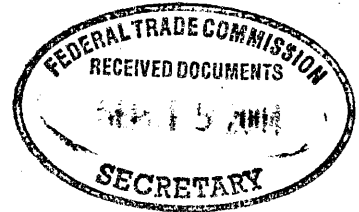


**PUBLIC**

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



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**DOCKET NO. 9313**

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**In the Matter of**  
**TELEBRANDS CORPORATION, TV SAVINGS, L.L.C., AND AJIT KHUBANI**  
**Respondents.**

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**INITIAL DECISION**

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**Stephen J. McGuire**  
**Chief Administrative Law Judge**

Date: September 15, 2004

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## I. INTRODUCTION

### A. Overview and Summary of Decision

This case addresses the advertising campaign for the Ab Force, an electronic muscle stimulation (“EMS”) ab belt device. Telebrands Corporation (“Telebrands”), TV Savings, L.L.C. (“TV Savings”), and Ajit Khubani (“Khubani”) (collectively “Respondents”) marketed the Ab Force through spot television, print, radio, internet, and email advertisements. Complaint Counsel alleges: (1) that Respondents’ advertising campaign for the Ab Force makes claims that the use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise; (2) that these claims are false or misleading; and (3) that these claims are material to consumers. Respondents’ primary argument is that the Ab Force advertisements did not contain the challenged claims.

The parties focus on the issue of whether Respondents should be held liable for dissemination of ads that capitalize on preexisting consumer beliefs regarding the effects of using ab belts. As discussed more fully in Section III(B)(1), *infra*, this theory of liability is neither central nor determinative of the case. Rather, the central issue is whether the advertisements are likely to mislead consumers, acting reasonably under the circumstances, in a material respect. This matter is resolved utilizing traditional case law analysis.

As set forth in this Initial Decision, the record indicates that the advertisements at issue made false and misleading claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. These claims, relating to health, weight loss, fitness, or exercise benefits, are clearly made based upon a facial analysis of the advertisements. Extrinsic evidence, although not necessary to the determination of these issues, further supports the ultimate conclusion that the advertising was likely to mislead consumers, acting reasonably under the circumstances, in a material respect. The remedy imposed is an appropriate cease and desist Order.

## **B. Summary of Complaint and Answer**

The Federal Trade Commission ("FTC") issued its Complaint in this matter on September 30, 2003. The Complaint charges that Telebrands, TV Savings, and Khubani, individually and as president of Telebrands and sole member of TV Savings, violated Sections 5 and 12 of the Federal Trade Commission Act, as amended ("FTC Act"). Complaint, ¶¶ 1-4. The Complaint charges Respondents with making false and misleading claims that the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. Complaint, ¶¶ 19-20.

In its Answer filed on October 23, 2003, Respondents denied the material allegations of the Complaint and asserted that the evidence would show that the alleged claims were not made in the Ab Force advertising. Answer, ¶¶ 19-23.

## **C. Procedural Background**

Complaint Counsel filed a Motion for Summary Decision on March 23, 2004. Respondents filed a Motion for Summary Decision on March 24, 2004. Both motions were denied on April 13, 2004 on the basis that whether the advertisements conveyed the alleged claims raised genuine issues of material facts requiring a trial on the merits.

The final prehearing conference was held on April 30, 2004. Trial in this proceeding commenced on May 4, 2004. The last day on which testimony was received was May 6, 2004. The parties subsequently filed post hearing briefs, proposed findings of fact and conclusions of law, and replies thereto. Closing arguments were heard on June 17, 2004.

The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated June 18, 2004. This Initial Decision is filed within one year of the issuance of the Complaint and within ninety days of the close of the record, pursuant to Commission Rule 3.51(a).

#### **D. Evidence**

The Initial Decision is based on the transcript of the testimony, the exhibits properly admitted in evidence, and the briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties. Citations to specific numbered Findings of Fact in this Initial Decision are designated by "F."<sup>1</sup>

This Initial Decision addresses only material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959).

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<sup>1</sup> References to the record are abbreviated as follows:

CX – Complaint Counsel Exhibit

RX – Respondents Exhibit

JX – Joint Exhibit

Tr. – Transcript of Testimony before the Administrative Law Judge

Dep. – Transcript of Deposition

CCPFF – Complaint Counsel's Proposed Findings of Fact

CCRPFF – Complaint Counsel's Response to Respondents' Proposed Findings of Fact

CCB – Complaint Counsel's Post Hearing Brief

CCRB – Complaint Counsel's Post Hearing Reply Brief

RPPF – Respondents' Proposed Findings of Fact

RRPFF – Respondents' Response to Complaint Counsel's Proposed Findings of Fact

RB – Respondents' Post Hearing Brief

RRB – Respondents' Post Hearing Reply Brief

## **II. FINDINGS OF FACT**

### **A. Factual Background**

#### **1. Respondents**

1. Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani worked together on the marketing and distribution of the Ab Force product. (JX 1, ¶ 6).

##### **a. Telebrands Corporation**

2. Respondent Telebrands Corporation (“Telebrands”) is a New Jersey Corporation with its principal place of business at 79 Two Bridges Road, Fairfield, New Jersey 07004. (JX 1, ¶ 2).

3. Telebrands was formed in 1987 as the successor to Direct Connection, which Ajit Khubani formed in 1983. (Khubani, Tr. 430).

4. Telebrands is in the business of developing, marketing, and distributing a wide variety of consumer products through direct response advertising. (Khubani, Tr. 431).

5. Telebrands either develops its own products or licenses the right to market products from inventors. (Khubani, Tr. 438).

6. Telebrands provided the financing necessary to perform media management services, credit card processing, customer response services, customs clearance, accounting, and bookkeeping services and acted as importer of record for TV Savings with respect to the Ab Force, as required under the Service Agreement between Telebrands and TV Savings. (JX 1, ¶ 14).

##### **b. TV Savings, L.L.C.**

7. Respondent TV Savings, L.L.C. (“TV Savings”), a Connecticut limited liability company, was organized on January 22, 2002. (JX 1, ¶¶ 4, 5).

8. TV Savings has offices at 81 Two Bridges Road, Fairfield, New Jersey 07004. (JX 1, ¶ 3). TV Savings shares office space with Telebrands. (Khubani, Tr. 282).

9. TV Savings was created to handle the Ab Force campaign. (Khubani, Tr. 282-83).

##### **c. Ajit Khubani**

10. Respondent Ajit Khubani (“Khubani”) is the president, chief executive officer, chairman of the board, and sole owner of Telebrands. (JX 1, ¶ 7). Khubani is also the sole



member of TV Savings. (JX 1, ¶ 8).

11. Khubani's office is located at 79 Two Bridges Road, Fairfield, New Jersey 07004. (Answer, ¶ 3).

12. Khubani has been involved in direct response television ("DRTV") since 1987 and has been involved with the direct response advertising industry since 1983. (Khubani, Tr. 434).

13. Khubani is a guest lecturer at Princeton University and belongs to the Electronic Retailing Association, where he served on the Board of Directors from 1999 to 2002. (Khubani, Tr. 430-31).

14. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, and practices of Telebrands and TV Savings. (JX 1, ¶ 9).

15. Khubani was appointed by Telebrands as the "Program Manager" pursuant to the Service Agreement dated January 22, 2002 between Telebrands and TV Savings. (JX 1, ¶ 13). He was also TV Savings' representative under the Service Agreement. (JX 1, ¶ 13). As the Program Manager appointed by Telebrands and as TV Savings' representative under the Service Agreement, Khubani represents both entities with regard to the responsibilities and duties of each under the Service Agreement. (JX 1, ¶ 13).

16. Khubani was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign and was primarily responsible for the creation and development of the scripts for the Ab Force television and radio advertising of the Ab Force product. (JX 1, ¶ 11; Khubani, Tr. 271-72). Khubani also set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, ¶ 12).

## **2. The Direct Response Advertising Industry**

17. Direct response advertising typically describes a product and offers the consumer a vehicle to order the product directly by telephone, by internet, or through a mailing address. (Khubani, Tr. 431-32). Unlike most traditional advertising, direct response advertising allows a consumer to order the product directly from the advertiser. (Khubani, Tr. 432).

18. The direct response industry is significant in scope and includes every form of advertisement to which a customer responds by ordering the product directly, including the internet, catalogues, direct mail, credit card inserts, print media, radio, and television. (Khubani, Tr. 434, 441).

19. DRTV advertising generally takes three forms. One is long form commercials, also called "infomercials." (Khubani, Tr. 432). These are usually program length commercials, typically 28 minutes, 30 seconds in length. (Khubani, Tr. 432). The second form is short form

spot DRTV, which are commercials that are typically 30 seconds, 60 seconds, 90 seconds or 120 seconds in length. (Khubani, Tr. 432). The third form is live shows, many of which are broadcast twenty four hours per day, seven days a week. These include QVC, Home Shopping Network, and Shop NBC. (Khubani, Tr. 432-33).

### **3. Telebrands' Marketing Practices and Techniques**

20. Telebrands sells a variety of products directly to consumers through direct response channels (telephone numbers and addresses contained in the advertising for the product) and through retail stores. (Khubani, Tr. 245-46; JX 1, ¶ 2).

21. Telebrands has employed all three types of DRTV – infomercials, short form, and live television – but relies primarily on short form commercials. (Khubani, Tr. 433). Khubani testified that short form commercials are most effectively used to advertise simple products typically sold for twenty dollars or less. (Khubani, Tr. 433).

22. Telebrands has marketed hundreds of products throughout its history and has had a number of successful products that have sold three to fifteen million units each. (Khubani, Tr. 435) (successful products include: Ambervision Sunglasses, the Magic Hanger, Dental White Tooth Whitening System, the Safety Can Opener, the Audubon Singing Bird Clock, the Better Pasta Pot, and the Roll-a-Hose Flat Hose).

23. Telebrands uses a variety of strategies in determining whether to market a product. (Khubani, Tr. 438-43).

24. Khubani typically will observe trends in the marketplace and in various channels of advertising and distribution and will evaluate what products would be appropriate for advertising on television. (Khubani, Tr. 438). This includes assessing what stage the product has reached in its life cycle and evaluating what steps competitors are taking in the marketplace. (Khubani, Tr. 438).

25. If Telebrands believes it has a competitive advantage and/or strategy for competing, Telebrands will compete with products already in the market. (Khubani, Tr. 439). Several times per year, Telebrands identifies existing popular products in the marketplace and enters the market as a competitor by offering a similar product at a lower price. (Khubani, Tr. 439-40).

26. Once Telebrands decides to market a product, it undertakes several steps to bring that product to the marketplace. (Khubani, Tr. 440-43).

27. Telebrands first creates test advertising, which involves creating an actual advertisement that is disseminated in a number of markets on a limited basis, and with a limited advertising budget. (Khubani, Tr. 440).

28. Telebrands typically runs test ads for thirty to forty products per year; about ten percent of which it expects will be successful. (Khubani, Tr. 442-43).

29. This test advertising may take the form of print, radio, television, or direct mail advertising. (Khubani, Tr. 441).

30. Test advertisements are disseminated to the public for a limited period of time. (Khubani, Tr. 440).

31. If the response to that test advertising is deemed positive, Telebrands will enter the second phase, called the "rollout" phase. (Khubani, Tr. 440).

32. Before a full-fledged, expensive nationwide campaign is rolled out, Telebrands undertakes a thorough review of its advertising and its acquisition plans so as to minimize risks of loss and ensure compliance with applicable regulations. (Khubani, Tr. 442). This includes a review of intellectual property, production plans, and a compliance review of any rollout advertising. (Khubani, Tr. 442).

33. The final legal review includes "final review of the TV commercial from a claims perspective and a compliance perspective" because "you don't want there to be any issues from any government agencies." (Khubani, Tr. 442). The substantiation for any claims that are made in the advertisements is also reviewed. (Khubani, Tr. 441).

#### **4. The Ab Force Ab Belt**

##### **a. The Product**

34. The Ab Force ab belt is comprised of a black elasticized belt; a thin, diamond-shaped pad measuring approximately nine by five inches that is purple on one side and silver/gray on the other; a warning and instruction label attached to the silver/gray side of the pad that divides the silver/gray side of the pad into two areas; and a small, battery powered control unit attached to the purple side of the pad. (Answer, ¶ 6).

35. The Ab Force ab belt is an electronic muscle stimulation ("EMS") device which uses electronic stimulation intended to cause stimulation of the muscles. (JX 1, ¶ 15). Electronic muscle stimulation makes one's muscles contract involuntarily. (Khubani, Tr. 455, 505).

36. The Ab Force is designed so that some amount of electricity goes into the body. (Khubani, Tr. 506).

37. Khubani contacted an overseas manufacturer and, with that manufacturer, began to develop the ab belt product to be sold by Telebrands. (JX 1, ¶ 19).

38. The manufacturer of the Telebrands ab belt product informed Khubani that it was also the manufacturer of the AbTronic ab belt, another EMS device. (Khubani, Tr. 264; JX 1, ¶ 20).

39. The manufacturer informed Khubani that the Telebrands ab belt product would have the same power output as two other advertised ab belt products, the AbTronic and the Fast Abs belts. (Khubani, Tr. 266; CX 18). Khubani believed that he could sell products with the same technology and same or similar power output to consumers for a significantly lower cost than that offered by other ab belt advertisers. (JX 1, ¶ 20).

40. Khubani posed the question of technical comparability to the manufacturer because he wanted to make sure that his advertisements were truthful in saying that the Ab Force used the same technology as ab belts which sold "for as much as \$120." (Khubani, Tr. 266-67). The AbTronic sold for \$120 and was the ab belt to which Khubani was referring. (Khubani, Tr. 267).

**b. Sales**

41. Gross sales for the Ab Force, including accessories such as batteries and gels, exceeded nineteen million dollars. (JX 1, ¶ 36).

42. Respondents sold approximately 747,000 units of the Ab Force and consumers placed a total of 330,510 orders for the Ab Force. (JX 1, ¶¶ 25-26).

43. Each of the ads disseminated by Respondents for the Ab Force generated orders from consumers. (JX 1, ¶¶ 25-26).

44. The 60 second and 120 second test television commercials (AB-B-60 and AB-B-120, respectively) ran in January of 2002 and were cleared for broadcast nearly ninety-six times. (JX 1, ¶ 24; RX 60).

45. Consumers placed 2,392 orders for the Ab Force by using the telephone number found in the 60 second test commercial. (JX 1, ¶ 27). Consumers also placed 2,238 orders for the Ab Force by using the telephone number found in the 120 second test commercial. (JX 1, ¶ 28; RX 61).

46. The final versions of the 60 second and 120 second television commercials for the Ab Force (AB-E-60 and AB-E-120, respectively) ran from January 19, 2002 until April 7, 2002. (JX 1, ¶ 29).

47. The AB-E-60 and AB-E-120 versions of the television spots were cleared for broadcast 11,508 times. (JX 1, ¶ 30). The Ab Force spots ran during all media day parts and appeared on cable, satellite, and broadcast television outlets in major national markets. (Khubani, Tr. 513; Answer, ¶ 8).

48. Consumers placed 74,566 orders for the Ab Force using the telephone number displayed in the 120 second spot (AB-E-120) and 240,440 orders using the telephone number listed in the 60 second spot (AB-E-60). (JX 1, ¶ 31; RX 61). This constitutes approximately ninety five percent of all orders placed. (JX 1, ¶ 31; RX 61).

49. The radio advertisement ran from December 23, 2001 through January 23, 2002. (RX 61; Khubani, Tr. 272-73). The radio advertisement generated a total of 1,340 orders, 211 for the test spot, and 1,129 for the final radio spot. (Khubani Tr. 493-94; JX 1, ¶ 32; RX 61).

