sent Telebrands a letter stating that the AB Force is a medical device subject to FDA jurisdiction

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clearly favors the defendant when it demonstrates a level of confusion much below ten percent.") (Emphasis added.)

<sup>10</sup> Dr. Gatling will testify that FDA does recognize that EMS devices have valid uses: "Doctors may use electrical muscle stimulators for patients who require muscle re-education, relaxation of muscle spasms, increased range of motion, prevention of muscle atrophy, and for treating other medical conditions which usually result from stroke, serious injury, or major surgery. The effect of using these devices is primarily to help a patient recover from impaired muscle function due to a medical condition, not to increase muscle size enough to affect appearance."

and regulation and that it may be in violation of the Federal Food, Drug, and Cosmetic Act due to its failure to obtain FDA marketing clearance before selling the Ab Force.

Moreover, Complaint Counsel's scientific expert, Dr. Anthony Delitto, Ph.D.,<sup>11</sup> a physical therapist who has taught courses and conducted extensive research regarding the application and uses of EMS, concurs that EMS devices in general, and the Ab Force device specifically, cannot cause or even assist in the loss of weight, inches, or fat from the human body. It is well known that, to lose one pound of weight, the average individual must take in approximately 3,500 fewer calories than he or she expends. *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1274. Dr. Delitto will testify that this means one must exercise, or expend calories, or restrict caloric intake in order to lose weight, and that if EMS were to cause fat loss it would have to aid in expending calories. Dr. Delitto will also testify that, "[t]here is no scientific evidence that demonstrates that use of EMS devices can burn calories to the degree of volitional exercise and in fact it probably uses only a fraction of the calories ... therefore it will not be factor in any weight loss." Delitto Expert Report, CX-113 ¶ 16. Nor is he "aware of any biophysical mechanism that would cause EMS to eliminate fat under the skin." Delitto Expert Report, *Id.* at 113 at ¶ 15.<sup>12</sup>

He will also testify that the Ab Force also cannot cause well-defined abdominal muscles.

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<sup>11</sup> Dr. Delitto is an Associate Professor and Chairman of the Department of Physical Therapy, School of Health and Rehabilitation Sciences, University of Pittsburgh and Vice President for Education and Research, Centers for Rehab Services, University of Pittsburgh Medical Center. Dr. Delitto spends the majority of his time conducting research related to the efficacy and effectiveness of treatment interventions, which include therapeutic EMS. Dr. Delitto has published over 50 peer-reviewed studies and 19 non-peer reviewed publications, including book chapters, commentaries, and conference proceedings. Delitto Expert Report, CX-113.

<sup>12</sup> One must lose weight to decrease the circumference of the waist or thigh area. *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1274.

In order to achieve well-defined or so called “six-pack” abdominal muscles, most persons first would have to substantially reduce the amount of fat over their abdominal muscles. *Id.* at ¶ 16. As described above, however, the Ab Force cannot appreciably reduce body fat. Further, in order to obtain greater definition of the abdominal musculature a person would have to increase the size of the Rectus Abdominis muscle, which is the largest muscle in the abdomen. When a person exercises a muscle, the first effect of the exercise is a strengthening of the muscle. Once the muscle becomes stronger, if the person continues to overload the muscle by exercising it vigorously over an extended period, the muscle will not only increase in strength but could also become larger, which is clinically referred to as “hypertrophy.” *Id.* at ¶ 19. The Ab Force cannot cause a muscle contraction strong enough to overload the muscles, and therefore it cannot strengthen muscles enough to develop hypertrophy. *Id.* at ¶ 25. Additionally, there is no evidence that EMS devices in general can induce substantial hypertrophy of muscles, even under overload training conditions. *Id.* at ¶ 21.

