

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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.)

DOCKET NO. 9313

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COMPLAINT COUNSEL'S AMENDED POST-TRIAL BRIEF

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I. INTRODUCTION

Respondents, through a false and deceptive multi-million dollar national advertising campaign, relentlessly compared their abdominal exercise belt, the Ab Force, to “those fantastic electronic ab belt infomercials on TV.” The record contains ample evidence that, through these verbal references and through images and graphics nearly identical to three other extensively-aired ab belt infomercials, Respondents asked consumers to recall the core claims about what ab belts do and to believe the Ab Force was just like the ab belts in “those fantastic electronic ab belt infomercials on TV” but cheaper. In addition, Respondents represented that the Ab Force did those basic “ab belt” things - caused fat, inch, or weight loss; built well-defined abdominal muscles; and was equivalent to traditional exercise - 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’ claims are false and unsubstantiated, and their deceptive advertising campaign, which took in over \$19 million, deceived thousands of United States consumers about the benefits of the Ab Force.

II. RESPONDENTS ARE A COMMON ENTERPRISE AND RESPONDENT KHUBANI DIRECTLY PARTICIPATED IN AND HAD AUTHORITY TO CONTROL THE DECEPTIVE AB FORCE CAMPAIGN

Respondent Telebrands Corp. (“Telebrands”), as a member of the “direct response” industry, sells consumer products directly to consumers through telephone numbers and addresses contained in the advertising for the product. (Khubani, Tr. 245-46, 431-32; JX 1, ¶ 2). Among the different strategies Telebrands uses for developing products is to examine what products its competition is offering on television and develop its own marketing campaign in the same category as the competitor’s product. Telebrands sometimes markets a product that is

similar in function to a popular product sold on TV but at a lower price. (Khubani, Tr. 248-49).

Respondent Ajit Khubani (“Mr. Khubani” or “Khubani”) is the president, chief executive officer, chairman of the board, and sole owner of Telebrands. (JX 1, ¶ 7). Individually or in concert with his officers and employees, Mr. Khubani formulates, directs or controls the policies, acts or practices of Telebrands. (JX1, ¶ 9). In early 2001, Respondent Khubani began to consider marketing an electronic ab belt for sale to consumers after noticing that an ab belt product, the AbTronic, was listed in the *JW Greensheet*, a publication that monitors the frequency of TV infomercial airings for the direct response industry. (JX 1, ¶ 16; Khubani, Tr. 248-49, CX 62; CX 72 through CX 95). Mr. Khubani then decided to market the Ab Force when he saw that ab belts were “one of the hottest categories to hit the market.” (Khubani, Tr. 255; CX 61).

Mr. Khubani was the primary person who created and developed the promotional materials for the Ab Force, and he was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign. (JX 1, ¶ 11). He wrote the scripts and text for the Ab Force ads (JX 1, ¶ 11; Khubani, Tr. 489), each of which compared the Ab Force to “those fantastic electronic ab belt infomercials on TV” or to “ab belts sold by other companies on infomercials.” (RX 50). (The AbTronic, AB Energizer, and Fast Abs were three of the ab belts he was referring to in the Ab Force ads. (Khubani, Tr. 273-274). Having decided to market an ab belt, Mr. Khubani made significant inroads in that market. Gary Hewitt, who was marketing the AB Energizer, believed that the Ab Force significantly undercut the market for the AB Energizer. (Khubani, Tr. 521).

Respondent TV Savings, LLC (“TV Savings”), a limited liability company, was set up to handle the Ab Force campaign. (JX 1, ¶ 5; Khubani, Tr. 282). TV Savings shared offices with

Telebrands (Khubani, Tr. 282), and the two companies 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. (JX 1, ¶14). These companies were controlled and operated by the same individual, Ajit Khubani. Respondent Khubani is the sole member of TV Savings, and he formulates, directs, or controls its policies, acts, or practices. (JX 1, ¶ 7-9; Khubani, Tr. 248). As the Program Manager appointed by Telebrands and as TV Savings' representative under the Services Agreement, Mr. Khubani represented both entities with regard to the responsibilities and duties of each under the Service Agreement with respect to the development, marketing, and sale of the Ab Force belts. (JX 1, ¶ 13).

III. THE MARKETING AND SALE OF THE AB FORCE

A. AB FORCE MARKETING STRATEGY

The Ab Force marketing strategy was to purposely compare itself to the electronic ab belts then being marketed on TV, such as AbTronic, AB Energizer, and Fast Abs, using what Respondent Khubani called a “compare and save” technique. (Khubani, Tr. 490). 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). The comparison in the Ab Force ads was with electronic ab belts, and specifically with ab belts that sell for up to \$120, which was the AbTronic. (Khubani, Tr. 276, 539). Respondent Khubani wrote the script for the Ab Force radio ads, print ad, and TV ads and the text for the Internet and email advertisements. (JX 1, ¶ 11; Khubani, Tr. 489). In each case, he acknowledged he was attempting to create a “compare and save” advertisement and to establish a point of reference. (Khubani, Tr. 490). 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). The AbTronic, the Fast Abs and the AB Energizer infomercials were among the ab belt infomercials that Mr. Khubani was referring to. (Khubani, Tr. 273-274).

B. AB FORCE ADVERTISING

Respondents began disseminating radio and print ads for the Ab Force in December 2001. (JX 1, ¶ 21). Respondents created and broadcast two versions of a 60-second radio advertisement. (JX 1, ¶ 32). The first Ab Force radio ad disseminated by Respondents contained the following statements:

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! They're the latest fitness craze to sweep the country. But, they're expensive, selling for up to 120 dollars each! But what if you could get a high quality electronic ab belt for just 10 dollars? That's right, just 10 dollars! 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. . . . Don't miss out. Get the amazing electronic Ab [F]orce belt—the latest fitness craze for just \$10.”

(CX 1-H).

Mr. Khubani acknowledges that he was thinking of the AbTronic, Fast Abs and AB Energizer ab belts, among others, when he wrote the statement in the radio ad, “They're amazing...promising to get our abs into great shape fast -- without exercise!” (Khubani, Tr. 273). Although the second radio ad omitted the reference to “promising to get our abs into great shape fast—without exercise” and the “latest fitness craze,” it continued the emphasis on those fantastic and amazing “electronic ab belt infomercials on TV,” which were described as the “latest craze.” (RX 49). The print ad continued these themes, and continued the emphasis on “compare and save,” asking “why would you want to buy a more expensive ab belt from the competition when

the Abforce is as low as just \$10?” (CX 1-G).

Starting in January 2002, and continuing until April 7, 2002, Respondents also marketed the Ab Force on television. (JX 1, ¶ 22). Respondents aired four television commercials for the Ab Force product: (1) a 60-second ad that was shot on December 22, 2001 and given the production code AB-B-60 (JX 2; Corresponds to Exhibit A of the Complaint (CX 1-A), transcript of which is Exhibit B of the Complaint (CX 1-B)); (2) a 120-second ad that was shot on December 22, 2001 and given production code AB-B-120 (JX 3; Corresponds to Exhibit C of the Complaint (CX 1-C), transcript of which is Exhibit D of the Complaint (CX 1-D)); (3) a 60-second ad that was shot in Mid-January 2002 and given the production code AB-E-60. (JX 4; Corresponds to Exhibit E of the Complaint (CX 1-E), transcript of which is Exhibit F of the Complaint CX 1-F)); and (4) a 120-second ad that was shot in Mid-January 2002 and given the production code AB-E-120. (JX 1, ¶ 22). All the Ab Force television ads contained images of well-muscled, bare-chested men and lean, shapely women, some of whom were wearing Ab Force ab belts and experiencing abdominal muscle contractions. (JX 2 through JX 5).