50. The print advertisement was not run in any publication until February 14, 2002. (JX 1, ¶ 34). At that time, it ran approximately one week in thirteen newspapers, and again as a newspaper insert from March 10, 2002 to March 17, 2002. (JX 1, ¶ 34). The print advertisement generated a total of 6,871 orders, or approximately two percent of all Ab Force orders placed. (JX 1, ¶ 34; RX 61).

51. The internet advertising ran from February 26, 2002 through April 6, 2002 and generated 2,663 orders in response, totaling less than one percent of all orders placed. (RX 61).

52. Respondents spent over four million dollars to televise commercials for the Ab Force. (Complaint, ¶ 8; Answer, ¶ 8).

53. Khubani set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, ¶ 12).

### **c. Advertisements**

54. Khubani wrote the scripts for the radio and print ads on December 18, 2001. (Khubani, Tr. 480-81, 488-89).

55. Khubani testified that he provided those two scripts to Collette Liantonio, the producer of the television advertisements, “[s]o she would have a basis for writing her TV commercials.” (Khubani, Tr. 482).

56. Liantonio has a regular working relationship with Telebrands. (RX 81 (Liantonio, Dep. at 26)). Her firm has produced more than a dozen television commercials for Telebrands. (RX 81 (Liantonio, Dep. at 26)).

57. Liantonio testified, however, that no one at Telebrands told her what the Ab Force was designed to do. (RX 81 (Liantonio, Dep. at 53)). She stated that she had no product, no literature, and no written information from Telebrands regarding Ab Force before the day that the television commercial was originally recorded. (RX 81 (Liantonio, Dep. at 30, 32-33)).

58. On December 22, 2001, the day the commercials were shot, Liantonio provided Khubani with a script which began with the statement: “[d]o you wish you could get into shape fast without exercise? Wouldn’t you love to have a flatter tummy without painful sit-ups?” (Khubani, Tr. 490).

59. Khubani rewrote Liantonio’s scripts, creating two new scripts (AB-B-60 and AB-B-120) that were used to shoot the test ads. (Khubani, Tr. 490, 492-93). It was Khubani’s regular practice to rewrite Liantonio’s scripts. (RX 81 (Liantonio, Dep. at 36)).

60. Khubani testified that he did not want to make the express claims in Liantonio’s scripts “because we didn’t possess substantiation to make those claims.” (Khubani, Tr. 490).

61. In addition to television, radio, and print advertising, Telebrands also created internet and email advertising. (JX 1, ¶ 33).

62. The Ab Force advertisements ran from December 2001 through April 2002. (Answer, ¶ 7; JX 1, ¶¶ 21-22).

63. Khubani believed the product category that included the AbTronic, Ab Energizer, and Fast Abs ab belts was “one of the hottest categories to ever hit the industry.” (Khubani, Tr. 255; CX 61).

64. Khubani testified that he felt safe saying in the Ab Force ads that the Ab Force was “just as powerful and effective as those expensive ab belts sold on infomercials on TV,” because he asked the factory how the Ab Force compared to those ab belts and was told by the factory that the Ab Force had the same output as the AbTronic and the Fast Abs belts. (Khubani, Tr. 266, 540-41).

## **B. Claims Made in the Ab Force Advertising**

### **1. Facial Analysis**

65. The Ab Force advertisements expressly claim that the Ab Force is technologically comparable to other ab belts and that the Ab Force is significantly less expensive than those other ab belts. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

66. The alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are not expressly made in the Ab Force advertisements. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

67. Khubani’s intention regarding the advertising did not change from one draft to the other. (Khubani, Tr. 492, 498). For example, Khubani testified that “all these scripts were the

same message” and that the “message was . . . still the same” even after changes were made to the scripts. (Khubani, Tr. 492, 496, 497, 498).

68. Each television commercial refers to the product name, includes visual images of primary models and stock footage, and includes oral and written statements. (JX 2; JX 3; JX 4; JX 5).

**a. Product Name**

69. Khubani testified that he selected the name Ab Force because “it was designed to work primarily on the abdominal area” and he thought it “was catchy, sort of like Air Force.” (Khubani, Tr. 264).

70. The name Ab Force implies that the device applies a force to the abdominal muscles and also implies that use of the device will make the abdominal muscles more forceful. (*See* JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

71. In the short test ad, AB-B-60, the name Ab Force is mentioned three times and in the long test ad, AB-B-120, the name Ab Force is mentioned nine times. (JX 2; JX 3). Moreover, in both test ads, the name Ab Force appears on the screen in a large font size at least four times, not including the order screen. (JX 2; JX 3).

72. In the short rollout ad, AB-E-60, the name Ab Force is mentioned four times and in the long rollout ad, AB-E-120, the name Ab Force is mentioned ten times. (JX 4; JX 5). Moreover, in both rollout ads the name Ab Force appears on the screen in a large font size at least four times, not including the order screen. (JX 4; JX 5).

**b. Visual Images**

**i. Primary Models**

73. The television advertisements all feature a female spokesperson, two female models, and a male model. (JX 2; JX 3; JX 4; JX 5).

74. The spokesperson is wearing a business suit; the male model is bare chested with exercise shorts or pants and both female models are wearing sports bras and exercise shorts or pants. (JX 2; JX 3; JX 4; JX 5).

75. Each model has abdomens that are bare except for the Ab Force. (JX 2; JX 3; JX 4; JX 5). Each model is thin with well-defined abs. (JX 2; JX 3; JX 4; JX 5).

76. There are over a dozen depictions of the models wearing the Ab Force and experiencing abdominal muscle contractions. (JX 2; JX 3; JX 4; JX 5).

77. In the longer test and rollout ads, the spokesperson indicates that she is wearing the Ab Force under her business suit, although it is not visible in the ads. (JX 3; JX 5) (“I’m wearing one right now, and it’s working while I’m working.”).

78. Khubani testified that he 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).

79. Liantonio and her employees at Concepts TV made handwritten notes in the course of creating television commercials for Ab Force. These notes indicate that Ab Force television models were required to wear sportswear and have great abdominal muscles. (CX 4; CX 5; CX 6).

80. A Concepts TV talent confirmation sheet for Ab Force states: “[s]eeing your abs is important.” (CX 6). A production job card for the Ab Force states: “girl with great abs.” (CX 4). Another talent confirmation sheet for Ab Force states: “[p]lease have Abs looking their best!” (CX 5). For wardrobe, this talent confirmation sheet calls for a “selection of fitness outfits, a sports bra and bike shorts type look.” (CX 5).

## ii. Stock Footage

81. Khubani asked Liantonio to insert some stock visual images into the advertising as background for the spokesperson. (Khubani, Tr. 541-42, 553-54).

82. The stock footage selected for the commercials included dollar signs, falling numbers, and wheels of technology, which reinforced the message of lower price. (JX 2; JX 3; JX 4; JX 5). There is also stock footage of a spinning globe and an American flag. (JX 2; JX 3; JX 4; JX 5).

83. The stock footage also includes close-up images of a bikini-clad woman showing off her thin waist and well-defined abdominal muscles. (JX 2 (twice); JX 3 (twice); JX 4 (once); JX 5 (once)). The longer ads include a close-up image of a bare-chested, thin, well-muscled man performing a crunch. (JX 3; JX 5). In these stock images, the models are not wearing the Ab Force or any exercise belt. (JX 2; JX 3; JX 4; JX 5).

84. 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.” (RX 81 (Liantonio, Dep. at 69)).



85. 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, Liantonio responded, “[y]es.” (RX 81 (Liantonio, Dep. at 70)).

**c. Statements**

**i. Oral Statements**

86. The test radio ad contains the statement: “[h]ave you seen those fantastic Electronic Ab Belt infomercials on TV? They’re amazing . . . promising to get our abs into great shape fast – without exercise!” (CX 1 H). Khubani testified that this language was included in the test radio script while he was determining “what sounds the best.” (Khubani, Tr. 489).

87. The “abs into great shape fast without exercise” language was eliminated from the rollout radio ad and was not included in any of the other ads, although Khubani stated that he felt the print ad and television commercials had the same message as the radio ad. (Khubani, Tr. 488-89, 492, 496, 498).

88. Khubani was asked “there’s a reference in the radio ad to no exercise, and the subsequent radio ad did not have that reference. Do you recall that change?” to which he answered, “[y]es.” (Khubani, Tr. 498). The next question asked “[d]id you intend to change the meaning from one ad to the next?” to which Khubani answered, “[n]o, I didn’t.” (Khubani, Tr. 498).

89. The test ads refer to the “latest fitness craze” while the rollout ads refer to the “latest craze.” (JX 2; JX 3; JX 4; JX 5). However, Khubani testified that the message was still the same. (See Khubani, Tr. 495-96).

90. Khubani took out the word “fitness” during a “final review and legal review” and “[b]ased on discussions with counsel.” (Khubani, Tr. 275, 278).

91. The rollout ads refer to the “same powerful technology as those expensive ab belts” and “same powerful technology as those ab belts sold by other companies,” while the test ads state that the Ab Force is “just as powerful and effective” as other ab belts. (JX 2; JX 3; JX 4; JX 5).

92. The sentence “Ab Force is just as powerful and effective” was changed to “Ab Force uses the same powerful technology” during the legal and final review process, although according to Khubani “[q]uite frankly, not that I thought that the other copy was inaccurate.” (Khubani, Tr. 276).

93. The opening to the test commercials contain the 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." (JX 2; JX 3; CX 1 B; Khubani Tr. 491).

94. Khubani testified that this language was included to serve as a point of reference for his price saving claims. (Khubani, Tr. 486-89).

95. Khubani also testified that this language was included to create excitement as part of an "everyone wants one" bandwagon effect. (Khubani, Tr. 491-92).

96. A "bandwagon effect" is a frequently observed phenomenon in advertising used to generate interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby, Tr. 373).

97. There are no oral statements in the television or radio advertisements about the purpose or effects of using the Ab Force. (JX 2; JX 3; JX 4; JX 5; CX 1 H).

## **ii. Written Statements**

98. The words on the screen in the rollout ads include the name Ab Force, the price, and ordering information. (JX 4; JX 5).

99. While the announcer is discussing the price savings, the words that appear reinforce that message by stating: "Price of Electronics Comes Down; Mass Production; Factory Deal; Pass Savings On To You!" (JX 2; JX 3; JX 4; JX 5).

100. In the 60 second rollout ad, the phrase "RELAXING MASSAGE" flashes for a brief moment while the spokesperson says "[c]apable of directing." The words then change to "10 INTENSITY LEVELS" while the announcer says "ten different intensity levels at your abdominal area." (JX 4; Khubani, Tr. 279).

101. In the 120 second rollout ad, the phrase "RELAXING MASSAGE" appears briefly while the spokesperson says "[i]t is so comfortable that you can even wear it under . . ." (JX 5). As the words disappear, she finishes the sentence, saying ". . . your clothes." (JX 5).

102. There are no other written statements in the advertisements about the purpose or effect of using the Ab Force. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

## **d. No Massage Claims Made**

103. Telebrands prepared two User's Manuals to accompany the two different models of the Ab Force product. (Khubani, Tr. 499; RX 45; RX 46).

104. The first lines of both User's Manuals state: "Ab Force is intended to provide a

relaxing massage. Ab Force is not intended for medical use, for the treatment of any medical condition, or for any permanent physical changes.” (RX 45; RX 46) (emphasis omitted).

105. Consumers did not receive the Ab Force User’s Manual until after they received the Ab Force ab belt. (Khubani, Tr. 551).

106. The television and radio scripts written by Khubani do not use the word “massage.” (Khubani, Tr. 538; CX 1 H). The print, internet, and email ads Khubani wrote also do not use the word “massage.” (CX 1 G; RX 50; RX 51; RX 52).

107. Operations Manager of CCT Marketing, Mark Golden, who worked on the Ab Force campaign, was never told that Ab Force was a massager. (Golden, Tr. 223).

108. In the Ab Force television commercials, the models who were depicted using the Ab Force did not indicate, through gestures or utterances, that they were being soothed or felt more relaxed. (JX 2; JX 3; JX 4; JX 5).

109. None of the Ab Force advertisements used the term electrical muscle stimulation or “EMS.” (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

**e. Surrounding Circumstances**

**i. The Ab Pulse Campaign**

110. Ab Pulse was another ab belt marketed by Telebrands. (Golden, Tr. 191). Ab Pulse was similar in appearance to the Ab Force. (CX 2). The Ab Pulse was expressly described in the television advertisement as a “massaging ab belt.” (Golden, Tr. 218; CX 2).

111. Elements of the television advertisements for the Ab Pulse were strikingly similar to elements in the television advertisements for the Ab Force. Both advertisements contained: identical oral statements regarding a cost savings from mass production and special deals with the factory; identical oral statements that “I’m wearing one right now and it’s working while I’m working;” the identical written statement “Price of Electronics Comes Down; Mass Production; Factory Deal; Pass Savings On To You!”; the same stock images of falling numbers, wheels of technology, and the American flag; the same spokeswoman; and male and female models in sports clothing with abdominal area bare except for the ab belt. (CX 2; JX 2, JX 3; JX 4; JX 5).

112. The primary difference from the Ab Force advertisements was that the Ab Pulse ad affirmatively stated that Ab Pulse was unlike electronic ab belts sold through infomercials by: describing the product as “the most innovative massaging ab belt to hit the market,” stating, “don’t confuse the Ab Pulse with an electronic ab belt that you’ve seen on infomercials,” and by showing a graphic of a red X superimposed on an ab belt displayed alongside the on-screen legend “infomercial ab belts.” (Golden, Tr. 218-19; CX 2). In addition, there are express claims

in the Ab Pulse ads that the belt is soothing and comfortable and the product is distinguished from other ab belts which “some people find uncomfortable.” (CX 2).

113. Based on sales results, Khubani considered the Ab Pulse campaign a failure. (Khubani, Tr. 281). Ab Pulse was offered for about a month and did not receive high call volume. (Golden, Tr. 222).

## **ii. Other Companies' Ab Belt Infomercials**

114. Unlike the Ab Pulse advertising campaign, the four Ab Force television ads, the radio, print, and internet ads, and one of the email ads expressly referred to those “fantastic electronic Ab belt infomercials on TV.” (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 49; RX 51; RX 52). The other Ab Force email ad expressly referred to “Ab belts sold by other companies on infomercials.” (RX 50).

115. When Respondent Khubani wrote the script for the Ab Force radio, print, and television ads, and the text for the internet and email ads, he testified that he was attempting to create a “compare and save” advertisement and to establish a point of reference. (JX 1, ¶ 11; Khubani, Tr. 486-87, 489-90).

116. Khubani testified that 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).

117. The AbTronic, Ab Energizer, and Fast Abs infomercials were among the ab belt infomercials to which Khubani was referring. (Khubani, Tr. 273-74).

118. AbTronic, Ab Energizer, and Fast Abs were EMS ab belts that were advertised by television infomercials in the United States prior to and during the time period when the Ab Force commercials appeared. (JX 1, ¶ 37).

119. AbTronic, Ab Energizer, and Fast Abs were substantially similar in appearance to the Ab Force, and were comprised of components substantially similar to those used by the Ab Force. (JX 2; JX 3; JX 4; JX 5; JX 7; JX 8; JX 9; JX 10; Mazis, Tr. 60). The Fast Abs and the AbTronic resemble the Ab Force in the button configuration on the belts. (Khubani, Tr. 271).

120. The advertising for the AbTronic, Ab Energizer, and Fast Abs ab belts made express and strongly implied claims that consumers using these devices would lose weight, fat, and inches; gain well-defined abdominal muscles; and achieve such results without the need for exercise. (JX 7; JX 8; JX 9; JX 10; Mazis, Tr. 47-48).

121. The television advertising for the AbTronic, Ab Energizer, and Fast Abs ab belts contained extensive footage of thin male and female models with well-defined abs wearing the

belts over their abdominal areas. (JX 7; JX 8; JX 9; JX 10). These images were displayed on the screen while the infomercial hosts repeatedly represented that the devices caused weight, inch, or fat loss; caused well-developed abs; and were an effective alternative to regular exercise. (JX 7; JX 8; JX 9; JX 10).