Dr. Delitto will also testify that the Ab Force is not an effective alternative to volitional exercises such as sit-ups, leg raises, weight lifting, or squats. He will describe empirical testing on the strength of the contractile force produced by the Ab Force device. He tested the Ab Force on 20 individuals, ten men and ten women, to determine whether it was capable of producing a contraction strong enough to move or “approximate” the rib cage to the pelvis as would occur in the first part of a sit-up. As he explains in his Expert Report, when a person contracts his or her abdominal muscles to do a sit-up the first thing that happens is the pelvis moves toward the rib cage, next the shoulders are lifted from the floor. The Ab Force is too weak to produce a contraction capable of causing movement of the pelvis toward the rib cage. Delitto Expert

Report, CX-113 at ¶ 25. Therefore, the Ab Force is not an effective alternative to a sit-up.<sup>13</sup> Nor is the Ab Force an effective alternative to thigh exercises such as leg raises or squats that also require a person to pull against gravity. Dr. Delitto's empirical testing demonstrated that the Ab Force produced a contraction too weak to lift the leg though the air against gravity. With so little muscle contractile force being generated as a result of the use of the Ab Force, the use of the Ab Force device would not replace exercises such as weight lifting or squats. *Id.* at ¶ 27.

**E. Respondents Have Provided No Evidence That Ab Force Does Perform the Claimed Functions**

Respondents have not introduced any evidence that contradicts the extensive scientific evidence Complaint Counsel will introduce. In fact, Respondents admit that they do not possess any evidence that Ab Force will cause users to develop well-defined abdominal muscles, lose weight, inches of girth, or body fat; that it is an effective alternative to regular exercise; or that it will tone, strengthen, or firm the abdominal muscles. Respondents' Admissions, CX-120, Admissions 1-6. Nor did they identify an expert on this issue in a timely manner. Rather, they assert that there is accepted evidence that EMS products substantially similar to Ab Force can provide cosmetic and other benefits and may improve abdominal muscle tone and strengthen and firm abdominal muscles. *Id.* at Admissions 1, 2 and 3.

Although other devices may provide some benefits, there is no evidence Ab Force does. Dr. Delitto will testify that EMS is an established treatment typically used in physical therapy to

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<sup>13</sup> The subjects were lying on their back wearing the Ab Force belt around their waists. Electrical muscle stimulation is often considered uncomfortable and even described as noxious. Delitto Expert Report, CX-113 at ¶ 30. The goal was to get as many participants as possible to tolerate the maximum output of the device. Six of the 20 participants were not able to tolerate the highest level of the Ab Force device. In fact, the Ab Force did burn one subject. The burn was superficial and resolved in 7 days. *Id.* at ¶ 31.



strengthen muscles after injury or surgery, which involves the application of electrical current to the human body in order to cause skeletal muscle contractions. EMS is commonly used on persons with musculoskeletal conditions such as knee injuries or post surgery or on patients with neurological conditions such as a stroke. Therapeutic EMS devices are much larger and deliver a much stronger current than the Ab Force belt.<sup>14</sup> Dr. Delitto will testify that he tested the Ab Force using a current meter to ascertain the peak current and found that the highest RMS current delivery of the Ab Force is never more than 0.20 milliamps of true RMS current.<sup>15</sup> Clinical EMS units that are used for strengthening purposes have RMS current outputs in the range of 30-100 milliamps RMS. Delitto Expert Report, CX-113 at ¶ 24. This means that they are about 100 times stronger than the Ab Force device.

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<sup>14</sup> For example, the EMS unit Dr. Delitto uses with patients is a large console unit that sits on a treatment table. It is plugged into the wall while the Ab Force uses only a small battery.

<sup>15</sup> Phase charge is one of the most important factors in an EMS device's ability to elicit muscle contractile force capable of overloading a muscle. Phase charge measures the electrical charge contained in the pulses of current delivered from the EMS device. A device's RMS current, or root means square current, is another way to determine if the device produces current levels sufficient to overload a muscle. RMS current represents values proportional to phase charge. Delitto Expert Report ¶¶ 23, 24.