The first 60-second television commercial for the Ab Force (production code AB-B-60) contained the following statements:

I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country and everybody wants one. The problem is, they're expensive, selling for up to \$120 each. Well, that's why we developed the Ab Force that you can buy right now for just \$10. . . . The Ab Force is just as powerful and effective as those expensive ab belts sold by others - - - - designed to send just the right amount of electronic stimulation to your abdominal area! . . .Don't miss out on this opportunity to join the latest fitness craze.”

(JX 2; CX 1-B at 4-5, Tr. 51-52).

It also contained the following images, among others: (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. (JX 2; Answer, ¶ 10). The first 120- second TV ad also contained these images, as well as close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. (JX 3; Answer, ¶ 10). It also continued the theme of comparing the Ab Force to the “latest fitness craze,” those “fantastic electronic ab belt infomercials on TV,” and noted that the Ab Force was “just as powerful and effective as those ab belts sold by other companies on infomercials.” (JX 3; CX 1-D at 4-5; Tr. 54-56).

The second 60-second television commercial for the Ab Force (AB-E-60) also continued the theme, as did the second 120-second television commercial for the Ab Force (AB-E-120). They compared the Ab Force to those fantastic and amazing “electronic ab belt infomercials on TV,” noting that it used “the same powerful technology as those ab belts sold by other companies on infomercials” but was \$20 instead of \$120. (JX 4, JX 5; CX 1-F at 3-5; Tr. 55-59). These ads contained many depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contraction, and two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles. (JX 4, JX 5). In addition, the second 120-second ad, like the first 120-second ad, contained an image of a well-muscled, bare-chested man performing a crunch on an exercise bench. (JX 5).

Respondents also disseminated internet advertising and e-mail advertising. (JX 1, ¶ 33). These ads continued the theme of comparing the Ab Force to ab belts sold by others through infomercials, and implying that it was the same but cheaper. Internet advertisements contained the following statements:

I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re

amazing! They're the latest craze to sweep the country and everyone wants one. The thing is they're expensive selling for up to \$120 each. That's why we developed the AbForce that you can buy right now for just \$20.

(RX 52).

One Ab Force email advertisement contained the following statements:

Don't be Fooled by the Price! The AbForce uses the same powerful technology as those Ab Belts sold by other companies on infomercials. The AbForce is truly a high quality product.

(RX 50).

A second Ab Force email advertisement contained the following statements:

They're Amazing! I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing! They're the latest craze to sweep the country and everyone wants one. The thing is they're expensive selling for up to \$120 each. That's why we developed the AbForce that you can buy right now for just \$20." Adjacent to these statements is an image of a well-muscled man wearing an Ab Force belt.

(RX 51).

C. AB FORCE SALES

Gross sales for the Ab Force, including accessories such as batteries and gels, exceeded \$19 million. (JX 1, ¶ 36). Respondents sold a total of 747,812 units of the Ab Force, and consumers placed a total of 330,510 orders for the Ab Force. (JX 1, ¶ 25-26). Each of the ads disseminated by Respondents for the Ab Force generated orders from consumers. (JX 1, ¶ 25-26).

IV. RESPONDENTS INTENDED THE AB FORCE ADS TO EVOKE THE CORE CLAIMS MADE BY THE ABTRONIC, AB ENERGIZER, AND FAST ABS AB BELTS

A. RESPONDENTS COMPARED THE AB FORCE TO OTHER AB BELTS SOLD BY MEANS OF INFOMERCIALS AND TO THE FITNESS CRAZE THAT THEY REPRESENTED

As noted above, Respondents used a “compare and save” strategy in marketing the Ab Force. All of the Ab Force ads compared the Ab Force to other ab belts sold by means of infomercials and to the “craze” that these ab belts represented. The AbTronic, the Fast Abs and the AB Energizer infomercials were among the ab belt infomercials Mr. Khubani was referring to when he wrote the ads. (Khubani, Tr. 273-274). Mr. Khubani acknowledges that he was thinking of the AbTronic, Fast Abs and AB Energizer ab belts, among others, when he wrote the statement in the radio ad, “They're amazing...promising to get our abs into great shape fast -- without exercise!” (Khubani, Tr. 273). He also acknowledges that the AbTronic, Fast Abs and AB Energizer ab belts were among the devices he was thinking of when he wrote, “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” for the Ab Force radio ad. (Khubani Tr. 273-274). When a point of reference is used in “compare and save” advertising, the advertiser tries to give a brief description of that reference, and these points were a “brief description” of the “fantastic electronic ab belt infomercials on TV.” (Khubani, Tr. 273, 487 and 538).

Mr. Khubani also acknowledged that he intended the following statements, which appear in the initial the Ab Force 60-second TV ad (production code AB-B-60), to establish a point of reference:

I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country, and everybody wants one. The problem is they're expensive, selling for up to \$120 each.

(JX 2; CX 1-B; Khubani, Tr. 491).

Although some minor changes were made in the wording of the second versions of the

Ab Force 60-second and 120-second television commercials (AB-E-60 and AB-E-120) as compared to the original Ab Force TV ads, the message was still the same, “compare and save.” Changing the words “just as powerful and effective” to “uses the same powerful technology as” did not reflect any change in Mr. Khubani’s intent as to the meaning of the ads. (Khubani, Tr. 496-97). Finally, although all of the scripts and text Mr. Khubani wrote compare the Ab Force to ab belts sold by others by means of infomercials (JX 2 through JX 5; CX 1-G; CX 1-H; RX 49; RX 50; RX 51; RX 52), none of his scripts or text contain the word “massage” or the term “electrical muscle stimulation” or “EMS.” (JX 2 through JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

B. RESPONDENTS INTENDED THE AB FORCE ADS TO EVOKE THE CORE CLAIMS MADE BY THE ABTRONIC, AB ENERGIZER, AND FAST ABS AB BELTS THROUGH THE USE OF IMAGES

The evidence on the record proves that Respondents intended their ads to evoke the core claims of the AbTronic, AB Energizer, and Fast Abs advertising through the use of images added in the production process, led by Colette Liantonio, president of Concepts TV Productions, Inc. Ms. Liantonio participated in the creation or development of promotional materials for the Ab Force by having principal responsibility for producing visual and other elements for television advertisements and for editing television advertisements. She consulted with Mr. Khubani regarding some of the creative elements for the production of television advertising. (JX 1, ¶ 37-38; JX6; CX 107 (Liantonio, Dep. at 8)). Ms. Liantonio and her employees at Concepts TV made handwritten notes in the course of creating television commercials for Ab Force, and these notes indicate that Ab Force television models were required to wear sportswear and/or have attractive or well-defined abdominal muscles. (CX 4; CX 5; CX 6). For example, a Concepts TV Talent Confirmation Sheet for Ab Force states: “For wardrobe please let us know if need us

to get anything. Seeing your abs is important.” And on a Production Job Card for Ab Force, on the line that says, “props,” to the right, the Card reads, “girl with great abs.” Another Talent Confirmation Sheet for Ab Force states: “Please have Abs looking their best!” For “Wardrobe,” this Talent Confirmation Sheet calls for “[a] selection of fitness outfits, a sports bra and bike shorts type look.” (CX 4; CX 5; CX 6; JX 6; CX 107 (Liantonio, Dep. at 65)).