122. The AbTronic infomercials stated: “[w]ell, you can lose all the weight in the world that you want, but unless you have good muscle tone underneath, you’re not going to have a washboard abdomen;” “with systems like the AbTronic where we can stimulate these muscles and you do both things, both the system of losing some weight, losing those inches, and then firming and toning the muscles underneath, that muscle definition will, therefore, show through much better and give you better cosmetic improvement;” and “watch as your ab muscles contract as if you’re doing a sit-up . . . . Ten minutes on the AbTronic is the equivalent of 600 sit-ups. That’s why we guarantee you’ll lose two inches off your midsection in less than a month or your money back.” (JX 7; CX 96, Ex. 2 at 10-11, 14, 27, 39).

123. The Ab Energizer infomercial contains statements: that the Ab Energizer was “absolutely incredible for people who want tighter abs and want to lose inches around the midsection” and that “with a touch of a button, you can go from flab to rock-hard abs.” (JX 8; CX 98, Ex. 2 at 3, 10, 11). The 60 second television spot for the Ab Energizer ab belt contains the following statements: “[t]he secret is Ab Energizer’s electronic impulses that stimulate your abs so they contract and relax as if you were doing a sit-up;” “[n]ow 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;” and “[i]f you don’t lose at least two inches off your waist in the first 30 days, return it for a full refund.” (CX 98, Ex. 4 at 3, 4, 5).

124. The Fast Abs infomercial contained the following statements: “[y]ou’ll drop four inches in the first 30 days. We guarantee it;” “[i]n fact, just 10 minutes of Fast Abs is like doing 600 sit-ups;” and “I guarantee you’ll firm the saggy midriff, tone those flabby love handles and lose that belly that’s been embarrassing you for years. Reshape all your problem areas or simply return Fast Abs, no questions asked. You deserve to have the body you’ve always imagined and now you don’t have to spend all day at the gym to get it.” (JX 9; CX 100, Ex. B at 11, 31, 53, 59; CX 100, Ex. D at 32, 63).

125. Infomercials for the AbTronic, Ab Energizer, and Fast Abs ab belts were aired frequently before and during much of the Ab Force campaign, according to the *J.W. Greensheet*. (CX 126; JX 1, ¶ 37). The *J.W. Greensheet* is a DRTV industry publication published weekly by Jordan Whitney, Inc. (Khubani, Tr. 248-49).

126. Telebrands has subscribed to the *J.W. Greensheet* for about twelve years. (JX 1, ¶ 18; Khubani, Tr. 249, 525). The *J.W. Greensheet* costs approximately \$250 per week. (Khubani, Tr. 249).

127. Each issue of the *J.W. Greensheet* contains a Top 50 ranking of television infomercials, a Top 40 ranking of television spots, and a Top 20 ranking of infomercial products. (Towers, Tr. 286).

128. The *J.W. Greensheet* states that it compiles its rankings based on confidential media budgets supplied by direct response marketers as well as its own monitoring of national cable and selected broadcast television markets. (Towers, Tr. 288).

129. The AbTronic electronic ab belt appeared twenty four times in the Top 50 infomercial rankings published in the *J.W. Greensheet* reports between September 3, 2001 and March 4, 2002. (Towers, Tr. 296-97; CX 72 at T011047; CX 73 at T011036; CX 74 at T011025; CX 75 at T011014; CX 76 at T011001; CX 77 at T011160; CX 78 at T011145; CX 79 at T011129; CX 80 at T011112; CX 62 at T011098; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011406; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011349; CX 95 at T011503).

130. The Ab Energizer infomercial appeared nineteen times in the Top 50 infomercial rankings published in the *J.W. Greensheet* reports between October 15, 2001 and March 4, 2002. (Towers, Tr. 297; CX 77 at T011161; CX 78 at T011145; CX 79 at T011129; CX 80 at T011112; CX 62 at T011098; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011407; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011350; CX 95 at T011504).

131. The Ab Energizer television spot appeared nineteen times in the Top 40 direct response spots rankings published in the *J.W. Greensheet* reports between October 15, 2001 and March 4, 2002. (CX 77 at T011163; CX 78 at T011147; CX 79 at T011131; CX 80 at T011114; CX 62 at T011100; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011339; CX 86 at T011327; CX 87 at T011315; CX 88 at T011301; CX 89 at T011287; CX 90 at T011409; CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011351; CX 95 at T011505).

132. Fast Abs infomercials appeared fifteen times in the Top 50 infomercial rankings published in the *J.W. Greensheet* reports between November 19, 2001 and March 4, 2002. (Towers, Tr. 298; CX 62 at T011099; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011406; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011349; CX 95 at T011503).

133. The Fast Abs television spot appeared fifteen times in the Top 40 direct response spots rankings published in the *J.W. Greensheet* reports between November 19, 2001 and March 4, 2002. (CX 62 at T011101; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85

at T011340; CX 86 at T011328; CX 87 at T011315; CX 88 at T011301; CX 89 at T011287; CX 90 at T011410; CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011352; CX 95 at T011506).

134. AbTronic, Ab Energizer, and Fast Abs were the only ab belts that appeared in the *J.W. Greensheet* Top 50 infomercials rankings between early September 2001 and mid-April 2002. (Towers, Tr. 305).

135. The Federal Trade Commission issued complaints against the advertisers of the Ab Energizer, Fast Abs, and AbTronic on May 7, 2002. (JX 1, ¶ 46).

136. Television advertisements for Ab Force were ranked five times in the Top 40 television spot rankings published in the *J.W. Greensheet* between February 4, 2002 and March 4, 2002. (CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011351; CX 95 at T011505).

### iii. Other EMS Device Advertisements

137. Respondents placed on the record promotional materials for eight EMS devices: (1) IGIA 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).

138. Khubani admitted that the EMS ab products being marketed at the time made a variety of statements, from weight loss and rock hard abs to relaxing massage, toning, and strengthening claims. (Khubani, Tr. 471-72).

139. The IGIA Electrosage is not an electronic ab belt and was advertised in spot advertising, not infomercials. (RX 72; Towers, Tr. 304). The IGIA Electrosage was advertised to provide a massage that would leave users “feeling refreshed, relaxed, and reenergized.” (RX 72). From September 2001 through February 2002, the short spot for the IGIA Electrosage appeared approximately twenty times in the *J.W. Greensheet* Top 40 direct response spot rankings. (Towers, Tr. 304; CX 73 at T011038; CX 74 at T011027; CX 75 at T011016; CX 76 at T011003; CX 77 at T011162; CX 78 at T011147; CX 79 at T011131; CX 80 at T011114; CX 81 at T011100; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011339; CX 86 at T011327; CX 87 at T011315; CX 88 at T011301; CX 90 at T011409; CX 91 at T011395; CX 92 at T011381; CX 93 at T011367).

140. The Mini Wireless Massage System product is not an electronic ab belt and was advertised in spot advertising, not infomercials. (RX 73; Towers, Tr. 301, 304). The television commercial for the Mini Wireless Massage System promises a “soothing and relaxing massage” and promises to “relieve muscle pain, soreness, and stiffness.” (RX 73; Khubani, Tr. 459). The television spot for the Mini Wireless Massage System did not appear in the Top 40 commercial

spot rankings published in the *J.W. Greensheet* from September 2001 through February 2002. (CX 62; CX 72-CX 95).

141. The Accusage product is not an electronic ab belt. (RX 74; Towers, Tr. 301-02). The Accusage promises a “relaxing muscle massage.” (RX 74). The Accusage was listed once in the Top 40 Direct Response Spots in the *J.W. Greensheet* for the weeks of December 24, 2001 (CX 86 at T011328) and January 14, 2002 (CX 88 at T011309).

142. The television spot for the Smart Toner ab belt states that the product is “the fast, easy, sexy way to have the slim, sexy body you’ve always wanted” and “in fact, we’ll guarantee you’ll lose two inches from your waist in just two weeks, or your money back.” (RX 75). Product testimonials in the Smart Toner ab belt commercial assert the loss of fifteen pounds, “a big reduction in body fat,” and “over two inches lost in the waistline.” (RX 75). The Smart Toner advertisement provided by Respondents was a short spot, not an infomercial. (RX 75). The television spot for the Smart Toner ab belt did not appear in the Top 40 commercial spot rankings published in the *J.W. Greensheet* from September 2001 through February 2002. (Towers, Tr. 302; *see also* CX 62; CX 72-CX 95).

143. The GymFitness advertisement mentions both massage and fitness, promising to “condition your muscles without working out;” offering “a relaxing massage;” promising to “work[] your abs and condition your muscles, toning them perfectly;” and repeatedly states that it is for use “when you can’t get to the gym.” (RX 76). The infomercial for the GymFitness ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings in the *J.W. Greensheet* from September 2001 through February 2002. (Towers, Tr. 302-03; *see also* CX 62; CX 72-CX 95).

144. The ElectroGym advertisement provided by Respondents was a short spot, not an infomercial. (RX 77). The ElectroGym product briefly appeared in an infomercial for the IGIA Electrosage. (RX 72). In this infomercial, the ElectroGym ab belt was offered as a “free gift” in connection with the sale of the IGIA Electrosage. (RX 72; Khubani, Tr. 451). This infomercial contains a statement that the ElectroGym ab belt offers “a great workout.” (RX 72; Khubani, Tr. 451). The television spot for the ElectroGym appeared approximately eight times in the Top 40 commercial spot rankings in the *J.W. Greensheet* from September 2001 through February 2002. (Towers, Tr. 303).

145. The Slim Tron advertisements indicates that the product will “tone your muscles and [you will] get a great looking body,” and indicates that users will lose three inches off their waist. (RX 78). The television spot for the Slim Tron ab belt appeared approximately three times in the Top 40 commercial spot rankings in the *J.W. Greensheet* from September 2001 through February 2002. (Towers, Tr. 303; *see also* CX 62; CX 72-CX 95).

146. The Slendertone Flex advertisement provided by Respondents was a short spot, not an infomercial. (RX 79). Slendertone Flex is an electronic ab belt. (RX 79). Direct response



television spots for Slendertone Flex have very recently appeared on television. (Khubani, Tr. 447). Respondent Khubani stated that the presentation for Slendertone Flex on QVC was “very similar” to the recorded Slendertone Flex television spot, which is dated November 10, 2003. (Khubani, Tr. 447; RX 79). The recorded Slendertone Flex television spot states: “You mean I don’t have to do sit-ups anymore?” and “9 in 10 users reported firmer, tighter abs.” (Khubani, Tr. 447 (playing exhibit); RX 79). Television advertising for the Slendertone Flex ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings in the *J.W. Greensheet* from September 2001 through February 2002. (See Towers, Tr. 305; CX 62; CX 72-CX 95).

## 2. Extrinsic Evidence

147. Complaint Counsel offered the expert opinion of Michael Mazis, Ph.D. to provide extrinsic evidence of the claims conveyed by the Ab Force ads. (Mazis, Tr. 35 *et seq.*; CX 58).

148. Mazis is Professor of Marketing at the Kogod School of Business, American University. (CX 58, ¶ 2; Mazis, Tr. 37). He has been a faculty member at American University for over twenty years, serving ten years as chair of the Department of Marketing. (CX 58, ¶ 2; Mazis, Tr. 37). For over a decade, he has taught undergraduate and graduate courses in marketing research and consumer behavior. (CX 58, ¶ 2; Mazis, Tr. 37-38).

149. Mazis served as a consultant on advertising issues and consumer behavior for the FTC, Food and Drug Administration, Consumer Product Safety Commission, Department of Justice, U. S. Mint, Bureau of Alcohol, Tobacco, and Firearms, the State of California, and Warner-Lambert Pharmaceutical Company. (CX 58, ¶¶ 4-5).

150. Mazis is a member of the American Marketing Association and a member and former director of the Association for Consumer Research. (CX 58, ¶ 6). He was editor of the *Journal of Public Policy & Marketing* from 1992 to 1995 and Associate Editor of *The Journal of Consumer Affairs* from 1998 to 2001. (CX 58, ¶ 6; Mazis, Tr. 38).

151. Mazis has conducted hundreds of surveys and research studies. (Mazis, Tr. 38). Mazis has published over sixty articles in academic journals including the *Journal of Marketing*, *Journal of Consumer Research*, *Journal of Marketing Research*, *Journal of Public Policy & Marketing*, *The Journal of Consumer Affairs*, *Journal of Personality and Social Psychology*, *Journal of Experimental Social Psychology*, and *Journal of the American Medical Association*. (CX 58, ¶ 7; Mazis, Tr. 38).

152. Respondents offered the expert opinion of Jacob Jacoby, Ph.D who severely criticized Mazis’s analysis and conclusions. (Jacoby, Tr. 335 *et. seq.*).

153. Jacoby holds an endowed chair at the Stern School of Business at New York University where he teaches research methodology and consumer behavior courses. (Jacoby,

Tr. 336-37).

154. Jacoby served as a peer reviewer on the chapter on survey research evidence in the *Reference Manual on Scientific Evidence* published by the Federal Judicial Center and wrote the chapter on consumer psychology in the International Encyclopedia of the Social and Behavioral Sciences. (Jacoby, Tr. 337-39).

155. Jacoby served as president of the Association for Consumer Research and the Society for Consumer Psychology and is a fellow of both institutions and has received awards from the Association for Consumer Research and from the Society for Consumer Psychology for research excellence. (Jacoby, Tr. 339-40).

156. Jacoby received several major grants from the National Science Foundation and from the American Association of Advertising Agencies to study the comprehension and miscomprehension of advertising. (Jacoby, Tr. 339).

**a. Mazis's Facial Analysis of the Ab Force Ads**

157. Mazis opines that consumers took away from the Ab Force ads certain core performance claims that were either the result of familiarity with ads for other ab belts or implied by images and words within the four corners of the Ab Force ads. (Mazis, Tr. 61-62).

**i. Direct Effects Within the Four Corners of the Ab Force Ads**

158. Direct effects within the four corners of the ad cause consumers to make inferences about Ab Force and take away implied claims. (Mazis, Tr. 66-67).

159. "[E]ven if you had never heard of an ab belt before, even if you didn't have any category beliefs about ab belts, you could see the ad and you could make inferences because there's certain implied claims in the ads." (Mazis, Tr. 66).

160. "Visual images are really more important than the verbal messages, because they really remain in people's memories." (Mazis, Tr. 59).

161. Direct effects in the challenged ads include the appearance of fit, trim models and the depiction of the Ab Force belt, itself, shown visibly pulsating the abdominal muscles of the models. (Mazis, Tr. 66-67).

162. Another direct effect is the name Ab Force which could have a double effect on consumers: "[o]n the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words, it makes your abs noticeable, that they . . . are really well developed." (Mazis, Tr. 60).

## ii. Indirect Effects of the Ab Force Ads

163. Mazis refers to the effects generated on consumers because of previous exposure to ab belts through either the infomercials for AbTronic, Ab Energizer, or Fast Abs, word-of-mouth about ab belts, and retail packaging for ab belts as “indirect effects” which cause consumers to develop an ab belt category of beliefs. (Mazis, Tr. 48, 65-66).

164. Mazis testified that these beliefs would cause consumers to associate ab belts with well-developed abs, losing inches, losing weight, and effective alternatives to exercise. (Mazis, Tr. 48). As a result of these indirect effects, Mazis opines that the Ab Force television spots contain implied claims that using Ab Force will result in well-developed abs and loss of inches around the waist. (Mazis, Tr. 61).

165. In identifying indirect effects that could shape and influence a consumer’s category beliefs, Mazis reviewed and considered the Complaint and exhibits in this matter; transcripts and videotapes of the infomercials for AbTronic, Ab Energizer, and Fast Abs; and infomercial ranking reports for the AbTronic, Ab Energizer, and Fast Abs products. (Mazis, Tr. 120-21; CX 58, ¶ 9).