#### **IV. EVIDENTIARY ISSUES**

Rule 3.43 of the Commission Rules of Practice provides, “Relevant, material, and reliable evidence shall be admitted. Irrelevant immaterial, and unreliable evidence shall be excluded.”

##### **A. Ads for Other EMS Devices Either Are Not Relevant Or Outside the Relevant Time Period and Should Be Given No Weight.**

Ignoring the universe of related products they defined in their ads - ab belts advertised via TV infomercials - Respondents attempt to confuse this Court with immaterial and irrelevant devices. For the reasons explained below, this Court should not give evidence as to these devices any weight.

##### **1. Five of the Devices That Respondents Identified Are Not Ab Belts**

Respondents have pointed to commercials for IGIA Electrosage, Mini Wireless Massage System, Accusage, Dermal Tone, and Rejuvenique, as examples of other EMS devices advertised on broadcast or cable television contemporaneously with the Ab Force. However, Respondents fail to disclose that these products are not ab belts – the category their own ads create in consumers’ minds.

IGIA Electrosage (depicted in RX-72) is a control box that is attached by wires about 24 inches long to eight pads intended to be placed on various areas of the body -- not a belt to be worn around the waist. Electrosage commercial, RX-72. The infomercial contained images of models with the IGIA Electrosage attached to various body parts or areas including, but not limited to, the abdomen, back, thigh, calf, buttocks, and face.

The Mini Wireless Massage System (depicted in RX-73) is a “butterfly-like” unit about four to six inches in length that the commercial depicts being applied to various parts of the body and not attached to a belt that can be worn around the waist. *Id.* at 2-3.

The Accusage (depicted in RX-74) is similar to the IGIA Electrosage, except there are only two pads connected by wires to a control unit. Like the other two devices, it is shown being applied to various locations on the body. *Id.* The commercial spot contained images of models with the Accusage attached to various body parts or areas including, but not limited to, the abdomen, waist, back, shoulders, arm and thigh. The other two devices, Rejuvenique and Dermal Tone are intended to be applied to the face only. Declaration of Kevin Towers with attached web pages.<sup>16</sup> By no stretch of the imagination can these devices be categorized as ab belts, and therefore their existence should be given no weight.

**2. Respondents Have Not Offered Proof that the Slendertone Flex Was Advertised at the Relevant Time**

Respondents have not produced any evidence that the Slendertone Flex was advertised at the relevant time. The video tape they provided for the Slendertone commercial is dated November 2003, nearly 18 months after the Ab Force campaign concluded. RX-79. Moreover, it is unlikely that Respondents will be able to provide any such evidence. If necessary, Complaint Counsel will offer testimony showing that infomercials for the product first aired on cable on November 4, 2002 on nine occasions, and two minute spots for the product ran nine times on cable starting May 9, 2003, well after the Ab Force advertising campaign ended. Accordingly, evidence as to the Slendertone Flex is not relevant and should be given no weight.

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<sup>16</sup> Although Respondents referred to ads for these products in their Memorandum in Support of Respondents' Motion *In Limine* to Exclude the Testimony and Report of Michael B. Mazis, Ph.D, they did not provide copies of commercials for these devices, nor did they list such ads on their Trial Exhibit List.