During production, Mr. Khubani edited certain visual aspects of the background of the Ab Force TV commercial designated as AB-B-120. Nevertheless, he allowed clips of two bikini-clad female models who are displaying slim, trim torsos (CX 7 and CX 8) and an image of a man with well-developed abs exercising on an exercise bench (CX 9) to remain in the background of the Ab Force TV commercial designated as AB-B-120. None of these models is wearing the Ab Force. (Khubani, Tr. 543-544). Collette Liantonio testified that Ab Force television commercials contained these stock images of bikini-clad models because “[i]t’s a beautiful body,” conveying “[b]eauty, the ideal.” (JX 6; CX 107 (Liantonio, Dep. at 69)). When asked whether images of bikini-clad models appeared in Ab Force commercials because this was the image that the viewer was supposed to aspire to, Ms. Liantonio responded, “yes.” (JX 6; CX 107 (Liantonio, Dep. at 70)). When asked why this image of a male model with well-defined abdominal muscles appeared in Ab Force commercials, Ms. Liantonio responded, “the same reason that the bikini is in there, I guess it’s perfect abs.” When asked what perfect abs have to do with Ab Force, she responded: “It’s the dream, it’s the beauty, it’s what we all aspire to.” (JX 6; CX 107 (Liantonio, Dep. at 72)).

Mr. Khubani used models in the Ab Force ads with slim physiques showing bare parts of their bodies, such as their abs partly because he felt “this was a product that forced the muscles to involuntarily contract, and the only way you could see what this product was doing and

demonstrate what this product does was to show people that were slim enough to show that happening.” (Khubani Tr. 518). He acknowledged, however, that the bikini-clad models in the background and the man with well-developed abs exercising on an exercise bench were not wearing the Ab Force. (Khubani, Tr. 543-544).

By comparison, Collette Liantonio produced a television commercial for a product called the Homedics Back Pleaser. In that television commercial, models who were depicted using the product indicated, through their gestures or utterances, that they were being soothed or felt more relaxed. They moaned or their faces showed relief. (JX 6; CX 107 (Liantonio, Dep. at 16)). In the Ab Force television commercials, however, the models who were depicted using the Ab Force did not indicate, through such gestures or utterances, that they were being soothed or felt more relaxed. (JX 2, JX 3, JX 4, JX 5). Ms. Liantonio acknowledged that, although an Ab Force television commercial created in January 2002 contained an on-screen statement referring to massage, that statement appeared on the screen for approximately a second and a half and the spokesperson in that commercial did not state that Ab Force massages or soothes. (JX5; JX6; CX 107 (Liantonio, Dep. at 79-80)). She stated that Mr. Khubani never told her that the Ab Force was intended to be a massager. (JX6; CX 107 (Liantonio, Dep. at 76)). And, in another visual comparison, Respondents’ television advertisement for the Ab Pulse visually cautioned viewers not to compare the Ab Pulse to “infomercial ab belts” by means of a graphic of a red cross superimposed on an ab belt displayed alongside the on-screen legend, “infomercial ab belts.” (Tr. 219; CX2).

C. RESPONDENTS HAD EVIDENCE THAT CONSUMERS VIEWED THE AB FORCE AS AN ABDOMINAL EXERCISE MACHINE

In addition, Respondents received information from their telemarketer early in the Ab

Force campaign that consumers thought the Ab Force was another ab exercise machine. CCT Marketing provides telemarketing services to direct response television advertisers and other clients. CCT Marketing's employees secure "800" numbers for clients, receive phone calls placed to those numbers, and employ a script to sell or take telephone orders from consumers. (Golden, Tr. 187-89). Mark Golden is Operations Manager for CCT Marketing. His duties included activating new clients, scripting for direct response television advertisers, and tracking conversion rates (the percentage of telephone calls that result in telephone orders). (Golden, Tr. 186, 188 and 190).

CCT Marketing provided telemarketing services for three electronic ab belts—AB Energizer, Ab Force, and Ab Pulse. (Golden, Tr. 191). The first ab belt that CCT Marketing handled was the AB Energizer. AB Energizer was offered for sale in mid-2001. Ab Force was offered for sale later, in early 2002. These two products were marketed at the same time. (Golden, Tr. 191, 207 and 208).

CCT Marketing has a procedure for responding to consumer questions; when consumers pose questions to which CCT Marketing employees do not know the answer, they gather that information and "escalate it" so that the question may be answered by CCT Marketing's client. (Golden, Tr. 194). CCT Marketing's procedure is as follows: The employee makes a handwritten note and presents that note to their supervisor at the end of their shift. The handwritten note is not forwarded to other employees, instead, it is incorporated in an email to the account executive directly responsible for the client's accounts. That email is then either forwarded directly to the client or to CCT Marketing management in New Jersey for delivery to the client. (Golden, Tr. 203).

CCT Marketing appears to have followed this procedure in the course of providing

telemarketing services for the Ab Force: Floor Supervisor Riza Rivera forwarded a series of “questions customers usually ask” about the Ab Force to Account Executive Jiezl Pineda. Jiezl Pineda was the account executive in charge of all of CCT Marketing’s Telebrands accounts. Ms. Pineda then forwarded this email to Operations Manager Mark Golden who, on January 7, 2002, forwarded this email to Telebrands, care of his contact Shail Prasad, an independent contractor employed by Telebrands who had an email address at telebrands.com. (Golden, Tr. 207-08, 211; CX43, see also JX 1, ¶ 40). According to this email, among the “questions customers usually ask” about the Ab Force was, “How does it differ from other ab electronic exercising machines?” (CX 43).

V. LOSS OF WEIGHT, INCHES OF FAT; WELL-DEFINED ABDOMINAL MUSCLES; AND EQUIVALENCE TO REGULAR EXERCISE WERE THE CORE CLAIMS IN ADVERTISEMENTS FOR THE AB ENERGIZER, ABTRONIC AND FAST ABS BELTS

The advertising for the AbTronic, AB Energizer, and Fast Abs electronic 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 the need for strenuous exercise. (JX 7 through JX 10; Mazis Tr. 47-48). The three ab belts, which were advertised heavily by television infomercials in the United States prior to and during the time period when the Ab Force commercials appeared (JX 1, ¶ 36), used electronic muscle stimulation (“EMS”) to cause stimulation of the muscles, and are designed so that some amount of electricity goes into the body. (JX 2 through JX 5; JX 7 through JX 9; Mazis TR. 60). They are all substantially similar in appearance to the Ab Force, and are comprised of components substantially similar to those used by the Ab Force. (Khubani Tr. 264; JX 2 through JX 5; JX 7; JX 9; Mazis Tr. 60).