166. Mazis testified that the ab belt category beliefs may be effected by word-of-mouth communication generated by viewers of the infomercials, or by people who have purchased an ab belt and communicated their impressions to others who did not see the ads, or by seeing the packaging for them on display in retail outlets. (Mazis, Tr. 64-65, 169-70). According to Mazis, people could be exposed to claims that appear on the retail packaging for ab belt products that appear on the shelves of retail outlets and they could use such information to form their own category beliefs. (Mazis, Tr. 139-40, 170-71).

167. According to Mazis, people exposed to infomercials for other ab belts do not necessarily remember the specifics of the ads they saw, rather, the ab belt infomercials produce general category beliefs about ab belts that would be triggered by the Ab Force ads. (Mazis, Tr. 156-57).

168. Mazis provided no empirical evidence that Ab Force advertisement viewers who happened to see the ads for AbTronic, Ab Energizer, or Fast Abs would remember or take away that information. (Mazis, Tr. 184).

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

170. The categorization theory is generally accepted in the field of consumer behavior. (Mazis, Tr. 49). A leading proponent of the theory, Mita Sujan, published a well-known peer-reviewed article on the subject in the *Journal of Consumer Research* about fifteen years ago. (Mazis, Tr. 49).

171. According to 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 affect associated with the category can be quickly retrieved and applied to the stimulus.” (CX 57 at 31).

172. Sujan investigated if and how novice and expert consumers processed information regarding one category of cameras in relation to another. (CX 57). In reaching a conclusion, Sujan designed an experiment whereby two descriptions were given in simulated print ads and were used to match or mismatch conditions to eliminate the confound between the manipulation of information match/mismatch and the actual content of the information. (CX 57 at 35). Test participants were asked to recall the type of camera about which they had received information in order to ensure that they had the relevant category available in memory. (CX 57 at 38).

173. While Respondents’ marketing expert, Jacoby, testified that he was familiar with the theory and with Sujan’s article, he did not agree with application of the theory to this case. (Jacoby, Tr. 344-45).

174. Jacoby testified that according to categorization theory consumers will form an understanding of categories and will place objects into categories, and thus will interpret and infer things about those objects. (Jacoby, Tr. 344).

175. Jacoby objected to the application of categorization theory to this case because, as presented by Sujan, categorization theory relies on the participants having a preexisting category of beliefs and there is no evidence that consumers have a preexisting ab belt category of beliefs. (Jacoby, Tr. 344-45).

176. A communication to consumers does not necessarily mean that the communication was sufficient to have an impact on consumers’ beliefs and behaviors. (Jacoby, Tr. 369). Simply because a source conveys information does not necessarily mean it has an impact on the receiver exposed to it, or that the communication has an impact to a significant degree. (Jacoby, Tr. 369). In other words, a mere reference to “other ab belts” or the physical appearance of the product or other elements may not be sufficient to trigger any category beliefs that consumers may have. (Jacoby, Tr. 367).

177. Jacoby indicated that in order to determine whether there was an impact on consumers, further research needs to be conducted. (Jacoby, Tr. 370-72).

178. Mazis, however, testified that four key elements in the Ab Force commercials would cause consumers to categorize the Ab Force with the AbTronic, Ab Energizer, and Fast Abs ab belts. (Mazis, Tr. 59-60). These four elements are: references in Ab Force ads to the other ab belts on television, the visual images of models with well-developed abs and slim bodies, the physical appearance of the Ab Force product which is similar to the other ab belts, and the similarity of the name Ab Force to the names of the other ab belts. (Mazis, Tr. 59-60).

179. When asked at trial whether he should have considered other EMS ab products in reaching his opinions, Mazis testified that while consumers would form a category belief based on seeing EMS ab belts, they would not include in that category other EMS ab products unless they were “relatively similar” in appearance. (Mazis, Tr. 135-36).

180. When asked whether products with a number of patches as opposed to one patch, and which made similar claims, could be considered in the category, Mazis admitted that he would need to examine the product and the ads before he could reach any opinion: “It would be one of those things where I would have to see the product and look at the – look at the advertisements. I just – answering it hypothetically is basically impossible.” (Mazis, Tr. 136).

181. Mazis indicated that there “might be a different category” established for products that looked different (for example, products that had wires) and that made some different claims. (Mazis, Tr. 136).

182. Mazis admitted that his opinion that the only ab belts in the ab belt category would be ones that looked the same and made the same claims “is a theory, this is a model” and that he had conducted no quantitative testing of this theory. (Mazis, Tr. 136-37).

183. Mazis was never provided with advertisements or products, nor did he review advertisements or retail packaging, for any other EMS ab product. (Mazis, Tr. 123-24, 134).

184. Mazis testified that he did not know how many consumers would have been exposed to the ads for AbTronic, Ab Energizer, or Fast Abs. (Mazis, Tr. 128, 182-83). Indeed, Mazis had no opinion about the likelihood that somebody who saw the Ab Force commercials would also have seen one of the ads for AbTronic, Ab Energizer, or Fast Abs, because he had “no information on that.” (Mazis, Tr. 172).

185. Mazis testified that, through the process of selective attention, people who have an interest in certain product categories such as those relating to losing weight or exercise, *e.g.*, the target audience, will pay attention to commercials for such products. (Mazis, Tr. 172-73). Thus, based on his knowledge of consumer behavior and how people watch television, if there is a propensity for people to watch one ab belt infomercial, there is a propensity for those same people to selectively attend to other such advertising. (Mazis, Tr. 173).

186. Mazis relied on his “assumption that there’s a lot of exposure to a lot of these different products,” because these infomercials ran “on weekends, late nights and so on, when there aren’t a lot of programming choices out there.” (Mazis, Tr. 172-73). This assumption, however, ignores his own testimony that spot advertising may not necessarily run at the same time or on the same stations to which infomercials are limited. (Mazis, Tr. 131-32).

187. Even if there was significant overlap between the Ab Force ad viewership and the viewership for AbTronic, Ab Energizer, and Fast Abs infomercials, Mazis admitted that it was not certain that the viewers who were exposed to the ads would have necessarily retained or even comprehended the ads. (Mazis, Tr. 172). He testified that retention would depend on “a lot of factors that go into that,” none of which he described or demonstrated applied in this case. (Mazis, Tr. 172).

188. Mazis admitted that he had seen no empirical data about the ability of viewers to remember what they saw in the infomercials for AbTronic, Ab Energizer, and Fast Abs. (Mazis, Tr. 184). He conceded that his opinions “about the take-away from those ads are just based on my facial analysis of those ads.” (Mazis, Tr. 184).

189. Mazis did not know what messages were being conveyed by advertisements or packaging for other EMS ab products. (Mazis, Tr. 167-71). Mazis did not know what messages were being conveyed by word-of-mouth communication. (Mazis, Tr. 169-70). Mazis did not know what other print or radio advertisements were being disseminated. (Mazis, Tr. 181-82). Indeed, Mazis admitted that when he referred to category beliefs, he was referring only to “ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer, and Fast Abs].” (Mazis, Tr. 171-72).

190. Despite having no reliable information regarding how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired, Mazis stood by his belief that “many consumers would have been exposed to these ads.” (Mazis, Tr. 166).

191. Because Mazis failed to test the theory that consumers necessarily formed or retained categorization beliefs about EMS ab products prior to viewing the Ab Force ads, or whether they even saw any of the ads for AbTronic, Ab Energizer, or Fast Abs prior to seeing the Ab Force ads, Mazis’s opinion that there was categorization by consumers is merely speculation, not evidence of the association. (Jacoby, Tr. 347-51).

192. Mazis’s assumption that consumers who saw the Ab Force ad also likely saw the ads for AbTronic, Ab Energizer, and Fast Abs is mere speculation that was untested in this matter. (Jacoby, Tr. 367). Mazis’s opinion that consumers actually developed categorization beliefs is mere untested speculation. (Jacoby, Tr. 347-51).

**b. The Copy Test**

193. Mazis conducted a consumer survey in which he designed a copy test of an Ab Force television spot. (Mazis, Tr. 67).

194. A copy test is an in-person survey in which people are shown an advertisement, and asked a number of questions in terms of their perceptions of the advertisement, which is sometimes referred to as the “take-away” from the advertisement. (Mazis, Tr. 67).

195. The purpose of the copy test was to assess whether a 60 second advertisement for Ab Force communicates to consumers that using Ab Force results in well-developed abdominal muscles; causes users to lose inches around the waist; causes users to lose weight; is an effective alternative to exercise; and removes fat deposits. (CX 58, ¶ 22).

196. Copy testing the Ab Force ad was preferable to surveying past purchasers of Ab Force ab belts because people are not likely to remember why they bought a product a year or more ago or exactly what claims the ads made, and they might make up answers. (Mazis, Tr. 151-52). Showing consumers the ad and getting their immediate response is the more valid means of measuring the way consumers perceive the ad. (Mazis, Tr. 151-52).

197. Mazis designed the study, and the contractor for the study, U.S. Research, collected the data. (Mazis, Tr. 67).

198. U.S. Research is reliable to execute such copy tests. (Mazis, Tr. 67).

**i. The Universe for the Copy Test Was Properly Defined**

199. The copy test was conducted in nine shopping malls located in Albuquerque, NM; Austin, TX; Colorado Springs, CO; Orlando, FL; Poughkeepsie, NY; St. Louis, MO; Schenectady, NY; Seattle, WA; and Toledo, OH. (Mazis, Tr. 67-68; CX 58, ¶ 24).

200. The choice of the mall locations assured geographic diversity throughout the country and facilitated achieving an approximately equal number of interviews in the four Census regions. (Mazis, Tr. 71).

201. Copy test interviews were conducted in December, 2003 and January, 2004. (CX 58, ¶ 25).

202. Interviewers from U.S. Research approached shoppers in the selected malls and asked them if they would answer a few brief questions. (Mazis, Tr. 72).

203. Interviewers used a screening questionnaire (“screener”) designed by Mazis to determine whether potential respondents were qualified to participate in the study. (Mazis,

Tr. 68; CX 58, ¶ 26; CX 58, Ex. C).

204. Age and sex quotas for copy test survey participants were based upon the results of a 1996 survey of consumers who were trying to lose weight and which was published in the October 13, 1999 issue of the *Journal of the American Medical Association*. (Mazis, Tr. 71-72; CX 58, ¶ 23).

205. The survey called for a survey universe of sixty percent females, forty percent males with twenty percent 18-29 years of age, forty five percent 30-49 years of age, and thirty five percent 50 years of age and older. (Mazis, Tr. 71-72; CX 58, ¶ 23).

206. The screener asked both “inclusion” questions and “exclusion” questions. (Mazis, Tr. 73-76; see CX 58, ¶ 26). These questions were designed to bring into the study people who might have some propensity to buy the product and eliminate people who wouldn’t be typical consumers. (Mazis, Tr. 68).

207. The questionnaire screened out people who worked for an advertising agency, a public relations firm, or a marketing research firm because they would have specialized knowledge of research technique. (Mazis, Tr. 75; CX 58, Ex. E).

208. Likewise, the questionnaire screened out people who worked for a store or company that sells exercise, fitness, weight loss products or programs, or products to massage the body because such people would have specialized knowledge about fitness, exercise, weight loss, or massage and consequently would not be typical consumers who would have a propensity to purchase the Ab Force. (Mazis, Tr. 75; CX 58, Ex. E).

209. In order to qualify for the study, potential survey participants had to have purchased in the past twelve months a product or used a service to help them lose weight, tone muscles, or massage the body. (CX 58 at 26; Mazis, Tr. 73-74). Consumers who had bought products or used a service to lose weight, tone their muscles, or massage their body were in a class of likely purchasers of the Ab Force ab belt. (Mazis, Tr. 73). Jacoby opined that this particular question was appropriate. (Jacoby, Tr. 353-54).

210. In addition, potential respondents, in the past twelve months, had to have purchased a product by calling a toll-free number that was included in a television ad, program, or infomercial. (CX 58, ¶ 26; Mazis, Tr. 74-75). Consumers who never bought products by calling toll free numbers in response to television ads, programs, or infomercials would be unlikely purchasers of the Ab Force. (Mazis, Tr. 75).

211. The screening questionnaire did not ask about prior purchases of ab belts. (Mazis, Tr. 152).



212. The screening questionnaire did not ask about whether people had been exposed to advertising for ab belts. (Mazis, Tr. 153-54).

213. The screening questionnaire also included “masking” questions regarding working for companies that sell personal computers or prescription drugs that served to disguise the true intent of the study and prevent people from assuming that the study was for a fitness or massage product. (Mazis, Tr. 74; CX 58, Ex. E).

## ii. The Control Advertisement

214. Survey respondents who qualified to participate in the study were randomly assigned to either a test group or a control group. (CX 58, ¶¶ 12, 27). The test group (consisting of 182 survey respondents) watched a version of the Ab Force ad (CX 104) that Respondents aired most often (AB-E-60). (Mazis, Tr. 79; CX 58, ¶¶ 12, 27). The control group (consisting of 220 survey respondents) saw an advertisement created by Mazis (CX 105) that was a “cleansed” (60 second) version of one of the 120 second rollout commercials for Ab Force. (Mazis, Tr. 83; CX 58, ¶ 28).

215. “[U]se of a control group is an attempt to essentially remove preexisting beliefs as a possible cause of the results we see.” (Mazis, Tr. 157).

216. A “cleansed” or control ad may have allegedly misleading elements removed and/or a statement correcting the alleged deception. (CX 58, ¶ 28).

217. In the control ad, the mention of ads for other electronic abdominal belts advertised on television was removed, the stock images of a woman in a bikini and a man performing a crunch were removed, and some, but not all, images of models wearing the Ab Force were removed. (CX 105).

218. The control ad did not eliminate the elements which Mazis indicated were direct effects that convey the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. (See F. 158-62).

219. The control ad includes three images of the female and male model with well-defined abs, wearing the Ab Force and sports clothing, and experiencing muscle contractions. (CX 105).

220. In the control ad, the name Ab Force is stated verbally six times. (CX 105).

221. The results for the control ad “are relatively high numbers for a control ad” which Mazis attributes to preexisting beliefs about ab belts. (Mazis, Tr. 108).

### iii. The Questions Were Unbiased and Appropriate

222. The control ad included the following statement at the end of the commercial: “Ab Force for a relaxing massage” which appeared on the screen and was read by an announcer. (Mazis, Tr. 88-89; CX 58, ¶ 28).

223. Survey respondents who qualified for the study were escorted to the interviewing facility maintained by the research organization and were administered one of the two versions of the “main” questionnaire. (Mazis, Tr. 77-78).

224. Approximately one half of the survey respondents were administered questionnaire version Version 1A and the other half Version 1B. (Mazis, Tr. 92). Each version contained exactly the same questions, but the order was changed to control for bias resulting from question ordering. (Mazis, Tr. 92; CX 58, ¶ 29).

225. In addition, each version of the questionnaire was color coded blue or green to correspond to either the “blue dot” test ad or the “green dot” control ad. (Mazis, Tr. 91-92). Respondents were initially asked to identify the color of the dot on the tape cassette they were about to view. (Mazis, Tr. 91-92). This was done to assure that respondents viewed the correct commercial. (Mazis, Tr. 91; CX 58, ¶ 30).

226. Survey participants were assigned to the test group or the control group at random. (Mazis, Tr. 90).

227. Each survey participant saw the test ad or the control ad twice before the questionnaire was administered. (CX 58, ¶ 31; Mazis, Tr. 92).

228. Survey participants were asked to identify the brand name of the product that was advertised in the commercial they had just seen. (CX 58, ¶ 31). The eighty one survey participants who were unable to identify the sponsor were not asked any of the subsequent questions and were eliminated from the study. (Mazis, Tr. 93, 147-48; CX 58, ¶ 31).

229. Mazis testified that the failure of eighty one participants to recall the name of the product indicated to him that those participants were not paying attention to the ad, which he considered a good reason not to include them in the final result. (Mazis, Tr. 147).