**B. Rankings and Other Data in Greensheets Are Material and Reliable**

The *JW Greensheet*, published by the Jordan Whitney Monitoring Service, tabulates and compiles market data for the direct response television industry, listing, among other information, the “Top Fifty Infomercials” based on “confidential media budgets and Jordan Whitney’s monitoring of national cable and selected broadcast markets.” Khubani dep. 18-19, 30-31. As discussed above, Complaint Counsel intend to introduce copies of the *JW Greensheet* (CX 72-95) in evidence at the trial of this matter. In Respondents’ Objections to Complaint Counsel’s Final Proposed Witness List and Exhibit List, Respondents objected to CX 72-95 as hearsay. In his deposition, however, Mr. Khubani indicated that among other sources, he consults the *JW Greensheet* on a weekly basis to “look at the top sellers on the half-hour infomercials and also the spots.” Khubani dep.19. In addition, *Response Magazine*, a trade journal for the electronic direct marketing industry, publishes Jordan Whitney’s Program Rankings for the top ten infomercials and top ten spots monthly. Kevin Towers Declaration (attached hereto). Thus, the *JW Greensheets*, including the rankings of infomercials published therein, are market reports or commercial publications within the meaning of exception 17 to Rule 803 of the Federal Rules of Evidence. Rule 803(17) provides for the following exception to the hearsay rule:

**Market reports, commercial publications.** market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by person in particular occupations.

Moreover, even if the *JW Greensheets* are determined not to be market reports or commercial publications within the meaning of Rule 803(17) of the Federal Rules of Evidence, they are admissible in this proceeding because the data they provide is relevant, material, and reliable, as required by Rule 3.43 of the Commission Rules of Practice. Courts and the

Commission itself have held that, pursuant to this rule, hearsay evidence may be admitted provided it meets this standard. *Gibson v. FTC*, 682 F.2d 554, 556 (5<sup>th</sup> Cir. 1982); *In re Schering-Plough Corp.*, 2003 FTC LEXIS 187, \*92 n.76. The *JW Greensheet*, including its ratings of the top infomercials and top spots, is considered reliable and is relied on by the members of the electronic direct marketing industry. Moreover, Complaint Counsel intends to point to the exact rankings for certain commercials over a period of time. These are reliable and material, especially when viewed over a period of time. The ranking for one week may be less reliable, but the longer a spot receives a certain ranking, the more reliable the ranking.

**C. A Strict Application of the *Daubert* Factors Is Not Appropriate in this Case and Is Inconsistent with Federal Trade Commission Jurisprudence**

On the basis of their prior motions, Complaint Counsel anticipate that Respondents will attempt to hold Dr. Mazis's report and the consumer survey he supervised to the standard for so called "hard science" gatekeeper test that was first propounded in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993). *Daubert* and its progeny, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 at 150 (1999), hold that a federal court must maintain a gatekeeper role when dealing with expert testimony, setting forth five factors for the court to weigh.

The Commission has never expressly adopted *Daubert* in its jurisprudence.<sup>17</sup> In a post-*Daubert* decision, 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 Foods Corp.*, 118 F.T.C. 746 at 799

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<sup>17</sup> See, e.g., the Commission's post-*Daubert* 1999 opinion in *Novartis*, whereby it assessed the quality and reliability of experts introduced by both parties following its long-standing jurisprudence.

(1994). Moreover, while *Daubert* dealt with “pure” or “hard” science, *Kumho* provides that for fields of soft science, the gatekeeper role is the same, but the *Daubert* factors are to be applied on a case-by-case basis allowing the court discretion in its choice of factors, depending on the issue, the expertise in question and the subject of the expert testimony.<sup>18</sup> *Kumho* at 251; see Margaret A. Berger, *The Supreme Court’s Trilogy on the Admissibility of Expert Testimony*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2d ed., 2000) (excerpt at Attachment 2); see also *Anthony Tyus v. Urban Search Management*, 102 F.2d.256 (7<sup>th</sup> Cir. 1996), *cert. denied* 520 U.S.1251 (1997) (Error for court to exclude a social sciences expert testimony on the results of a focus group); *Betterbox Communications LTD v. BB Technologies, Inc.* 300 F. 2d 325 at 329-30 (3<sup>rd</sup> Cir. 2002) (Refused to rule that lower court’s admitting expert opinion testimony on likelihood of confusion in trademark infringement case based on his personal knowledge or experience was abuse of discretion). Otherwise, a rigid *Daubert* analysis would preclude all experts except those in pure sciences such as chemistry, physics, and biology. Such a rigid analysis is expressly contrary to the Commission’s jurisprudence that it will consider the testimony of “expert witnesses . . . as to how an advertisement might reasonably be interpreted.” *Thompson Medical*, 104 F.T.C. at 790; see also *Kraft*, 114 F.T.C. at 122.