The television advertising for the AbTronic, AB Energizer, and Fast Abs ab belts contained extensive footage of well-sculpted male and female models 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, inch, or fat loss; built well-developed abs; and were an effective substitute for exercise. (JX 7 through JX 10).

A. AB ENERGIZER

The AB Energizer infomercial includes: (1) user testimonials, (2) scientific-looking images that purport to illustrate how the AB Energizer functions, (3) commentary by Dr. Michael Skyhar, an orthopedic surgeon, and (4) male and female models with exceptional abdominal definition dressed in bikinis and tight-fitting workout clothes. (JX 8). The AB Energizer infomercial contains the following statements, among others:

“absolutely incredible for people who want tighter abs and want to lose inches around the midsection” and “with a touch of a button, you can go from flab to rock-hard abs” (JX 8; CX 98 (Exhibit 2) at 22, 29-30, 39, 50, 62);

“The AB Energizer gives you firm, toned abs without even breaking a sweat.” (JX 8; CX 98 (Exhibit 2) at 38);

“[S]o, why not get the six-pack abs you’ve been dreaming about? You can do it sooner than you think with the AB Energizer.” (JX 8; CX 98 (Exhibit 2) at 67);

“[I]t’s safe, fast, and really gets the results you’re after. So, if you don’t want all that pain and hardship while working out in a sweaty gym on those machines, or you can’t afford a gym membership, or you just plain don’t want to stand in those long lines, get the AB Energizer and you’ll be on your way to fitter, tighter abs.” (JX 8; CX 98 (Exhibit 2) at 48).

“So, if you’ve been looking for a great way to get firm, toned abs, waist, hips and thighs, now’s your chance, because the AB Energizer does the thinking and workout for you. You don’t have to sweat, you don’t have to do sit-ups or use any more ab machines on the floor. It’s as easy as putting on a belt and pushing a button.” (JX 8; CX 98 (Exhibit 2) at 49-50).

“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." (JX 8; CX 98 (Exhibit 2) at 62, 63).

"I've lost 40 pounds. I've gone from a waist 37 to a waist 34." (JX 8; CX 98 (Exhibit 2) at 30-31).

The AB Energizer was also advertised by means of 60-second TV spots that contained the following statements:

"The secret is AB Energizer's electronic impulses that stimulate your abs so they contract and relax as if you were doing a sit-up." . . . 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." . . . "I've gone from a waist 37 to a waist 34."... ON SCREEN: "Size 37 to 34 ... "If you don't lose at least two inches off your waist in the first 30 days, return it for a full refund." (CX 98, (Exhibit 4) at 70).

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" and "[y]ou'll develop that six-pack you've always wanted in the easiest way imaginable." (JX 7; CX 96 (Exhibit 2) at 13, 27). The infomercial also included numerous testimonials, stating that consumers who used the ab belt lost several inches on their waist (CX 96 (Exhibit 2) at 19, 32-33), and further stating, "[y]ou'll see how the AbTronic System gives you the results of 600 sit-ups in just 10 minutes without any effort." (CX 96 (Exhibit 2) at 3-4; Mazis Tr. 43).

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." (JX 9; CX 100 (Exhibit B) at

3-4, 22; Mazis Tr. 45).

“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.” (JX 9; CX 100 Exhibit B) at 52; (Exhibit D) at 54).

“Folks everywhere are sitting back and relaxing while they firm up, slim down, and shed inches quickly.” (JX 9; CX 100 (Exhibit B) at 4, 23, 54; (Ex D) at 4, 23-24, 45, 57; Mazis Tr. 45-46).

“You’ll drop four inches in the first 30 days. We guarantee it.” (CX 100 (Exhibit B)).

“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]” (JX 9; CX 100 (Exhibit B) at 11, 52).

VI. ABTRONIC, AB ENERGIZER AND FAST ABS WERE HEAVILY ADVERTISED AND SOLD

As noted, infomercials for the AbTronic, AB Energizer, and Fast Abs ab belts were aired heavily shortly before and during much of the Ab Force campaign. (CX 126; JX 1). Television advertising for the direct response TV industry is monitored by two companies, Jordan Whitney, Inc. (“Jordan Whitney”) and Infomercial Monitoring Service, Inc. (“IMS”). (CX 126; Khubani, Tr. 248-49; JX6; CX 107 (Liantonio, Dep. at 24)). Jordan Whitney publishes the *JW Greensheet*, a market report that compiles industry data and tabulates the top-ranked direct response commercials on a weekly basis. (Khubani, Tr. 248, 525). IMS detects airings of infomercials and spots and ranks them by frequency; it also publishes reports on what advertisements are widely shown. (CX 126; JX6; CX 107 (Liantonio, Dep. at 24)). These rankings and data are relied on in the industry. *Response Magazine*, a publication targeted towards the direct response television industry, reprints Jordan Whitney’s rankings as well as IMS reports. (Khubani, Tr. 245, 249; JX 6, ¶ 1; CX 107 (Liantonio, Dep. at 23-24)).

Although the *JW Greensheet* rankings may not give a perfect snapshot of television advertising, over time they give a picture of the most heavily-advertised infomercials and spots. The *JW Greensheet* indicates 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.” (CX 62, CX 77-95, CX 126). From late November 2001 through mid-February 2002, the *J.W. Greensheets* consistently ranked AbTronic, AB Energizer, and Fast Abs among the top fifteen infomercials appearing on national cable and selected broadcast television markets. For the week ending January 12, 2002, they were numbers 1, 2, and 3. (CX 88).

The frequency of the infomercials for these three ab belts is corroborated by figures provided by IMS. As of February 22, 2002, IMS had detected 2,082 airings of the AbTronic infomercials, 1,693 airings of the AB Energizer infomercials, and 1,272 airings of the Fast Abs infomercials. (CX 126). 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. (CX 126).

Finally, the frequency of the infomercials for these three ab belts is corroborated by information provided by persons associated with companies that marketed or distributed them. These sources indicate that the AB Energizer infomercials or spots ran at various times of the day, locally and nationally, from September 2001 through April 2002, and that the AB Energizer infomercial was aired over 20,000 times during that period. (JX 6, ¶ 13). They also indicate that Fast Abs infomercials or spots ran at various times of the day, locally and nationally, from November 8, 2001 through February 24, 2002. The Fast Abs infomercial was aired 8,227 times

during that period. (JX 6, ¶ 10). The sales information provided by these sources also indicates that these products were widely marketed. A total of 600,000 AbTronic units, 622,131 AB Energizer units, and more than one million Fast Abs units were shipped to direct response customers. (JX 11, ¶ 4, JX 6, ¶ 15, JX 6, ¶ 11). In addition, at least 45,000 AbTronic units and 650,000 Fast Abs units were sold in retail stores. (JX 11, ¶¶ 3 and 5, JX 6, ¶ 11).

In short, in early 2002, infomercials for AbTronic, AB Energizer, and Fast Abs were among the most frequently-aired infomercials on television.