230. Eliminating inattentive participants from the survey, although not required, was not unreasonable because inattentive survey respondents may have been unlikely to give meaningful responses to the ensuing questions. (See Mazis, Tr. 94).

231. The remaining participants were then asked an open-ended question: “[w]hat did the commercial say, show, or imply about Ab Force?” (CX 58, ¶ 32).

232. Open-ended questions are questions in which there are no defined answer categories. (Mazis, Tr. 95) (“People just give the answer in their own words, and the interviewer records that response verbatim.”)

233. Question 4 asked respondents whether the commercial said, showed, or implied that Ab Force improves users’ appearance, fitness, or health. (CX 58, ¶ 33). Participants were shown a card with only three possible answers: “yes, it does,” “no, it doesn’t,” or “don’t know or no opinion,” and asked to provide one of those three answers. (CX 58, ¶ 33). This is a “filter” question designed to reduce guessing to subsequent questions. (CX 58, ¶ 33).

234. Only participants who answered question 4 in the affirmative were asked the ensuing close-ended questions. (CX 58, ¶ 33; Mazis, Tr. 95).

235. The purpose of the filtering question was to eliminate participants who might be prone to guess in answering subsequent closed-ended questions. (Mazis, Tr. 95; CX 58, ¶ 33). If participants did not see a fitness, health, or appearance claim in the commercial, their answers to the more specific questions would not be very reliable. (Mazis, Tr. 95).

236. Question 5 began with participants being informed that they would be read a list of statements, of which, some, all, or none, may have been implied by or made in the Ab Force commercial. (Mazis, Tr. 95-96).

237. This instruction was followed by a series of eight statements with the order rotated throughout the questionnaires so that there was no order bias. (CX 58, ¶ 34; Mazis, Tr. 96).

238. Five of the eight statements were at issue in the case:

- “Using Ab Force causes users to lose inches around the waist.”
- “Using Ab Force results in well-defined abdominal muscles.”
- “Using Ab Force removes fat deposits.”
- “Using Ab Force is an effective alternative to regular exercise.”
- “Using Ab Force causes users to lose weight.”

(CX 34; Mazis, Tr. 97-98).

239. The three other statements (regarding stomach ulcers, nausea, and blood pressure) were included to mask the intent of the study. (CX 58, ¶ 34). Mazis explained that these were included to assure that participants were paying attention and not just saying yes to every question. (Mazis, Tr. 97).

240. After each statement was read to participants, they had the opportunity to select one of three possible answers: “YES, it is implied by or made in the Ab Force Commercial,” “NO, it is not implied by or made in the Ab Force commercial,” or, “You DON’T KNOW or you have

NO OPINION.” (Mazis, Tr. 96; CX 58, ¶ 34).

241. Question 6 asks “[d]oes or doesn’t the Ab Force commercial say, show, or imply that the Ab Force gives users a massage?” (Mazis, Tr. 98). Mazis explained that this question was included in anticipation of Respondents’ claim that their ads conveyed a massage claim. (Mazis, Tr. 98).

242. This massage question was asked before question 4 (the appearance, fitness, health question) in half of the questionnaires to control for order bias. (Mazis, Tr. 98-99).

243. Question 7 asks whether, in the last thirty days, respondents had seen, read, or heard a news story or stories featuring an abdominal device. (Mazis, Tr. 100).

244. Question 7 was added just before the study was about to go into the field and was prompted by recent news accounts on television discussing an FTC action regarding companies making weight loss claims with depictions of ab belts. (Mazis, Tr. 99).

245. Those who answered affirmatively were asked “[a]s best you can remember, what did the news story or stories say about abdominal belt ab belts?” (CX 58, ¶ 36).

246. Forty-one persons gave responses indicating that the news stories said that the ab belts were ineffective, didn’t cause weight loss, were dangerous, or were a false advertising scam. (CX 58, ¶ 41; Mazis, Tr. 100).

247. These survey participants were removed out of prudence to avoid potential bias due to the recent news stories. (Mazis, Tr. 154-56).

248. At the completion of the survey, completed questionnaires from the nine shopping malls were sent to U.S. Research where they were reviewed to confirm that they had been filled out properly and for possible mistakes in the way the interview was administered. (Mazis, Tr. 101).

249. The names and telephone numbers of all survey respondents who provided them were then sent to Park Research, an interviewing service not affiliated with U.S. Research, to conduct telephone validation. (CX 58, ¶ 40).

250. The purpose of validation is to confirm that the survey respondents did, in fact, participate in the interview and that they met the criteria for being included in the study. (Mazis, Tr. 101; CX 58, ¶¶ 40-41).

251. As a result of the validation process, 171 survey respondents were eliminated from the database. (CX 58, ¶ 41). Most of the people were removed because they said that they hadn’t purchased a product from an 800 number. (Mazis, Tr. 101).

252. After validation, Mazis removed the questionnaires of the forty one people who, in response to question 7, indicated either that ab belts were ineffective, didn't cause weight loss, were dangerous, or were a false advertising scam. (CX 58, ¶ 41; Mazis, Tr. 100, 154-56).

253. Mazis also did not include the eighty one partially completed questionnaires of survey respondents who were inattentive and unable to identify Ab Force as the sponsor of the advertisement. (Mazis, Tr. 102; CX 58, ¶ 41).

254. Therefore, 389 questionnaires were included in the data tabulations. (CX 58, ¶ 41).

#### iv. Results

255. Copy test results were reported in total percentages, and then in terms of statistical significance. (CX 58).

256. Under Mazis's supervision, U.S. Research developed a coding framework for the open-ended question: "[w]hat did the commercial say, show, or imply about Ab Force?" (CX 58, ¶ 38; CX 58, Ex. F; Mazis, Tr. 104). Two independent coders, who were unaware of the study's purpose, coded the responses to the open-ended question. (Mazis, Tr. 102).

257. The responses to this open-ended question reveal that 22.3% of survey respondents in the test ad group and 11.9% of the survey respondents in the control group indicated that the advertisement communicated that using Ab Force results in well-defined abdominal muscles, in loss of weight or inches around the waist, or in an improved physique. (CX 58, ¶ 42; Mazis, Tr. 104-05).

258. For the statement that using Ab Force causes users to lose weight, 43% of the test group and 28.1% of the control group responded affirmatively. (Mazis, Tr. 107). The net difference between the test group and the control group for the lose inches around the waist statement was 15.7%. (Mazis, Tr. 106). That result was statistically significant at the .01 level. (Mazis, Tr. 107).

259. To the statement that using Ab Force causes users to lose inches around the waist, 58.1% of the test group and 42.4% of the control group responded affirmatively. (Mazis, Tr. 106). The net difference between the test group and the control group for the lose inches around the waist statement was 15.7%. (Mazis, Tr. 106). That result was statistically significant at the .01 level. (Mazis, Tr. 106).

260. For the statement that using Ab Force removes fat deposits, 22.9% of the test group and 19.0% of the control group responded affirmatively. (Mazis, Tr. 107). The net difference between the test group and the control group of 3.9% was not statistically significant. (Mazis, Tr. 107).

261. To the statement that using Ab Force results in well-defined abdominal muscles, 65.4% of the test group and 48.1% of the control group responded affirmatively. (Mazis, Tr. 106). The net difference between the test group and the control group for the well-defined muscles statement was 17.3%. (Mazis, Tr. 106). That result was significant to the .001 level. (Mazis, Tr. 106).

262. For the statement that using Ab Force was an effective alternative to exercise, 39.1% of the test group and 28.6% of the control group responded positively. (Mazis, Tr. 107). The net difference between the test group and the control group for the lose inches around the waist statement was 10.5%. (Mazis, Tr. 107). That result was statistically significant at the .05 level. (Mazis, Tr. 107).

263. The following chart summarizes the affirmative responses to each of the five key closed-ended statements posed in Question 5:

Using Ab Force . . .	TEST AD	CONTROL AD
Results in well-defined abdominal muscles	117 (65.4%)	101 (48.1%)
Causes users to lose inches around the waist	104 (58.1%)	89 (42.4%)
Causes users to lose weight	77 (43.0%)	59 (28.1%)
Is an effective alternative to exercise	70 (39.1%)	60 (28.6%)
Removes fat deposits	41 (22.9%)	40 (19.0%)
Lowers blood pressure	9 (5.0%)	6 (2.9%)
Relieves nausea	2 (1.1%)	4 (1.9%)
Relieves pain from stomach ulcers	0 (0%)	9 (4.3%)

(CX 58, ¶ 47).

264. If the maximum percent of participants who responded affirmatively to the control questions is subtracted from the percent responding affirmatively to the tested ad, then the claims at issue were found by 60.4% (well-defined abdominal muscles); 53.1% (lose inches around the waist); 38% (lose weight); 34.1% (alternative to exercise) and 17.9% (removes fat deposits). (See F. 258-63, 267-69).

265. The level of affirmative responses for the control ad was relatively high, particularly for the well-defined abdominal muscles response (48.1%) and the inches around the waist response (42.4%). (Mazis, Tr. 107-08; CX 58, ¶ 45).

266. Mazis attributed the high level of response to survey respondents' prior knowledge of ab belts and the presence in the control ad of the name Ab Force and the visual image of an ab belt around the waist. (Mazis, Tr. 108; CX 58, ¶ 45).

267. None of the test group and only 4.3% of the control group answered yes to the statement about stomach ulcers. (CX 58, Ex. H at 12).

268. To the statement about relieving nausea, only 1.1% of the test ad participants and 1.9% of the control ad participants answered yes. (CX 58, Ex. H at 15).

269. Only 5.0% of the test group and 2.9% of the control group said yes to the statement that Ab Force lowers blood pressure. (CX 58, Ex. H at 17).

**C. 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**

270. Use of the Ab Force does not cause loss of weight, inches, or fat. (JX 6, ¶ 16)

271. Use of the Ab Force does not cause well-defined abdominal muscles. (JX 6, ¶ 17)

272. Use of the Ab Force is not an effective alternative to regular exercise. (JX 6, ¶ 18)

273. Respondents did not possess and rely upon substantiation for the alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. (JX 6, ¶ 19)

**D. Claims That Use of the Ab Force Causes Loss of Weight, Inches, or Fat; Causes Well-Defined Abdominal Muscles; and Is an Effective Alternative to Regular Exercise Are Material to Consumers**

274. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise relate to the central purpose of the Ab Force and are material to consumers. (See F. 97, 102-109).

275. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise involve appearance, fitness, or health claims and are material to consumers. (See CX 58).

### III. ANALYSIS AND CONCLUSIONS OF LAW

#### A. Preliminary Issues

##### 1. Jurisdiction

The Complaint charges Respondents with violating Sections 5 and 12 of the FTC Act. 15 U.S.C. §§ 45, 52. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction “to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *American Fin. Services Assoc. v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985); *Koch v. FTC*, 206 F.2d 311, 315 (6th Cir. 1953)). The Ab Force ab belt, an EMS device which uses electronic stimulation of the muscles, is a device within the meaning of Section 15 of the FTC Act which defines “device” as including “an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . intended to affect the structure or any function of the body of man.” 15 U.S.C. § 55(d). Respondents engaged in a nationwide advertising campaign to offer for sale and sell the Ab Force. F. 41-53. Respondents were engaged in and affected commerce, as “commerce” is defined in Section 4 of the FTC Act. 15 U.S.C. § 44. Respondents do not dispute that the acts and practices of Respondents challenged in the Complaint have been and are now in or affecting commerce, as “commerce” is defined in the FTC Act, or that the Federal Trade Commission has jurisdiction in this proceeding. RRPFF at 157, 159. Accordingly, the Commission has jurisdiction over Respondents and the subject matter of this proceeding.

##### 2. Burden of Proof

Under Commission Rule of Practice 3.51(c)(1), “[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.” 16 C.F.R. § 3.51(c)(1). The Commission made amendments to its Rules of Practice, effective May 18, 2001. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622 (April 3, 2001). Through these amendments, the Commission removed the requirement of Rule 3.51(c)(3) that the initial decision of an Administrative Law Judge (“ALJ”) be supported by “substantial” evidence. 66 Fed. Reg. at



17,626. The Administrative Procedure Act, however, requires that an ALJ may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” Administrative Procedure Act (“APA”) 5 U.S.C. § 556(d). According to Black’s Law Dictionary, “probative evidence” means having the effect of proof; tending to prove, or actually proving an issue. “Substantial evidence” is defined in Black’s Law Dictionary as such evidence that a reasonable mind might accept as adequate to support a conclusion. At the adjudicative level of these proceedings, any difference between “probative” evidence and “substantial” evidence is not dispositive under these standards. Therefore, all findings and conclusions in this Initial Decision are supported by reliable, probative, and substantial evidence.

The parties’ burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the APA, and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” 16 C.F.R. § 3.43(a). Under the APA, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings). The preponderance of the evidence standard has been used in false advertising cases. *See, e.g., In re Peacock Buick, Inc.*, 86 F.T.C. 1532; 1975 FTC LEXIS 4, \*46-48 (1975).

For these reasons, Complaint Counsel’s case in this proceeding shall be adjudicated under the preponderance of evidence standard.

## **B. Analytical Framework**

The FTC Act makes it unlawful to engage in unfair or deceptive practices or to induce consumers to purchase certain products through advertising that is misleading in a material respect. 15 U.S.C. §§ 45, 52, 55. An “advertisement is deceptive under the Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *see also Pantron*, 33 F.3d at 1095; *In re Thompson Medical*, 104 F.T.C. 648, 788 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986). “In implementing this standard, the Commission examines the overall net impression of an ad and engages in a three-part inquiry: (1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers.” *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *accord Kraft*, 970 F.2d at 314.

The Complaint alleges that the Ab Force advertisements made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise; that these claims are false and misleading; and that these claims are material to consumers. Complaint ¶¶ 19-23.

### **1. Whether the Claims at Issue Are Conveyed in the Ad**

To prove its case, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would likely interpret the message of the advertisement to have conveyed the alleged claims. *See In re Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000). Claims may be either express claims or implied claims. *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992); *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*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7. 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*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7, 818; *In re Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984). Moreover, evidence that consumers have actually been misled is not necessary; the likelihood of deception is the standard by which the advertising is judged. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687, 687 n.9 (3d Cir. 1982); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984).

In determining whether the asserted claims were made, the advertising, itself, is reviewed in a facial analysis. If it can be determined with confidence from the facial analysis that the claims appear in the advertising, then resort to extrinsic evidence of those claims is unnecessary. *Novartis*, 127 F.T.C. at 680; *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789. If, however, the claims are not self-evident or reasonably apparent on the face of the advertising, then extrinsic evidence that the advertising made the asserted claims will be considered. *Novartis*, 127 F.T.C. at 680; *Stouffer*, 118 F.T.C. at 798-99; *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789; *Bristol-Myers*, 102 F.T.C. at 319.

**a. Facial Analysis**

**i. Express Claims**

Express claims directly state the representation at issue. *Kraft*, 114 F.T.C. at 120; *Thompson Medical*, 104 F.T.C. at 788. In this case, the Ab Force advertisements expressly claim that the Ab Force is technologically comparable to other ab belts and that the Ab Force is significantly less expensive than other ab belts. F. 65. These price savings and comparable technology claims were made by oral and written statements that were reinforced by visual images in the advertisements. F. 82, 99. The alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are not, however, expressly made in the Ab Force advertisements. F. 66. Indeed, the purpose of the Ab Force is never expressly identified in any of the advertisements.

F. 97, 102. Therefore, to determine whether the claims alleged in the Complaint were made in the advertisements, an analysis of whether the alleged claims are implied must be undertaken.