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<sup>18</sup> For example, in *Kumho*, the Court noted

[*Daubert*] made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist.

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*Kumho*, 526 U.S at 151.

**V. RESPONDENTS DISSEMINATED FALSE AND UNSUBSTANTIATED CLAIMS, VIOLATING SECTIONS 5 AND 12 OF THE FTC ACT**

Respondents represented that the Ab Force will cause loss of weight, inches, or fat, cause well-defined abdominal muscles, and is an alternative to regular exercise. Because these are claims about the purpose or central characteristics of the product, they are presumed to be material. *Deception Statement*, 103 F.T.C. at 182. These claims were likely to affect a consumer's decision whether to purchase the Ab Force. If unsubstantiated or false, these claims would likely mislead reasonable consumers considering such a purchase.

**A. Respondents' Advertising Violates Sections 5 and 12**

**1. The Ads Visually and Orally Imply that Ab Force Causes Loss of Inches, Fat and Weight, Causes Well-defined Abdominal Muscles, and Is an Effective Alternative to Regular Exercise**

As a review of the ads themselves demonstrate, claims about inch loss and well-developed abs are communicated by elements within the four corners of the Ab Force ads, *e.g.*, pictures of trim, well-developed models wearing and using the belt and the name of the product itself, "Ab Force." Moreover, several ads expressly mention the "latest fitness craze" or otherwise mentioned or depicted exercise.

Moreover, the evolution of the ads demonstrates the Respondents' intent to promote the device to cause inch, weight or fat loss, develop well-sculpted abs, and be an effective alternative to exercise. Telebrands routinely markets products similar in function as to those already being promoted successfully on TV. Respondent Khubani decided to "cash in" on the ab belt market after noticing a mention of AbTronics in industry market reports and after determining that ab belts, including AbTronic, AB Energizer, and Fast Abs, were "one of the hottest categories to hit the market." In addition, the radio ad specifically stated "get ... into great shape fast - without

exercise.” And one of the TV spots opened with a man doing crunches. “While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made.” *Novartis Corp.*, 127 F.T.C. 580, 683 (1999), *aff’d.*, 223 F.3d 783 (D.C. Cir. 2000).

## **2. The Ads Prompt Consumers to Recall Core Efficacy Claims Made by Other Ab Belt Marketers**

The Complaint in this matter alleges that Respondents represented, either expressly or by implication, that Ab Force could produce the same results touted in deceptive infomercials for AbTronic, AB Energizer, and Fast Abs. As a review of the ads for those products shows, the core messages of those infomercials were that users could achieve weight loss, fat loss, and inch loss, get well-developed abs, and obtain results that were equivalent to volitional exercise. The Respondents’ use of visual images and graphic styles nearly identical to those used in the infomercials for the other three ab belts combined with verbal references to “those fantastic electronic ab belt infomercials on TV” were meant to and did compel consumers familiar with infomercials for the other three ab belts to recall those core efficacy claims and attribute them to the Ab Force device.

As discussed above, Dr. Mazis will testify that references within the Ab Force ads to infomercials for other ab belts can create consumer perceptions that the Ab Force can cause results claimed in those infomercials for the other belts, *e.g.*, loss of weight and inches, and well-developed abs without the need for exercise. Applying the well-developed categorization theory, Dr. Mazis will point out that consumers who have seen a previous ab belt commercials would view a new ad with the perspective of the previous ad, especially if the images are similar. Dr. Mazis will further testify that if the number of airings of the previous commercial was



substantial, the likelihood of such an indirect effect on consumers is greater. Since these three ab belt infomercials were among the most frequently aired for much of Ab Force's life, it is clear that many consumers in fact did think of the Ab Force belt as the same category of product as the other three belts. And more to the point, it strains credulity for Respondents to argue that consumers did not because it is exactly that "hot category" the Respondents wished to cash in on.