VII. THE ONLY AB BELTS OTHER THAN ABTRONIC, AB ENERGIZER, AND FAST ABS THAT WERE ADVERTISED BY INFOMERCIALS DURING THE AB FORCE CAMPAIGN ALSO MAKE TYPICAL “AB BELT” CLAIMS

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. Most of the devices are not within the universe of products to which Respondents chose to compare the Ab Force - *i.e.*, “those fantastic electronic ab belt infomercials on TV.” Respondents have produced promotional materials for eight EMS devices: (1) IGI’A Electrosage (RX 72); (2) Mini Wireless Massage System (RX 73); (3) Accusage (RX 74); (4) Smart Toner (RX 75); (5) GymFitness (RX 76); (6) ElectroGym (RX 77); (7) Slim Tron (RX 78); and (8) Slendertone Flex (RX 79). Three of the eight EMS device advertisements produced by the Respondents were for massage products - IGI’A Electrosage (RX 72), Mini Wireless Massage System (RX 73), and Accusage - that are not ab belts. (RX72; Towers, 302-03, RX73; Towers, Tr. 299-300, RX74; Towers, Tr. 300). Two of the EMS device advertisements produced by the Respondents - ElectroGym (RX 77) and Slendertone Flex (RX 79) - were not the subject of infomercials. Moreover, there is no evidence that these devices (except for the Electrosage) were heavily advertised, whether by infomercial or otherwise, at the time the Ab Force was advertised.

Only five other ab belt devices are within the ab belt universe, and all 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 advertisements for these other ab belts 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. 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. For example:

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.

(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). And the Electrogym

ab belt offers “a great workout.” (RX 72; Khubani, Tr. 451).

Respondents pointed to one other ab belt in their effort to confuse the issues--- Slendertone Flex. Mr. Khubani testified that he saw the Slendertone Flex ab belt advertised on QVC in Fall, 2001, but there is no extrinsic evidence to corroborate or confirm this statement. (Khubani, Tr. 447; RX 79). Indeed, there is absolutely no evidence that Slendertone Flex was advertised in infomercials before or during the time period in which Ab Force was advertised and sold.

The recorded Slendertone Flex television spot produced by the Respondents bears the date of November 10, 2003. (Khubani, Tr. 447; RX 79). Mr. Khubani stated that the recent Slendertone Flex television spot was “very similar” to the presentation for Slendertone Flex on QVC. (Khubani, Tr. 447; RX 79). The television spot for Slendertone Flex contains a potentially misleading statement suggesting 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 further 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.

VIII. 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. § 52.¹ 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 (9th 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 *Thompson Medical.*, 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).

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*, 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.” 104 F.T.C. at 789 (Emphasis added). When the language of, or depictions in, an ad are clear enough to permit

¹ 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 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. at 120. 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, 798 (citing *Kraft*, 114 FTC at 121 and *Thompson Medical*, 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).

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. at 120; *Thompson Medical*, 104 F.T.C. at 788. 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; *Deception Statement*, 103 F.T.C. at 178. 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).²

Because consumers may be misled by innuendo as well as by outright false statements, both implied and express representations may be found deceptive. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir.), *cert. denied*, 429 U.S. 818 (1977). 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 at 687; *Cliffdale Assoc.*, 103 F.T.C. at 165. 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).

In determining whether an advertisement conveys a claim, the Commission looks to the overall, net impression created by the advertisement, through the interaction of different elements in the ad, rather than focusing on the individual elements in isolation. *Stouffer Foods Corp.*, 118 F.T.C. at 799; *Kraft, Inc.*, 114 F.T.C. at 122; *see American Home Prods.*, 695 F.2d at 688; *Deception Statement*, 103 F.T.C. at 179 & n.32.

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*, 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

² *See also Deception Statement*, 103 F.T.C. at 178 n.21 (“A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate.”).

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 (1st 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 (2d Cir. 1964) (common enterprise found where individuals were transacting an integrated business through interrelated companies); sharing office space and offices, *Zale Corp. and Corrigan-Republic, Inc. v. FTC*, 473 F.2d 1317, 1320 (5th Cir. 1973). *Accord Martin v. Deiriggi*, 985 F.2d 129 (4th Cir. 1992); *Barber v. Kimbrells, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 268-69 (6th 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 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. *FTC v. Standard Educ. Soc’y*, 302 U.S. 112, 119-20 (1937); *Thiret v. FTC*, 512 F.2d 176, 181-82 (10th 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; *National Housewares, Inc.*, 90 F.T.C., 572, 598 (1977).

IX. RESPONDENTS' ADS MADE THE CHALLENGED CLAIMS

A. 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 clear 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, Tr. 264).³ 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, contained unambiguous statements such as: “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.” (CX 1-H).

Two of the Ab Force TV ads made the same reference to the “latest fitness craze” as the radio ad. (JX 2-3; CX 1-B at 4-5, CX 1-D at 4-5; Tr. 51-52, 54-56). Equally important in the TV ads, however, was the use of visual images. As the Complaint alleges, the television ads contain

³ The fact that Mr. Khubani also chose the name because of the play on “Air Force” does not preclude consumers from perceiving other interpretations. *Kraft, Inc.*, 114 F.T.C. at 120, *Thompson Medical*, 104 F.T.C. at 189.

“(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.” (JX 2-5; Answer, ¶ 10). Two of them included a close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. (JX 3, JX 5; Answer, ¶ 10).

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.

B. 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 infomercials 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.” 114 F.T.C. at 123. When compared to the image of a full glass of milk for Kraft singles, the Commission found that the comparison of 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 and claiming that their product is essentially the same but cheaper. As their print ad said, “ So why would you want to buy a more expensive ab belt from the competition when the Abforce is as low as just \$10?” (CX 1-G). 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. 104 F.T.C. at 789. In this case, all the advertisements themselves invite such scrutiny by referring 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.” (JX 2; CX 1-B at 4-5, Tr. 51-52). Another stated, “The Ab Force is just as powerful and effective as those ab belts sold by other companies on infomercials.” (JX 3; CX 1-D at 4-5; Tr. 54-56). The two most heavily-aired spots 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.” (JX 4, JX 5; CX 1-F at 3-5; Tr. 55-59).

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 AbTronic, AB Energizer, and Fast Abs ran before and during the period in which the Ab Force ads ran (CX 126; JX 1) and dominated the direct sales TV marketplace during that period. (CX 62, CX 72-95, CX 126; JX 6, ¶ 10, 13, 14; Towers, Tr. 294-96). Moreover, the infomercials for those products were permeated

with express and strongly implied claims that they caused loss of inches and weight, produced well-defined abdominal muscles, and were effective alternatives to exercise. (JX 7-10; Mazis Tr. 43, 45-48; CX 96 (Exhibit 2) at 3, 4, 6, 8-11, 13, 14, 19, 27, 32, 33, 39; CX 98 (Exhibit 2) at 22, 30, 31, 38, 39, 48-50, 62, 63, 67; (Exhibit 4) at 70; CX 100 (Exhibit B) at 3-4, 11, 20, 22-24, 31, 34-35, 42, 51-54, 59; (Exhibit D) at 4, 20, 23-24, 32, 43, 45, 53-54, 57, 63). Thus, it is reasonable to conclude that many consumers viewing the Ab Force ads recalled the ads for AbTronic, AB Energizer, and/or Fast Abs and at least some of the core efficacy claims for those products and attributed them to Ab Force. It is appropriate, therefore, to determine that the Ab Force ads conveyed the challenged claims based on a facial analysis of the ads and the surrounding circumstances. *See generally Thompson Medical*, 104 F.T.C. at 789.