## ii. Implied Claims – from Four Corners

Implied claims are any claims that are not express. *Kraft*, 114 F.T.C. at 120. Implied claims range on a continuum from claims that would be “virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.” *Id.* (quoting *Thompson Medical*, 104 F.T.C. at 789); accord *Novartis*, 127 F.T.C. at 680. Implied claims will only be found where it may be determined with confidence, after examining all of the constituent elements of the advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad. *Kraft*, 970 F.2d at 318-20; *Thompson Medical*, 104 F.T.C. at 320.

An advertisement will only be found to contain implied claims where the “language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances.” *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789. However, “if, based on [an] initial review of the evidence from the advertisement itself, we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable.” *Kraft*, 114 F.T.C. at 121 (citing *Thompson Medical*, 104 F.T.C. at 789; *Bristol-Myers*, 102 F.T.C. at 319).

Such facial interpretation must be based upon the overall net impression of the advertisement, taken as a whole. *Kraft*, 970 F.2d at 314, 319. The determination must be made based on the “net impression created by the interaction of different elements in a given ad, not [based on] the elements by themselves.” *Thompson Medical*, 104 F.T.C. at 793 n.17. A facial

analysis does not involve the effect of individual words, phrases, or visual images. *See Thompson Medical*, 104 F.T.C. at 793, n.17. In this case, the product name, visual images, and statements all contribute to the overall net impression of the advertisements, taken as a whole.

A product name may play a role in implying a claim. *E.g., Jacob Siegel Co. v. FTC*, 327 U.S. 608, 609 (1946) (addressing order where name “Alpacuna” implied that the product contained vicuna); *Thompson Medical*, 104 F.T.C. at 793 (name “Aspercreme” implied that product contains aspirin). Upon a facial review of the challenged Ab Force advertisements, the Court determines that the name Ab Force conveys the impression that the device works on the abdominal muscles – either because it applies force to the abs or because it makes the abs more forceful. *See* F. 162. As Khubani admitted, the name Ab Force was selected because “the product was designed to work primarily on the abdominal area.” F. 69. That Khubani also claims he chose the name because of the play on “Air Force” does not preclude other interpretations. *See Kraft*, 114 F.T.C. at 120; *Thompson Medical*, 104 F.T.C. at 789. While the name Ab Force, alone, would not be sufficient to imply a claim, in combination with the visual images and words used, it contributes to the overall net impression that use of the Ab Force confers health, weight loss, exercise, or fitness benefits.

Visual images are effective in conveying claims and may also be used to determine implied claims. *See, e.g., Kraft*, 114 F.T.C. at 322; *see also* F. 160. The visual images in the Ab Force television commercials consist of shots of the spokesperson, over a dozen shots of three models, and stock footage. F. 73-85. The three models are wearing exercise clothing and each model is thin, with well-defined abs. F. 74-75. Each model has an abdomen that is bare, except for wearing the Ab Force. F. 75. During the ads, each model can be seen experiencing abdominal muscle contractions. F. 76. Stock footage includes, *inter alia*, a close-up image of a bikini-clad woman showing off her thin waist and well-defined abdominal muscles. F. 83. The longer ads also include a close-up of a bare-chested, thin, well-muscled man performing a crunch on an exercise bench. F. 83. In this stock footage, the models are not wearing the Ab Force. F. 83. These visual images strongly convey the impression that the Ab Force is designed to

provide health, weight loss, fitness, or exercise benefits.

Statements contained in advertisements may also be used to determine implied claims. *See, e.g., Kraft*, 114 F.T.C. at 322. The statements in the challenged Ab Force advertisements are both oral and written on the screen. F. 86-102. The test radio ad opened by referring to other ab belt infomercials, stating that they “promis[e] to get our abs into great shape fast – without exercise.” F. 86. When asked whether he intended to change the meaning in the rollout radio ad (which did not include the “no exercise” language), Khubani said that he did not. F. 87-88. The test television and radio ads make statements that refer to the “latest fitness craze.” F. 89. Although the rollout television ads only refer to the “latest craze,” Khubani testified that the message was still the same. F. 89. Khubani testified that the word “fitness” was taken out during a “final review and legal review.” F. 90. In addition, the phrases “powerful technology” and “just as powerful and effective” conspicuously imply that the Ab Force does something “powerful” and “effective” to the abdominal muscles. *See* F. 91-92. These phrases – “abs into great shape fast – without exercise,” “latest fitness craze,” “latest craze,” “powerful technology,” and “powerful and effective” – strongly and clearly imply that the Ab Force is, *inter alia*, a fitness or exercise device, and convey the impression that the Ab Force is designed to provide health, weight loss, fitness, or exercise benefits.

Respondents seemingly argue that the Ab Force advertisements made massage claims as well as price savings and comparable technology claims. *See* RPF at 24-25. Although the phrase “relaxing massage” is briefly flashed on the screen, it is too brief and non-specific to put consumers on notice that the device is intended merely or exclusively for massage. The “relaxing massage” phrase is displayed in connection with a discussion of the ten intensity levels in the short rollout ad and in the context of the belt’s comfort in the long rollout ad. F. 100-01. If the consumer noticed the phrase, it would be reasonable to conclude that “relaxing massage” was but one of the ten available power settings of the device or that the Ab Force included a relaxing, comfortable setting. Indeed, other EMS devices explicitly advertise that some available settings provide a massage, while other EMS device ads combine claims of massage with claims

of weight loss, fitness, or muscle development. F. 137-46. Thus, the single, momentary phrase “relaxing massage” does not offset or counter the numerous oral and printed statements, in combination with the name and visual images, which contribute to the overall net impression that use of the Ab Force causes loss of inches, weight and fat; causes well-defined abs; and is an effective alternative to regular exercise.

If there is an intended purpose or effect of using the Ab Force other than losing inches, weight, and fat; building well-defined abs; or being an effective alternative to regular exercise, that purpose or effect was never identified in any of the Ab Force advertisements. *See* F. 97, 102. Indeed, the only evidence of the purpose for which the Ab Force is intended is the statements in the instruction manual that consumers received after purchasing the product. F. 103-09. In this case there are no words, phrases, or visual images that effectively counter the implication that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. *See* F. 65-109. Such an absence of any identified purpose may be considered in determining an ad’s claims. *Thompson Medical*, 104 F.T.C. at 648 (noting “the absence of any elements giving a contrary impression, such as express disclosures”).

The overall net impression of the product name, visual images, and statements in the four corners of the challenged Ab Force advertisements is conspicuous, self-evident, and reasonably clear so that the Court may conclude with confidence that the advertisements convey the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. This conclusion is based solely upon an assessment of the interaction of all of the constituent elements, or the net impression created by the advertisements, without reference to ads for other ab belts or the need for extrinsic evidence. An analysis of the surrounding circumstances behind the development of the challenged ads contributes to this facial analysis.

### iii. Implied Claims – from Surrounding Circumstances

The “circumstances surrounding” advertising, including the advertiser’s intent, may be considered in false advertising cases. *Thompson Medical*, 104 F.T.C. at 789; *Novartis*, 127 F.T.C. at 683. “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*, 127 F.T.C. at 683. In this case, Respondents’ intent to make the alleged claims is demonstrated from an examination of Respondents’ prior experience marketing another ab belt, the Ab Pulse, and from the process of drafting the Ab Force advertisements. In addition, although the existence of advertising for other ab belts is appropriate to consider as part of the surrounding circumstances, the impact on consumers of the advertising for other ab belts is not clear and cannot be determined on a facial analysis.

The record shows that 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 ever hit the industry.” F. 63. The Ab Pulse was a “massaging ab belt” marketed by Telebrands. F. 110. The Ab Pulse was similar in appearance to the Ab Force and the advertisements for the Ab Pulse were strikingly similar to the advertisements for the Ab Force in making claims of cost savings. F. 111. The Ab Pulse television commercial differed from the Ab Force commercials by distinguishing it from other ab belts by: stating “don’t confuse the Ab Pulse with an electronic ab belt that you’ve seen on infomercials;” by showing a graphic of a red X superimposed on an ab belt displayed alongside the on-screen legend “infomercial ab belts;” and by making a soothing or comfort claim. F. 112. The Ab Pulse was offered for sale for about a month, did not receive high call volume, and, based on sales results, was considered by Khubani to be a marketing failure. F. 113. Thus, Respondents’ first attempt to enter the market by selling a “massaging ab belt” and differentiating it from other electronic ab belts proved unsuccessful. The Ab Pulse campaign, however, provided Respondents with valuable experience in the ab belt market and affected the development of its subsequent advertising.



Khubani wrote the scripts for the radio and print ads for the Ab Force on December 18, 2001. F. 54. The radio ad included an express statement that other ab belts “promis[e] to get our abs into great shape fast without exercise.” F. 86. On December 22, 2001, the day the commercials were shot, Liantonio provided Khubani with a script which began with the statements: “[d]o you wish you could get into shape fast without exercise? Wouldn’t you love to have a flatter tummy without painful sit-ups?” F. 58. Khubani rewrote Liantonio’s scripts, deleting these express claims, and creating two new scripts (AB-B-60 and AB-B-120) that were used to shoot the test ads. F. 59. Parts of the Ab Force scripts are identical to parts of the Ab Pulse scripts. F. 111. Khubani testified that he did not want to make the express claims in Liantonio’s scripts because “we didn’t possess substantiation to make those claims.” F. 60. While Khubani clearly did not want to make health, weight loss, fitness, and exercise claims expressly, given his desire to enter “one of the hottest categories to ever hit the industry” and his inability to successfully market a “massaging ab belt,” the evidence shows that Khubani intended to imply those same claims. Merely removing false express claims will not protect an advertisement where the same claims are implied. *Thompson Medical*, 104 F.T.C. at 792 (“We note to begin with that none of the Aspercreme ads includes an express representation that Aspercreme contains aspirin. On the contrary, like much advertising we find deceptive, the ads are drafted with an artful choice of words to make what Thompson thought were literally correct statements.”).

The record here demonstrates Khubani’s desire to enter the ab belt market and recounts his initial failure to successfully market the Ab Pulse, a product whose only stated purpose was as a “massaging ab belt.” F. 110. Given the commercial success of the “infomercial ab belts” and despite knowing that he did not have substantiation to expressly make the type of health, weight loss, fitness, and exercise claims contained in those ads, Khubani nevertheless created commercials for the Ab Force which relied on the name, visual images, and statements to implicitly make those very same false and misleading claims. F. 60, 65-102, 114-36. The absence of an expressly identified purpose of using the Ab Force required consumers to rely on these implied claims. Thus, Khubani’s intent seems clear. While Khubani may have removed

the express health, weight loss, fitness, and exercise claims, perhaps in an effort to avoid liability, he clearly intended to make those same claims by implication.

Complaint Counsel argues that in this case, the Ab Force advertisements invite scrutiny of the surrounding circumstances by explicitly referring to other Ab Belt infomercials. CCB at 28. Each of the Ab Force commercials made some comparison of the Ab Force's power and effectiveness to the other ab belts advertised on television. F. 91. Complaint Counsel asserts that the express references in the Ab Force ads to infomercials for competing ab belts, along with the claims of comparability to those products, invite consumers to think of those infomercials while viewing the Ab Force ads. CCB at 28. While such express references to other ab belt infomercials must be considered in the analysis of the surrounding circumstances, it is not clear from such an analysis what effect this inclusion has on consumer beliefs.

Respondents assert that the reference to other ab belts infomercials was part of a compare and save marketing strategy and was meant only to serve as a point of reference for the comparison. RB at 22-23. Khubani testified that there were a number of other products in this category and that his marketing strategy was to offer the same technology at a cost savings. F. 39, 65, 93. In addition, Khubani testified that the language is designed as hype to build excitement about the product. F. 94-96. While there clearly are express price saving and comparable technology messages in the advertisements, this, by itself, does not insulate Respondents from liability. *See Kraft*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7. Respondents will be liable for deceptive advertising even if other, non-false, messages are conveyed. *See Kraft*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7.

The impact on consumers of the express reference in Ab Force ads to other ab belt infomercials is inconclusive. Complaint Counsel has not met its burden of demonstrating whether references to other ab belt infomercials effected the claims conveyed by the ads. Thus, the Court cannot conclude with confidence that references to other ab belt infomercials would lead consumers to take away the alleged claims. Where the impact of a statement is not

conspicuous, self-evident, or reasonably clear on the face of the ad, and cannot be determined with confidence from the face of the ad, extrinsic evidence is required to determine the impact of that statement. *See Kraft*, 970 F.2d at 318; *Thompson Medical*, 104 F.T.C. at 320. However, as explained in Section II(B)(2)(1)(ii), *supra*, the extrinsic evidence also does not support the theory that claims are implied in the Ab Force ads merely by the reference to other ab belt infomercials.

Despite this conclusion, it is clear from the other evidence of the surrounding circumstances, including the Ab Pulse campaign and the development of the Ab Force campaign, when combined with the product name, visual images, and statements, that the ads make the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. Although an examination of the extrinsic evidence is not necessary for disposition of this case, that evidence likewise supports the Court's conclusions.

#### **b. Extrinsic Evidence**

When extrinsic evidence is used to determine the meaning of an ad, the evidence may consist of expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation. *Cliffdale*, 103 F.T.C. at 166; *see also Thompson Medical*, 104 F.T.C. at 790. The opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted may be considered "if such opinions are adequately supported." *Kraft*, 114 F.T.C. at 122. However, where the opinions voiced by experts are not adequately supported, those opinions will be given little weight. *Thompson Medical*, 104 F.T.C. at 790. "[T]o be adequately supported [those] opinions that describe empirical research or analyses [must be] based on generally recognized marketing principles or other objective manifestations of professional expertise. Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue." *Id.* at 790 n.11.

Complaint Counsel's expert, Dr. Michael Mazis, is qualified in this matter to testify as an expert witness in consumer response to advertising, including a facial analysis of advertising, advertising effectiveness, consumer behavior, marketing research, including the design and implementation of surveys and analysis of surveys. F. 147-51. Mazis testified that in this case the implied claims are established through direct effects from the four corners of the advertisements; through indirect effects of prior exposure to ab belts through other advertising, word-of-mouth, or retail packaging; and as evidenced by a copy test which he conducted. F. 157-69. Respondents' expert, Dr. Jacob Jacoby, is qualified in this matter to testify as an expert witness in consumer behavior and consumer psychology, as well as consumer comprehension and miscomprehension of advertising. F. 152-56. Jacoby severely criticized Mazis's conclusions and methods. F. 152. After a review of the expert testimony, the Court concludes that Mazis's conclusions are entitled to varying degrees of weight, as explained below.

**i. Direct Effects**

A type of evidence that will be considered, if offered, is the opinion of expert witnesses as to how an advertisement might reasonably be interpreted. *Thompson Medical*, 104 F.T.C. at 790; *Kraft*, 114 F.T.C. at 122. Respondents argue that Mazis's analysis of the direct and indirect effects is no more than his own personal opinion and is not the proper subject of expert testimony. RB at 49. It is clear, however, that experts may testify based on their experience in their given field, including their knowledge of consumer perceptions, to claims that consumers might take away. *See Thompson Medical*, 104 F.T.C. at 790; *see generally* Fed. R. Evid. 702. Thus, Mazis's testimony regarding direct effects is valuable not as an expression of his personal opinion, but rather as expert opinion regarding his knowledge and experience of consumer perceptions and claims that consumers would take away from the four corners of the advertising at issue.

Mazis testified that there are direct effects within the four corners of the ad that cause consumers to make inferences about the Ab Force and to take away from its ads certain implied claims. F. 158-62. Mazis stated "that even if you had never heard of an ab belt before, . . . you

could see the ad and you could make inferences because there's certain implied claims in the ads." F. 158-59. Mazis identified as direct effects the appearance of trim, fit models and the depiction of the Ab Force belt itself shown visibly pulsating the abdominal muscles of the models. F. 161. According to Mazis, another influence that is within the four corners of the Ab Force ads is the name Ab Force. F. 162. Mazis testified that the name could have a double effect on consumers: "[o]n the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words it makes your abs noticeable, that they are – really well developed." F. 162.