**3. The Evidence Is Uncontroverted That the Claims Challenged in the Complaint are False and Unsubstantiated**

Respondents admit that they did not possess and rely on, at the time, adequate substantiation for the challenged claims. Nor will they introduce at trial a scientific expert.

**B. All Respondents Are Liable for Section 5 Violations**

The common ownership and control of the two corporate respondents by the individual respondent is also undisputed. Respondent Ajit Khubani owns and controls both corporate respondents, each of which played a role in the process of making and/or marketing the Ab Force. Mr. Khubani was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign and was the primary person who created and developed the promotional materials. He was primarily responsible for the creation and development of the Ab Force advertising. Mr. Khubani set the pricing strategy for the Ab Force, directed the placement and dissemination of the advertising, and decided when the Ab Force would no longer be marketed or sold. Mr. Khubani developed the idea for marketing an ab belt, chose the name Ab Force, contacted the factory that made the Ab Force, and discussed specifications for the Ab Force with the factory.

Because of the common ownership and control of these companies, and their inter-related functions with respect to the marketing of the Ab Force, each should be considered part of a

cooperative effort. Relief is thus necessary and proper against both corporate respondents and the individual respondent.

## **VI. THE PROPOSED ORDER**

### **A. The Injunctive Provisions of the Notice Order Are Appropriate**

Part I of the proposed order prohibits proposed respondents from representing, expressly or by implication that the Ab Force EMS device or any substantially similar device causes or promotes: (1) loss of weight, inches, or fat; (2) well-defined abdominal muscles, including through the use of terms such as “rock hard abs,” “washboard abs,” “chiseled abs,” “cut abs,” “well-developed abs,” etc.; (3) use of any such device for any period of time is an effective alternative to regular exercise, including but not limited to sit-ups, crunches, or any substantially similar exercises; and (4) any such device makes a material contribution to any system, program, or plan that produces the results referenced above. Part II covers the same claims and prohibits proposed respondents from making any such *misrepresentations*, expressly or by implication, about any EMS device. Part III prohibits proposed respondents from making any representation, expressly or by implication, about weight, inch, or fat loss, muscle definition, or the health benefits, safety, or efficacy of Ab Force or any EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program, unless, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. Part IV provides an FDA safe harbor, which allows proposed respondents to make any representation for a device that is specifically permitted in labeling for that device by FDA.

These remedial provisions are essentially the same as those sought in other Commission actions against the marketers of EMS ab belts. These requirements are appropriate in terms of

claim and product coverage given both the serious and deliberate nature of respondents' violations. *See, e.g., Stouffer Foods Corp.*, slip op. at 17-20; *Thompson Medical*, 104 F.T.C. at 833. The offense is serious because the deceptive claim was disseminated in numerous ads, in multiple media. Respondents paid over \$4 million to disseminate the challenged ads. The duration, number of executions, and multi-million dollar cost of the campaign all constitute significant evidence of the seriousness of the violations. *See Thompson Medical*, 104 F.T.C. at 834-36. The "fencing-in" relief in Part III, which extends the prohibitions of the order beyond EMS devices to "any food, drug, dietary supplement, device, or any other product, service, or program," is appropriate given the seriousness of the violations, the ease with which the unlawful conduct can be transferred to other products, and the fact that Respondent Khubani, who controls the other two Respondents, has a long history of violations of the FTC Act. *See Thompson Medical Co.*, 104 F.T.C. at 833