Furthermore, in considering the surrounding circumstances of an ad, the Commission is entitled to consider evidence of intent of the ad's creators. *Novartis Corp.* 127 F.T.C. at 683; *see also Thompson Medical*, 104 F.T.C. at 791. *Novartis*, 127 FTC at 683. The record is replete with evidence that the Respondents intended to refer viewers to the infomercials for AbTronic, AB Energizer and Fast Abs, thus further supporting the finding that the ads conveyed that claim. (Khubani, Tr. 255, 259-261, 266, 273-274, 276, 486-87, 489, 490-492, 496, 497, 518, 521, 538-541, 543-544, 550; JX 1, ¶ 11; JX 2-5; JX 6 (Liantonio, Dep. at 26, 30, 32-33, 55, 57, 64-67, 69, 70, 72, 73, 75, 76, 92, 104, 105); CX 1-B, CX 1-G, CX 1-H, CX 4-9, CX 61, CX 80; RX 49-52). 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 Khubani decided to enter the ab belt market after noticing a mention of the AbTronic 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 two of the TV spots opened with a man exerting himself doing crunches. Both demonstrate Respondents intended consumers to believe their ab belt was a substitute for exercise.⁴

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.

C. EXTRINSIC EVIDENCE CONFIRMS THAT THE RESPONDENTS MADE THE CLAIMS CHALLENGED IN THE COMPLAINT

Even in cases where extrinsic evidence is not necessary, the Commission will consider it if it exists. *Stouffer* 118 F.T.C. at 804. In this case, there is extrinsic evidence that supports the facial analysis finding the challenged claims were made. The results of a facial analysis performed by Complaint Counsel’s marketing expert confirms the conclusions of the facial analysis above. Second, a copy test conducted on Respondents’ television advertising confirms that the Ab Force ads conveyed the challenged claims. Such extrinsic evidence is given great weight in Commission proceedings and should be carefully considered. *Thompson Medical*, 104 F.T.C. at 789.

⁴ 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.

1. A Facial Analysis of the Challenged Ads Performed by Complaint Counsel’s Marketing Expert Demonstrates That They Convey Well-developed Abs, Inch Loss, Weight Loss, and Alternative to Exercise Claims

At trial, Dr. Mazis offered a facial analysis based upon his expertise in advertising, marketing, and consumer behavior as to the claims consumers were likely to perceive from the Ab Force TV spots.⁵ Dr. Mazis concluded that consumers took away certain core performance claims that were either the result of familiarity with infomercials for Ab Tronic, AB Energizer, and Fast Abs ab belts, or implied by images and words within the “four corners” of the Ab Force ads. (CX 58 at 4, 9 ; Mazis, Tr. 61-62).

In performing his facial analysis, Dr. Mazis relied on information in the FTC Complaint (CX 1) and attached exhibits (JX 2-5), particularly information that AbTronic, AB Energizer, and Fast Abs were among the most frequently aired infomercials in the nation. (CX 58 at 7; Mazis, Tr. 125-26). As confirmed by rankings in the monitoring reports from Jordan Whitney and Infomercial Monitoring Service, the evidence is conclusive that infomercials for these three products as well as a sixty second spot for AB Energizer were indeed the most frequently aired TV commercials for ab belts by a wide margin. (CX 62, CX 72-95, CX 126, Towers, Tr. 294, 303-04; JX 6, ¶ 8-11, 13-15, JX 11, ¶ 3-5; Khubani, Tr. 521).

In addition, Dr. Mazis considered the FTC complaints, video tapes of advertisements and

⁵ As noted in Part VII.B., the Commission can consider the opinion of an expert witness as to how an ad may reasonably be interpreted. *Kraft, Inc.*, 114 F.T.C. at 127.

transcripts of advertisements for the AbTronic, AB Energizer, and Fast Abs EMS ab belts.⁶ (JX 7-10; CX 58 at 4; Mazis Tr. 42, 120, 123, 124, 134, 141). Dr. Mazis concluded that the infomercials for these products contained numerous representations about how using the products causes consumers to obtain well-defined abdominal muscles and lose inches around the waist (CX 58 at 17; Mazis, Tr. 47) as well as representations that product performance is equivalent to or superior to abdominal exercises, such as sit-ups and crunches, and that use of the products leads to weight loss. (CX 58 at 8; Mazis, Tr. 47-48).

Dr. Mazis opined that consumers exposed to the infomercials for these three products formed an “ab belt category of beliefs,” by which they would associate ab belts with well-developed abs, losing inches around the waist, losing weight, and effective alternatives to exercise.⁷ (Mazis, Tr. 48; CX 58 at 7). These ab belt category beliefs would affect such consumers’ perceptions of Ab Force advertising. (Mazis, Tr. 64). According to Dr. Mazis, people exposed to the ab belt infomercials do not necessarily remember the specifics of the ads they saw, but, instead, they form general category beliefs about ab belts that would be triggered by the Ab Force ads. (Mazis, Tr. 156-57).

Dr. Mazis’s opinion is grounded in the psychological/consumer behavior theory of “categorization” in which people take objects such as products and group them together in categories based on their similarity. (Mazis, Tr. 49, 156-57). The categorization theory is well-

⁶ Dr. Mazis testified that he also reviewed reports that rated infomercial frequency and that the reports seemed consistent with the information as to frequency contained in the FTC’s complaints against AbTronic, AB Energizer, and Fast Abs. (Mazis, Tr. 119-21).

⁷ According to Dr. Mazis, other elements also would contribute to the formation of the ab belt category beliefs, *e.g.*, word-of-mouth generated by the infomercials or by people who have purchased an ab belt and exposure to packaging for ab belts on display in retail outlets. (Mazis, Tr. 64-65, 139-40, 169-71)

recognized in the field of consumer behavior, and a leading proponent of the theory, Mita Sujan published a well-known, peer-reviewed article on the subject in the Journal of Consumer Research. (Mazis, Tr. 49). According to Professor Sujan:

[The] basic premise [of the categorization approach] is that people naturally divide the world of objects around them into categories enabling an efficient understanding and processing of the environment. . . . If a new stimulus can be categorized as an example of a previously defined category, then the effect associated with the category can be quickly retrieved and applied to the stimulus.

(CX 57 at 31).

The categorization theory is generally accepted by consumer perception scientists. (Mazis, Tr. 49). Respondents' marketing expert, Dr. Jacoby testified that he was familiar with the theory and with Dr. Sujan's article. (Jacoby, 344-45).

According to Dr. Mazis, four key elements in the Ab Force commercials would cause consumers to categorize them 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; CX at 8-9). 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 "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).

Dr. Mazis uses the term "indirect effects" to refer to the effects generated on consumers because of previous exposure to ab belts through either the infomercials, word-of-mouth about ab belts, or retail packaging for ab belts. (Mazis, Tr. 66). It is through these indirect effects that the Ab Force TV spots make implied claims that using Ab Force will result in well-developed abs and loss of inches around the waist.⁸ (Mazis, Tr. 61; CX 58 at 9-10). Dr. Mazis also opined that consumers may also perceive claims that use of Ab Force results in weight loss and that the Ab Force is an effective substitute for regular exercise because, although not reinforced by visual images, consumers associate them with the ab belt category. (Mazis, Tr. 61).