Mazis's testimony regarding consumer perceptions of the challenged advertising is relevant in determining the claims directly conveyed by the four corners of the ads. Mazis's expert testimony regarding consumer perceptions thus supports the conclusion that the Ab Force advertising made the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. However, as noted earlier, Mazis's opinion is not necessary to reach that determination.

## **ii. Indirect Effects**

Mazis uses the term "indirect effects" to refer to the effects on consumers of previous exposure to ab belts through either infomercials, word-of-mouth, or retail packaging for other ab belts. F. 163. Mazis opines that it is through these indirect effects that the Ab Force television spots make implied claims that using Ab Force will result in well-defined abs and loss of inches around the waist. F. 164. Mazis also opined that consumers may perceive claims that use of the Ab Force results in weight loss and that the Ab Force is an effective substitute for regular exercise because consumers associate them with ab belt category beliefs. F. 164, 167.

Mazis's opinion is based on the psychological and consumer behavior theory of "categorization." F. 169. Categorization theory is generally accepted in the field of consumer behavior. F. 170. A leading proponent of the theory, Mita Sujun, asserted in a well-known peer-reviewed article that 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.” F. 171.

Complaint Counsel argues that consumers, upon hearing the reference in the Ab Force commercials to “those other ab belt infomercials” would infer that the claims made in those other infomercials would apply to the Ab Force. CCB at 7-12. Mazis testified that four key elements in the Ab Force commercials would have an impact on consumers that would cause them to categorize the Ab Force specifically with the AbTronic, Ab Energizer, and Fast Abs products. F. 178. These four elements are: (1) references in Ab Force ads to the other ab belts, (2) the visual images of models with well-defined 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. F. 178.

Mazis considered only a limited number of materials and conducted no empirical research to support his opinions regarding the indirect effects of the Ab Force advertisements. F. 165, 168, 183, 188-92. Mazis’s conclusions regarding indirect effects must be viewed in light of his limited analysis. Mazis reviewed and considered the Complaint and exhibits in this matter; transcripts and videotapes of the infomercials for AbTronic, Ab Energizer, and Fast Abs; and infomercial ranking reports for the AbTronic, Ab Energizer, and Fast Abs products. F. 165. Mazis did not know and could not determine what messages were being conveyed by advertisements or packaging for other EMS ab products, by word-of-mouth communication, or what other print or radio advertisements were being disseminated. F. 166, 189. Indeed, Mazis admitted that when he referred to category beliefs, he was referring only to “ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer, and Fast Abs].” F. 189. Mazis provided no evidence that those Ab Force ad viewers who happened to see the ads for AbTronic, Ab Energizer, and Fast Abs would retain or even comprehend that information. F. 184-88. Despite having no reliable information regarding

exactly how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired, Mazis stood by his belief that “many consumers would have been exposed to these ads.” F. 166. This is not credible testimony supported by reliable evidence.

Respondents’ marketing expert, Jacoby, testified that he was familiar with the categorization theory and with Sujjan’s article. F. 173. Jacoby, however, did not agree with Mazis’s application of the theory to this case. F. 173. In particular, Jacoby argued that categorization theory, as presented by Sujjan, relies on consumers having a preexisting category of beliefs. F. 175. Respondents argue that consumers might not have an ab belt category of beliefs and that even if they have such a category, it might be formed based upon devices other than the AbTronic, Ab Energizer, or Fast Abs. RB at 31-48.

Upon review of the record, there is no empirical evidence to determine what beliefs consumers would include in an ab belt category. Indeed, there is no reliable, demonstrated showing regarding whether consumers have an ab belt category of beliefs and, if so, what products would fall into the category. This would likely depend on a number of factors: when, what channels, and how often advertisements for other ab belts or EMS devices aired; whether the consumers had seen advertisements for other ab belts or EMS devices; whether the consumers remembered the claims from the other advertising; how similar the products were in appearance; and how similar the advertisements were in terms of claims, visual images, and statements. These indirect effects, if any, cannot be determined without more evidence than was provided by Complaint Counsel in this case. Thus, to the extent that Mazis relied upon categorization theory to support his conclusions, such analysis fails as a matter of proof.

### **iii. Copy Test – Methodology**

The reliability of the copy test designed and introduced by Mazis in this proceeding is examined next. In doing so, the Court notes that courts are not limited only to looking at a survey of prior purchasers asking why they purchased a product. *See FTC v. Figgie Int’l, Inc.*,

994 F. 2d 595, 605 (9th Cir. 1993); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F. 2d 1312, 1316 (8th Cir. 1991). “The most convincing extrinsic evidence is a survey ‘of what consumers thought upon reading the advertisement in questions,’ but the Commission also relies on other forms of extrinsic evidence including consumer testimony, expert opinion, and copy tests of ads.” *Kraft*, 970 F.2d at 318 (quoting *Thompson Medical*, 104 F.T.C. at 788-89). To constitute reliable and probative evidence, copy tests must be methodologically sound. *Stouffer*, 118 F.T.C. at 799; *Thompson Medical*, 104 F.T.C. at 790. The standard used to determine whether copy tests are methodologically sound is whether they “draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly.” *Thompson Medical*, 104 F.T.C. at 790; *accord Stouffer*, 118 F.T.C. at 799. In evaluating survey evidence, the Commission does not require that surveys be perfect methodologically, but that they be “reasonably reliable and probative.” *Stouffer*, 118 F.T.C. at 799.

A copy test is an in-person survey in which people are shown an advertisement, and asked a number of questions in terms of their perceptions of the advertisement, which is sometimes referred to as the “take-away” from the advertisement. F. 194. The copy test designed by Mazis and implemented by U.S. Research, although flawed in certain respects, confirms that the Ab Force television commercials made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. As explained below, (1) the universe of participants was reasonably reliable and probative; (2) appropriate questions were asked; (3) the control ad, although flawed, does not adversely impact the copy test results; and (4) the failure to control for preexisting beliefs was not critical.

First, the universe for participants in the copy test was limited to people who, in the last twelve months, had purchased a product or used a service for weight loss, muscle toning, or massage, and also in the last twelve months had purchased a product by responding to a direct response television ad. F. 209-10. Age and sex quotas were based upon a survey report in the *Journal of the American Medical Association* of persons trying to lose weight. F. 204.



Respondents object to the survey population, arguing that it is overly broad because the purchase of any item via response to a direct response television ad was not sufficiently tailored to limit the universe to potential purchasers of the Ab Force. RB at 53-54. Respondents argue that “[a]ppropriate criteria should have excluded those respondents who had not purchased a product to help them lose weight, tone muscles, or massage their bodies from a toll-free number.” RB at 55. Respondents do not, apparently, object to the age and sex quotas or exclusion of people who had not purchased a product or used a service for weight loss, muscle toning, or massage. *See* RB at 53. Complaint Counsel argues that for a claim take away survey, the universe of participants should be relatively broad and it would have been unnecessarily narrow to have excluded from the universe those people who had demonstrated an interest in weight loss, muscle toning, or massage and who had made purchases via direct response television of products other than in those three categories. CCRB at 29-30. While the universe for participants in the copy test could have been more narrowly tailored, as designed it is nevertheless reasonably reliable and probative. *See Stouffer*, 118 F.T.C. at 799.

Second, appropriate, unbiased questions were asked in the copy test. F. 231-54. The evidence shows that the copy test questionnaire proceeded from general, open-ended questions to more narrow, close-ended questions; used a filter question to ensure that responses to follow-up, close-ended questions would not be based upon random guessing; that such a funneling approach is the best way to ask questions on a copy test; that the close-ended questions rotated the order in which the questions were read, thereby controlling for order bias, or yea-saying; and that all three possible answers to each question were read and shown to the participants before each question was asked. F. 231-54. As designed and implemented, Complaint Counsel has demonstrated that appropriate questions were asked in a manner that was proper, minimized bias, and produced reliable results. *See Stouffer*, 118 F.T.C. at 804-06.

Third, although a control of some kind is necessary for close-ended questions, the control may take the form of a control ad or a control question. *Thompson Medical*, 118 F.T.C. at 808-09. Moreover, “there is nothing in Commission precedent that requires the use of a control ad

for open-ended questions.” *Id.* at 808. The record shows that Mazis utilized both methods, a control ad and three control questions, in his copy test. F. 214-30, 239. The parties focused on the impact of the control ad.

The copy test utilized a control ad to compare to the test ad. F. 214-30. The test ad was a 60 second Ab Force spot that was the most frequently aired of the four commercials produced for Respondents. F. 214. The control ad was created by 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, eliminating the stock images and eliminating some, but not all, images of models wearing the Ab Force. F. 214, 217. The control ad, however, was ineffective because it did not eliminate the very elements which Mazis, himself, indicated were direct effects that convey the health, weight loss, fitness, and exercise benefits of using the Ab Force. F. 218. Specifically, the control ad includes three images of the female and male model with well-defined abs, wearing the Ab Force, and experiencing muscle contractions. F. 219. In addition, in the control ad, the name Ab Force is stated six times. F. 220. Study participants who saw the control advertisement took away the same claims as those who saw the test advertisement, albeit in smaller numbers. F. 255-69. Mazis admits that the results for the control ad “are relatively high numbers for a control ad” and attributes these numbers to preexisting beliefs about ab belts. F. 221. The higher numbers, however, could also result from the direct effects which remained in the control ad. Regardless of the cause, the flaws in the control ad inflate the control ad numbers thereby reducing the net take away results. *See* F. 266-69.

Fourth, a central issue in this case has been the impact of consumers’ preexisting beliefs. Respondents argue that the copy test failed to adequately control for the influence of any preexisting beliefs held by study participants; that a reliable survey must control for background “noise,” including preexisting beliefs; that Mazis admitted his controls were ineffective, but improperly dismissed the failure to control as not relevant; that Mazis nevertheless decided to control for one source of preexisting beliefs while not controlling for others; and that the “relatively high” number of control participants who detected misleading claims confirms that

the effect of background noise on the results was substantial. RB at 57-65. Complaint Counsel responds that Mazis properly controlled for preexisting beliefs of the survey participants. CCRB at 32-36.

The extent of advertisers' liability under the FTC Act for preexisting beliefs has been discussed in case law only in the context of whether copy tests should control for preexisting beliefs. *E.g.*, *Stouffer*, 118 F.T.C. at 809-11; *Kraft*, 114 F.T.C. at 131. For example, in *Kraft*, the Commission rejected as unreliable a copy test which failed "to correct for preexisting or inherent survey bias" where there was a suggestion that the response rate may have been attributable to consumers' prior exposure to other Kraft ads. *Kraft*, 114 F.T.C. at 131 n.19. Discussing this section of *Kraft*, the Commission in *Stouffer* stated that "[t]he [*Kraft*] case does not hold that consumer surveys must invariably control for preexisting beliefs. Instead, *Kraft* teaches that the failure of a consumer survey to control for preexisting beliefs about the alleged advertising claim introduces a potential for bias, and indeed that this *may* be a critical defect." *Stouffer*, 118 F.T.C. at 810 (emphasis in original). The footnote to this section of *Stouffer* states: "[i]ndeed, it is established that respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs." *Id.* at 810 n.31 (citing *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978)). The Commission in *Stouffer*, based on this analysis of *Kraft*, refused to reject a copy test which failed to control for preexisting beliefs that the sodium content of Lean Cuisine entrees was low where the evidence indicated that, to the extent consumers had a preexisting belief regarding the entrees, it was that the sodium content was high, not low. *Id.* at 810-11 ("there must be evidence of preexisting bias to find that failure to control for such bias is a critical defect.").

Complaint Counsel relies heavily on the above-quoted footnote 31 in *Stouffer* which cites the *Simeon* case. In *Simeon*, the Ninth Circuit stated "[t]hat the belief [that injections have been determined by a proper government agency to be safe and effective] is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive." *Simeon*, 579 F.2d at 1146 (citing *cf. Brite Mfg. Co. v. FTC*, 347 F.2d 477 (D.C. Cir.

1965)). In *Brite*, the D.C. Circuit held that the Commission properly took official notice of specific consumer preferences where the respondents made no attempt to rebut those perceptions during the hearing, stating that the FTC was “entitled to rely on established general facts within the area of its expertise, subject, of course, to [respondent’s] right to rebut.” *Brite*, 347 F.2d at 478. Neither of these cases supports the assertion in *Stouffer* that “respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs.” *Stouffer*, 118 F.T.C. at 810 n.31.

While *Kraft* stands for the proposition that a copy test may be rejected for failure to control for preexisting beliefs (even where those beliefs were created by the respondent itself) and *Stouffer* stands for the proposition that a copy test will not be rejected for failure to control for a preexisting belief where there is no evidence that such a belief effected the results, neither case stands for the legal theory that advertisers may be found liable for capitalizing on preexisting consumer beliefs. This issue was addressed in the Lanham Act case of *Johnson & Johnson \* Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294 (2d Cir. 1992). In *J&J\*Merck*, the Second Circuit states that “J&J\*Merck argues that [the advertisement] purposefully taps into a preexisting body of public misinformation [that the ingestion of aluminum causes Alzheimer’s disease] in order to communicate the false and misleading message that aluminum-based antacids are harmful. The gravamen of J&J\*Merck’s claim is that advertisers may be liable for the knowing exploitation of public misperception.” *Id.* at 297. The Second Circuit did not “reject nor embrace” this “novel theory of Lanham Act liability.” *Id.* In this case, in addition to the weak legal support, there is no factual support for imposition of liability based upon capitalizing on preexisting consumer beliefs.

The factual record in this case does not support imposing liability on Respondents based upon the preexisting beliefs of consumers because there is insufficient empirical evidence of the existence, extent, or impact of those preexisting beliefs. *See* F. 157-269. However, the case law does not require rejecting the entirety of the conclusions reached in the copy test merely for failure to account for preexisting beliefs. The copy test is valid even though, as explained above,

the control advertisement was flawed. Therefore, despite flaws in Mazis's control ad, the copy test is sufficiently methodologically sound as to be reasonably reliable and probative of the issues before the Court.

#### iv. Copy Test – Results

Mazis's copy test results were reported in total percentages, and then in terms of statistical significance. F. 255. Respondents assert that the net difference between the numbers of test and control group participants who perceived misleading claims is the appropriate measure to be examined; and that Mazis's improper decision to drop eighty one study participants substantially affects the results reported. RB at 65-69. Complaint Counsel argues that Mazis properly excluded from the survey analysis eighty one respondents who could not remember the name of the product after viewing the ab force spots twice. CCRB at 36-39. Because a primary goal of copy testing is to define a universe of likely purchasers of the tested product, it is not unreasonable to conclude that people who could not recall the product name should not be a part of the survey universe. Unlike other screening criteria that were a part of a separate screening questionnaire, it was not possible to screen these people out until they had actually viewed the commercial. In addition, even when the results of the copy test are viewed in terms of net difference, as Respondents prefer, the results support the conclusion that the ads, in fact, made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

In so holding, the Court notes that there is no absolute minimum number of copy test respondents who must report taking away a specific message from an advertisement before that message is deemed communicated. The Commission's opinion in *Thompson Medical* provides a level of close-ended responses deemed sufficient to show that a claim was communicated by an advertisement. There, the Commission relied on percentages, after the control question responses had been deducted, of sixteen to eighteen percent 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]." *Thompson Medical*, 104 F.T.C. at 805-06 (22.2% minus 6.3% or 4.8%). Other

FTC cases suggest that the Commission would be justified in considering levels of ten percent net take away sufficient. For example, in *Firestone*, 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." *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973); see also *Stouffer*, 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 cases support the proposition that a result of between ten percent and fifteen percent is sufficient to support an allegation of trademark infringement. *E.g.*, *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 Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 279 n.23 (7th Cir. 1976) (referring to prior case showing 11%); *Goya Foods, Inc. v. Condal Distribs., Inc.*, 732 F. Supp. 453, 456-57 (S.D.N.Y. 1990) (9%); compare *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 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.").