The Commission has taken four previous actions against Khubani and his corporations. In 1990 and in 1996, the Commission obtained consent judgments enjoining Khubani and corporations he controlled from violating the Mail or Telephone Order Merchandise Rule ("Mail Order Rule") and requiring them to pay penalties of \$35,000 (1990) and \$95,000 (1996) for alleged violations.<sup>19</sup> In 1996, the Commission also obtained an administrative order prohibiting Khubani and Telebrands from violating Section 5 of the FTC Act in connection with the marketing of antennas and hearing aids.<sup>20</sup> Finally, in 1999, the Commission modified the existing 1996 consent judgment with Khubani and Telebrands and obtained penalties of

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<sup>19</sup> *United States v. Azad Int'l, Inc.*, No. 90 CIV 2412-(PLN) (S.D.N.Y. Apr. 12, 1990); *United States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 18, 1996).

<sup>20</sup> *In re Telebrands Corp.*, 122 F.T.C. 512 (1996).

\$800,000 for alleged violations of the Mail Order Rule.<sup>21</sup>

## **B. The Proposed Bond**

Part V requires Ajit Khubani to secure a \$1,000,000 performance bond before engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device, as that term is defined in Section 15(d) of the FTC Act, 15 U.S.C. § 52. This provision is included because Khubani has repeatedly violated the FTC Act, and previously marketed a device (a hearing enhancement aid) with deceptive claims.<sup>22</sup>

The Commission has the authority to impose a bond as fencing-in relief if presented with facts showing that such relief is necessary to prevent future violations. The Commission has broad discretion to fashion remedies to “close all roads to the prohibited goal, so that [the Commission’s] order may not be by-passed with impunity.” *FTC v. Rubberoid Co.*, 343 U.S. 470, 473 (1957). Requiring Respondent Khubani to post a bond prior to marketing a food, drug or device as defined by the FTC Act is reasonably related to the conduct and appropriate to prevent future violations. *See, e.g., United States v. Vlahos*, 884 F.Supp. 261, 266 (N.D. Ill. 1995), *aff’d*, 95 F.3d 1154 (7<sup>th</sup> Cir. 1 996); *FTC v. Slim America*, 77 F. Supp. at 1276-77.<sup>23</sup> Khubani’s history of violating the FTC Act and of marketing medical devices with false claims

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<sup>21</sup> Modified Consent Decree, *United States v. Telebrands Corp.*, Civ. No. 96-827-R (W.D. Va. Sept. 1, 1999).

<sup>22</sup> *See* 15 U.S.C. § 55(d)(2), (d)(3) (defining “device” to include any implement “intended for use . . . in the cure [or] mitigation of disease . . . or intended to affect the structure or any function . . . of the body of man”).

<sup>23</sup> Although the Commission has not reviewed the inclusion of a bond in a litigated Part III matter, it has accepted orders with a bond in several part III matters. *See, e.g., William E. Shell, MD*, docket no. C-3749 (June 16, 1997); *Original Marketing, Inc.*, C-3596 (August 9, 1995); *Taleigh Corp.*, C-3587 (June 16, 1995).

suggests that a powerful deterrent is necessary to ensure that similarly deceptive campaigns do not occur in the future. The proposed bond also ensures that funds will be available if Khubani fails to comply with the FTC Act in marketing devices.

**VI. CONCLUSION**

The evidence in the hearing in this matter will demonstrate 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 violations of law.

Respectfully submitted,

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Dated: April 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2004, I caused a true copy of Complaint Counsel's Pretrial Brief to be served by electronic mail and by hand delivery upon:

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I also hereby certify that on this 26th day of April 2004, I caused two true copies of Complaint Counsel's Pretrial Brief to be served by hand upon the Honorable Stephen J. McGuire, Chief Administrative Law Judge and the original and one copy upon Donald S. Clark, Secretary of the Commission. I also certify that I caused a true copy of Complaint Counsel's Pretrial Brief to be served by electronic mail upon Donald S. Clark, Secretary of the Commission.

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Constance M. Vecellio  
Complaint Counsel