In addition to the indirect effects that influence consumer perceptions of the Ab Force ads, Dr. Mazis testified that there are direct effects from within the four corners of the ad that

⁸ According to Dr. Mazis, these are the most prominent of the ab belt category belief claims that consumers likely perceive because they are reinforced with visual images. (Mazis, Tr. 61; CX 58 at 9-10).

cause consumers to make similar inferences about Ab Force and take away similar implied claims. (Mazis, Tr. 66-67). These direct effects are not dependent upon prior exposure to information about ab belts or having a category of beliefs about them. Dr. Mazis identified these direct effects as the appearance of very trim, very fit models and the depiction of the Ab Force belt itself shown visibly pulsating the abdominal muscles of the models. (Mazis, Tr. 66-67, 180). Another influence that is within the four corners of the Ab Force ads is the “Ab Force” name. According to Dr. Mazis, the name “Ab Force” implies that the product applies force to your abs because of the electronic stimulation, and it also implies that it makes your abs a force, *e.g.*, noticeable and well developed. (Mazis, Tr. 60). It stands to reason, therefore, that as a result of these direct effects, even consumers who had no prior exposure to other ab belt advertising will perceive claims that the Ab Force causes well-developed abdominal muscles and loss of inches around the waist.

Dr. Mazis’s analysis is logical, persuasive, and supported not only by well-recognized theory but also the record evidence. TV advertising for AbTronic, AB Energizer, and Fast Abs dominated the direct response sales TV market before and during the Ab Force TV campaign. Respondents were well-aware of the impact of these infomercials and intended that their advertising campaign capitalize on that impact. It is reasonable and logical to conclude, therefore, as Dr. Mazis did, that the express claims of comparability to the other ab belts on TV caused consumers to recall the express performance claims for AbTronic, AB Energizer, and Fast Abs. Dr. Mazis’s analysis is not only based on sound scientific theory, it is just as importantly grounded in common sense.

2. Copy Test Evidence Confirms That the Challenged Television Advertisements Made the Challenged Claims

The record contains a methodologically sound copy test designed by Dr. Mazis that empirically establishes that the Ab Force TV ads conveyed claims that the product causes inch loss, weight loss, well-defined abdominal muscles and is an effective alternative to exercise.

To constitute reliable and probative evidence, copy tests must be methodologically sound. *Stouffer Foods Corp.*, 118 F.T.C. at 799; *Thompson Medical*, 104 F.T.C. at 790. The primary standards that the Commission applies in determining whether a copy test is methodologically sound are whether it "draw[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." *Stouffer Foods Corp.*, 118 F.T.C. at 799 (quoting *Thompson Medical*, 104 F.T.C. at 790).

In evaluating survey evidence, the Commission does not require that surveys be perfect methodologically, but that they be "reasonably reliable and probative." *Stouffer Foods Corp.*, 118 F.T.C. at 799. A study that harbors one or more sources of potential error or bias can still be probative. *Id.*

The copy test designed by Dr. Mazis, implemented by U.S. Research, and introduced by Complaint Counsel in this proceeding provides compelling confirmatory evidence that the Ab Force TV ads implied that Ab Force causes users to lose inches, lose weight, gain well-defined abdominal muscles, and is an effective alternative to exercise.

The universe for Dr. Mazis's copy test was appropriately comprised of persons who had demonstrated an interest in weight loss, fitness, or massage products or services in the past (Mazis, Tr. 68, 72-76; Jacoby, Tr. 353-54, 356, 407-08; CX 58, Exhibit 3, Q. F, G) and had shown a propensity for responding to direct response TV advertising. (CX 58 at 12; Mazis, Tr.

72-76). Age and sex quotas were based upon a survey report in the *Journal of the American Medical Association* of persons trying to lose weight and called for a study population that is 60% male and 40% female with 20% 18-29 years of age, 45% 30 to 49 years old, and 35% 50 years and older. (Mazis, Tr. 71-72; CX 58 at 11).

The copy test questions were appropriate and asked in ways that minimized bias. (CX 58 at 15, 16, 21; Exhibit H at 12, 15, 17; Mazis, Tr. 95-100). Specifically, the questionnaire proceeded from general, open-ended questions to more narrow close-ended questions, and used a filter question to ensure that responses to follow-up, close-ended questions would not be based upon random guessing. (CX 58 at 15; Mazis, Tr. 95). Such a “funneling” approach” is “the best way to ask questions on a copy test.” *Stouffer* 118 F.T.C. at 804. The close-ended questions rotated the order in which the questions were read to respondent, thereby controlling for order bias.⁹ (Mazis, Tr. 92; CX 58 at 14). All three possible answers to the each question were read and shown to the respondent before each question was asked. (CX 58 at 15, 16, Exhibit D; Mazis, Tr. 95-96).

Finally, the study utilized an appropriate control 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

⁹ Order bias is also known as “yea saying” to leading questions and the “halo effect.” *Stouffer*, 118 F.T.C. at 806.

of the ab belt itself. (Mazis, Tr. 83-84, 146; CX 58 at 12-13).

In addition to the potential sources for bias that Dr. Jacoby incorrectly opines are fatal flaws to Dr. Mazis's study, Respondents incorrectly argue that the failure to control for pre-existing beliefs is a fatal error. Their argument, however, is baseless. In fact, the Commission expressly rejected the same argument in *Stouffer*, 118 F.T.C. at 809-10. The Commission instead held that it must consider the totality of the circumstances, "and not that a survey must control for pre-existing beliefs." *Id.* While the Commission recognized that *Kraft* teaches us that failure to control for pre-existing beliefs introduces a potential for bias, it at the same time states that respondents may be held liable for a dissemination of ads that capitalize on pre-existing consumer beliefs. *Id. See also id.* n.31.

Accordingly, the results of both the open-ended and close-ended questions in the copy test were analyzed correctly and are probative and reliable. (Mazis, Tr. at 100-102, 104-108, 153-156; CX 58 at 17-21; CX 58, Exhibit F). Over twenty-two percent (22.3%) of the test ad respondents to the open-ended question, "[w]hat does the Ab Force commercial say, show, or imply about Ab Force?" 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. (CX 58 at 19; Mazis, Tr. 104-105). The net difference was 10.4%. (CX 58 at 19; Mazis, Tr. 104-105). Dr. Mazis found the results to be statistically significant at the .01 level. (Mazis, Tr. 105; CX 58 at 19).

The results for the close-ended questions 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" for a net difference of 17.3%. (Mazis, Tr. 106). 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” resulting in a net difference of 15.7% (Mazis, Tr. 106).

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.” (Mazis, Tr. 107). The net difference was 14.9%. (Mazis, Tr. 107). 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” resulting in a net difference of 10.5%. (Mazis, Tr. 107). All of the foregoing net responses were statistically significant within a range of .0001 to .05. (Mazis, Tr. 106-07). 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. (CX 58 at 21). This result did not produce a statistically significant difference. (Mazis, Tr. 107).

There is no absolute minimum number of copy test respondents who must report taking a specific message before that claim is deemed communicated. The commission’s opinion in *Thompson Medical* does provide, however, a level of close-ended responses deemed sufficient to show that a claim was communicated by an ad. There, the Commission relied on percentages, after the control question responses had been deducted, of 16% to 18% of the respondents answering that they took the claim to conclude that the tested ad “did, in fact, cause average viewers to believe the [claim].” 104 F.T.C. at 805. Other FTC cases suggest that the Commission would be justified in considering levels of 10% net take-away sufficient. For example, in *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th 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.” *Id.* at 249. *See also Stouffer Foods*, 118 F.T.C. at 805 (where the Commission noted that one of Stouffer’s own experts “testified that often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful”).

Moreover, numerous decisions in Lanham Act decisions support the proposition that a net difference between 10% and 15% is sufficient to support an allegation of trademark infringement. *See Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (10%); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 817 (8th Cir. 1969) (11%); *James Borough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 279 n.23 (7th Cir. 1976) (referring to prior case showing 11%); *Jockey Int’l, Inc. v. Burkard*, 185 U.S.P.Q. (BNA) 201, 205 (S.D. Cal. 1975) (11.4%); *McDonough Power Equip. Inc. v. Weed Eater, Inc.*, 208 U.S.P.Q. (BNA) 676, 683-85 (Trademark Trial & App. Bd. 1981) (11%); *Goya Foods, Inc., v. Condal Distribs., 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, 716 (S.D.N.Y. 1973), *modified and aff’d*, 523 F.2d 1331 (2nd Cir. 1975) (8.5%); *compare Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, n.15 (4th Cir. 1996) (“We may infer from case law that survey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent.”).

X. 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 have stipulated that the Ab Force does not cause loss of weight, inches or

fat; does not cause well-defined abdominal muscles; and is not an effective alternative to regular exercise. (JX 6, ¶ 16-18). Respondents have also stipulated that they did not possess and rely upon substantiation for the alleged claims that (a) Ab Force causes loss of weight, inches or fat; (b) Ab Force causes well-defined abdominal muscles; and (c) use of the Ab Force is an effective alternative to regular exercise. (JX 6, ¶ 19).

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

As demonstrated above, 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. Moreover, the Commission may presume materiality for (1) express claims; (2) implied claims where Respondents intended to make the claims; and (3) claims involving health, and safety. *Thompson Medical*, 104 F.T.C. at 816-17. As demonstrated above, the Respondents made express and intentionally implied claims through the use of visual images of well-developed, “perfect” bodies; through intentional references to the AbTronic electronic ab belt and to ab belt infomercials; and through express and intentional use of the words “fitness” and “exercise” in several of their ads. References to fitness, exercise, and devices advertised for weight loss, fat loss, and inch loss are all related to health concerns. The Respondents’ 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 prompt consumers familiar with infomercials for the other three ab belts to recall those core efficacy claims and attribute them to the Ab Force ab belt.

As discussed above, Dr. Mazis opined that references within the Ab Force ads to the infomercials for those ab belts created perceptions in consumers familiar with those other ab belt ads that the Ab Force causes results claimed in those infomercials, *e.g.*, loss of weight and inches, and well-developed abs without the need for exercise. Applying the well-recognized categorization theory, Dr. Mazis concluded that consumers familiar with the advertising for AbTronic, AB Energizer, and Fast Abs likely formed an ab belt belief category as to the core claims of those devices. As these three ab belt infomercials were among the most frequently-televised infomercials for much of Ab Force's life, it is entirely reasonable that consumers would place the Ab Force ab belt in the same product category as those ab belts and perceive that Ab Force could fulfill those products' advertised promises of weight loss, inch loss, fat loss, "six pack" abs and an effective alternative to exercise, albeit for fewer dollars.

3. The Claims Challenged in the Complaint Are False and Unsubstantiated

Respondents have admitted that the challenged claims are false and that they did not possess and rely on, at the time, adequate substantiation for the challenged claims.

B. ALL RESPONDENTS ARE LIABLE FOR VIOLATIONS OF SECTIONS 5 AND 12 OF THE FTC ACT

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 interrelated functions with respect to the marketing of the Ab Force, each respondent should be considered part of a cooperative effort. Relief is thus necessary and proper against both corporate respondents and the individual respondent who, as sole member of TV Savings, has demonstrated the ability to create new corporate entities to promote new products.

XII. THE PROPOSED ORDER

A. The Injunctive Provisions of the Notice Order Are Appropriate

Part I of the proposed order prohibits 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 respondents from making any such *misrepresentations*, expressly or by implication, about *any EMS device*. Part III prohibits 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, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. Part IV provides an FDA safe harbor, which allows 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.*, 118 F.T.C. at 811-15; *Thompson Medical*, 104 F.T.C. at 833. The offense is serious because the deceptive claim was widely disseminated in numerous ads, in multiple media, across the nation. 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, including making misrepresentations in connection with a hearing aid device. *See Thompson Medical*, 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.¹⁰ 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.¹¹ Finally, in 1999, the Commission modified the existing 1996 consent judgment with Khubani and Telebrands and obtained penalties of \$800,000 for alleged violations of the Mail Order Rule.¹²

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

¹⁰ *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).

¹¹ *In re Telebrands Corp.*, 122 F.T.C. 512 (1996).

¹² Modified Consent Decree, *United States v. Telebrands Corp.*, Civ. No. 96-827-R (W.D. Va. Sept. 1, 1999).

provision is included because Khubani has repeatedly violated the FTC Act, and previously marketed a device (a hearing enhancement aid) with deceptive claims.¹³

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 (7th Cir. 1996); *FTC v. SlimAmerica, Inc.*, 77 F. Supp.2d 1263, 1276-77 (S.D. Fla. 1999).¹⁴ Khubani’s history of violating the FTC Act and of marketing medical devices with false claims 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.

¹³ 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”).

¹⁴ 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*, 123 F.T.C 1477 (1997); *Original Marketing, Inc.*, 120 F.T.C. 278 (1995); *Taleigh Corp.*, 119 F.T.C. 835 (1995).

XIII. 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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Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: June 7, 2004

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

_____)	
In the Matter of)	
)	
TELEBRANDS CORP.,)	
a corporation,)	
)	
TV SAVINGS, LLC,)	
a limited liability company, and)	
)	DOCKET NO. 9313
AJIT KHUBANI,)	
individually and as president of)	PUBLIC DOCUMENT
Telebrands Corp. and sole member)	
of TV Savings, LLC.)	
_____)	

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION
TO FILE AMENDED POST TRIAL BRIEF**

On June 7, 2004, Complaint Counsel filed a Motion For Leave to File an Amended Post Trial Brief along with an amended brief that corrected citations therein that did not comply with the May 7, 2004 Order on Post Trial Briefs. Complaint Counsel indicated that Respondents' Counsel did not oppose the motion.

The motion is **GRANTED**. The Complaint Counsel's Amended Post Trial Brief shall be substituted for the original filing.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Dated June ___, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2004, I caused *Complaint Counsel's Motion for Leave to File an Amended Post-Trial Brief* and the *ALJ's Order Granting Complaint Counsel's Motion to File Amended 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.
VENABLE LLP
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