The copy test results, despite the previously noted flaws, support the conclusion that the Ab Force ads conveyed the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. To the open-ended question, "[w]hat does the Ab Force commercial say, show, or imply about Ab Force?" over twenty two percent (22.3%) of the test ad respondents and nearly twelve percent (11.9%) of the control ad respondents said that the advertisement claimed that using the Ab Force results in well-defined abdominal muscles, in loss of weight, or inches, or in an improved physique. F. 257. As discussed above, results of open-ended questions may be reliable without subtracting the results from a control ad or control question. *Stouffer*, 118 F.T.C. at 808.

As to a claim about weight loss, 43.0% of the test ad respondents and 28.1% of the control ad respondents agreed that the ad they saw communicated that the Ab Force “causes users to lose weight.” F. 258, 263. Over half (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.” F. 259, 263. 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. F. 260, 263. As to claims about fitness and exercise, 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.” F. 261, 263. Nearly forty percent (39.1%) of the test ad respondents and more than a quarter (28.6%) of the control ad respondents agreed with the claim that “using Ab Force is an effective alternative to regular exercise.” F. 262, 263.

The copy test also included close-ended control questions regarding whether the ads conveyed claims regarding stomach ulcers, nausea, or lower blood pressure. F. 239. The results of these control questions showed a maximum result of five percent. F. 263, 267-69. When using a control question, the percentage of participants who responded affirmatively to the control question is deducted from the percentage of participants who responded affirmatively to the tested claim. *Stouffer*, 118 F.T.C. at 806. Here, if the maximum percent of participants who responded affirmatively to the control questions is subtracted from the percent responding affirmatively to the tested ad, then the claims at issue were found by 60.4% (well-defined abdominal muscles); 53.1% (lose inches around the waist); 38% (lose weight); 34.1% (alternative to exercise) and 17.9% (removes fat deposits). F. 264.

Thus, both the open-ended and close-ended questions contained in the copy test demonstrate that a significant number of participants took away from the test ad the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

## 2. Whether the Claims at Issue Are False or Misleading

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. A “false advertisement” is any advertisement that is “misleading in a material respect.” 15 U.S.C. § 55; *see also Pantron*, 33 F.3d at 1095. There are “two theories on which the government can . . . rely in section 12 cases involving objective product claims:” (1) the “falsity” theory under which the government must “carry the burden of proving that the express or implied message conveyed by the ad is false” or (2) the “so-called ‘reasonable basis’ theory” under which “the government must ‘show that the advertiser lacked a reasonable basis for asserting that the message was true.’” *Id.* at 1096 (quoting *Thompson Medical*, 104 F.T.C. at 818-19).

Under either the falsity theory or the reasonable basis theory, Complaint Counsel has established that the alleged claims are false or misleading. The parties stipulated that use of 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. F. 270-72; RRPF at 154. The parties further stipulated that Respondents did not possess and rely upon substantiation for the alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. F. 273; RRPF at 154. Therefore, any claims that the use of the Ab Force causes consumers to lose weight, fat, and inches; causes well-defined abdominal muscles; and is a substitute for regular exercise are patently false and misleading.

## 3. Whether the Claims at Issue Are Material to Consumers

A “material claim is one that ‘involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.’” *Novartis Corp.*, 223 F.3d at 786 (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165); *see Kraft*, 970 F.2d at 322. The Commission may apply a presumption of materiality to three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers



would be concerned. *Novartis*, 223 F.3d at 786; *Kraft*, 970 F.2d at 322-23; *Thompson Medical*, 104 F.T.C. at 816-17. In *Novartis*, the D.C. Circuit affirmed the Commission's application of a presumption of materiality based on its finding that the implied claim was intentional and involved both a health matter and the product's purpose and efficacy. *Novartis*, 223 F.3d at 786-87.

The claims implied by the Ab Force advertising were material. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise directly involve the purpose and effects of using the product. F. 274-75. Such claims involve information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. If unsubstantiated or false, these claims would likely mislead reasonable consumers considering such a purchase. Moreover, there is evidence that Respondent intended to make the implied health, weight loss, fitness, and exercise claims which further supports the finding of materiality. *See* Section II(B)(1)(e), *supra*. Therefore, based on the record as developed at trial, the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are found to be material to consumers.

## **C. Remedy**

### **1. Joint and Individual Liability**

Corporate respondents acting in concert to further a common enterprise are each 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 there was common control); *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir. 1964) (treating all defendants as single economic entity where there was common control); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (common enterprise found where individuals were transacting an integrated business through a maze of interrelated companies); *Zale Corp. and Corrigan-Republic, Inc. v. FTC*, 473 F.2d 1317, 1320 (5th Cir. 1973) (sharing office space and offices). Respondent Ajit Khubani is the president,

chief executive officer, chairman of the board, and sole owner of Telebrands. F. 10. Khubani is also the sole member of TV Savings. F. 10. Telebrands and TV Savings share office space. F. 8. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, or practices of Telebrands and TV Savings. F. 14. Khubani was appointed by Telebrands as the “Program Manager” pursuant to the Service Agreement dated January 22, 2002 between Telebrands and TV Savings and was also TV Savings’ representative under the Service Agreement. F. 15. Together, Respondents have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force device. Thus, the evidence establishes that Respondents Telebrands, TV Savings, and Khubani were acting in concert to further a common enterprise and that they jointly and collectively violated Sections 5 and 12 of the FTC Act.

To obtain a cease and desist order against an individual, Complaint Counsel must prove violations of the FTC Act by the corporation and that the individual either directly participated in the acts at issue or had some measure of control over those acts. *FTC v. Standard Educ. Soc’y*, 302 U.S. 112, 119-20 (1937); *National Housewares, Inc.*, 90 F.T.C. 572, 598 (1977). As stated above, the evidence shows that individually or in concert with his officers and employees, Respondent Khubani had authority to and did control the policies, acts, or practices of Respondents Telebrands and TV Savings. F. 14. As the program manager appointed by Telebrands and as TV Savings’ representative under the Service Agreement, Khubani represents both entities with regard to the responsibilities and duties of each under the Service Agreement. F. 15. Khubani was ultimately responsible for overseeing the marketing and creative design of the challenged Ab Force advertising and promotional campaign; was primarily responsible for the creation and development of the scripts for the Ab Force television and radio advertising and the text for the internet and email advertising of the Ab Force product; set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. F. 16. Therefore, Respondent Khubani is found to be individually and jointly liable with TV Savings and Telebrands for violations of Sections 5 and 12 of the FTC Act. Having addressed the issue of liability, the Court next considers the appropriateness of the relief proposed in the Complaint.

## 2. Fencing In Provisions

Included in the relief sought in the Complaint is a request to impose broad “fencing in” relief including, among other provisions, a performance bond and substantiation prior to advertising “any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program.” Complaint at 16-17 (proposed order); CCPFF at 118. As explained below, portions of the relief contemplated by the proposed remedy are overly broad and unsupported by law. For instance, Complaint Counsel seeks the imposition of a performance bond as part of the proposed remedy. Complaint at 16-17 (proposed Order). However, Complaint Counsel has not cited, nor has the Court found, any case law which would support the imposition of such a bond as a remedy in a litigated Part III matter. The fact that the Commission has previously *accepted* consent orders with a performance bond in Part III matters does not provide sufficient legal foundation to impose such a bond in this case. “[T]he circumstances surrounding . . . negotiated [consent agreements] are so different that they cannot be persuasively cited in a litigation context.” *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n.12 (1961). Accordingly, no performance bond will be ordered.

Rather, the Order entered by the Court restricts Respondents from making any representations regarding the production, promotion, sale, and distribution of Ab Force and any other EMS device, or any device, product, service, or program pertaining to the efficacy of or pertaining to health, weight loss, fitness, and exercise, unless Respondents can substantiate such representations by competent and scientific evidence. Order, Section IV, *infra*.

In so ordering, the Court notes that “‘the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.’ Having been caught violating the Act, respondents ‘must expect some fencing in.’” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) and *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 431 (1957)); *see also Jacob Siegel*, 327 U.S. at 611-12. The Supreme Court held in *Jacob Siegel* that the remedy selected must have a “reasonable relation to

the unlawful practices found to exist.” *Jacob Siegel*, 327 U.S. at 613; *see also Colgate-Palmolive*, 380 U.S. at 394. The Supreme Court has cautioned, however, that an order must be sufficiently clear and precise to be understood by the violator and “as specific as the circumstances will permit.” *Colgate-Palmolive*, 380 U.S. at 392-93; *see also American Home*, 695 F.2d at 705. Moreover, the “propriety of a broad order depends upon the specific circumstances of the case.” *Colgate-Palmolive*, 380 U.S. at 394.

In determining whether a broad fencing in order bears a “reasonable relationship” to a violation of the Act, factors to be considered include: the deliberateness and seriousness of the violation; the degree of transferability of the violation to other products; and any history of prior violations. *Kraft*, 970 F.2d at 326; *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *American Home*, 695 F.2d at 706. “The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor.” *Sears*, 676 F.2d at 392; *see also Kraft*, 970 F.2d at 327.

A violation is serious and deliberate where it involves “an expensive, nationwide campaign with highly effective results.” *Kraft*, 970 F.2d at 326. The Ab Force advertising campaign constitutes a serious violation because the deceptive claims were disseminated in numerous ads and through multiple media (television, print, radio, internet, and email). F. 47, 49-51, 61. Respondents spent over four million dollars to disseminate the challenged ads nationwide. F. 52. The Ab Force television spots appeared more than ten thousand times on cable, satellite, and broadcast television outlets in major national markets. F. 44-51. Respondents sold approximately 747,000 units of the Ab Force and gross sales, including accessories, exceeded nineteen million dollars. F. 41-42. The duration, number of executions, and multi-million dollar cost of the campaign, as well as the total sales and revenues, all constitute significant evidence of the effectiveness of the advertisements and, thus, the seriousness of the violations. Moreover, the evidence regarding Respondents’ intent (*see Section*

III(B)(1)(a)(iii), *supra*) as well as the fact that Khubani is a sophisticated and experienced marketer (*see* F. 12-13, 22) establish that the claims were made deliberately and purposefully.

A violation is transferrable where other products could be sold utilizing similar techniques. *Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Sears*, 676 F.2d at 392. The Ab Force advertisements failed to expressly identify the purpose or effects of using the Ab Force but rather strongly implied that use of the Ab Force product would confer health, weight loss, fitness, or exercise benefits. *See* F. 65-146. The health, weight loss, fitness, or exercise benefits of using a device, product, service, or program cannot readily be determined by consumers from an advertisement and therefore consumers must rely on the representations of the advertiser. Implying these unseen benefits is an advertising practice that is readily transferrable to advertising for other devices, products, services, or programs. Moreover, the fact that Respondents have the ability to provide the financing necessary to perform media management services, credit card processing, customer response services, customs clearance, accounting, and bookkeeping, and act as an importer of record (F. 6); the fact that Respondents have the financial means to spend millions of dollars on effective, nationwide advertising (F. 41-52); and the fact that Respondents have promoted and sold hundreds of products (F. 22) is sufficient for the Court to determine, under the *Kraft* rationale, that Respondents' advertising techniques and practices are readily transferrable to other products.

Complaint Counsel argues that Respondents have a history of prior violations based on "four previous actions" taken by the FTC against Telebrands. CCRB at 46. This argument is based upon three consent agreements between Telebrands and the FTC and an additional modification of one of the consent agreements. CCRB at 46. Complaint Counsel failed to enter any of these consent agreements into evidence. *See* RRPFF at 155-56. Moreover, it is the Court's understanding that none of the consent agreements involved any finding of liability on the part of any of the respondents (*see* RRB at 46) and therefore they cannot be utilized to form the basis for imposing a broad fencing in order in this case. However, a defendant need not have a history of prior violations in order for a broad fencing in order to be imposed. *See, e.g., Kraft*,

970 F.2d at 327.

Here, a broad fencing in order is appropriate under the standards in *Kraft* and *Sears* given the deliberateness and seriousness of the violations and the ease with which the unlawful conduct can be transferred to other products. Therefore, the fencing in relief in Section IV of the Order extends the prohibitions of the Order beyond the Ab Force device and other EMS devices to any device, product, service, or program promoting the efficacy of, or pertaining to health, weight loss, fitness, or exercise benefits. Courts have repeatedly approved orders that cover multiple products, despite the fact that the violations found involved only a single product. *Sears*, 676 F.2d at 392; *see also Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563-64 (2d Cir. 1984); *American Home*, 695 F.2d at 704-05. Indeed, the Supreme Court has enforced a Commission order which applied to all products produced by the respondents. *Colgate-Palmolive*, 380 U.S. at 394.

The Court, looking to the circumstances as a whole, has determined that a fencing in order is required and bears a reasonable relationship to Respondents' violations of the Act found to exist. As such, it is necessary to "close all roads to the prohibited goal, so that (the FTC's) order may not be by-passed with impunity." *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *Ruberoid*, 347 U.S. at 473). The accompanying Order is narrowly tailored and reasonably related to the violation of law found to exist.

#### IV. SUMMARY OF CONCLUSIONS OF LAW

1. Pursuant to Section 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52, the Commission has jurisdiction over the subject matter of this proceeding and over Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani.

2. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, and practices of Telebrands and TV Savings.

3. The Ab Force ab belt, an EMS device which uses electronic stimulation of the muscles, is a device within the meaning of Section 15 of the FTC Act which defines "device" as including "an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . intended to affect the structure or any function of the body of man." 15 U.S.C. § 55(d).

4. By engaging in a nationwide advertising campaign to offer for sale and sell the Ab Force device, Respondents were engaged in and affected commerce, as “commerce” is defined in Section 4 of the FTC Act. 15 U.S.C. § 44.

5. Pursuant to Rule 3.51(c)(3) and 5 U.S.C. § 556(d), the findings of fact and conclusions of law in this Initial Decision are supported by reliable, probative, and substantial evidence.

6. The issues in this case are adjudicated under the preponderance of evidence standard.

7. Employing a facial analysis of the Ab Force advertising, there are no express statements which support the claims that using the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

8. The overall net impression of the product name, visual images, and statements in the four corners of the Ab Force advertising in addition to the surrounding circumstances, is conspicuous, self-evident, and reasonably clear so that the Court can conclude with confidence that the advertisements convey the claims that the use of the Ab Force by consumers causes loss of weight, inches, and fat; causes well-defined abs; and is an effective alternative to regular exercise.

9. Mazis’s expert testimony regarding consumer perceptions supports the conclusion that the Ab Force advertising made the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise.

10. There is no empirical evidence to support what beliefs consumers would include in an ab belt category. Thus, to the extent Complaint Counsel relies upon categorization theory or indirect effects to support the allegations, such analysis fails as a matter of proof.

11. Despite flaws in the control ad methodology, the copy test conducted by Complaint Counsel’s expert is otherwise valid and is sufficiently sound so as to be reasonably reliable and probative of the issues before the Court.

12. The copy test results support the conclusion that the Ab Force ads convey the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

13. The claims asserting that use of the Ab Force causes consumers to lose weight, fat, and inches; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are false or misleading pursuant to Section 12 of the FTC Act. 15 U.S.C. § 52.

14. The claims asserting that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are

material to consumers.

15. Corporate respondents acting in concert to further a common enterprise are each liable for the acts and practices of the others in furtherance of the enterprise.

16. Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force device. As such, they jointly and collectively violated Sections 5 and 12 of the FTC Act.

17. Respondent Ajit Khubani is individually liable for violations of Sections 5 and 12 of the FTC Act.

18. Complaint Counsel has met its burden of proof in establishing Respondents' liability for the violations of the FTC Act charged in the Complaint.

19. "Fencing in" relief is appropriate where, after examining circumstances of the case as a whole, it bears a "reasonable relationship" to a violation of the FTC Act.

20. Complaint Counsel has not demonstrated that imposition of a performance bond is an appropriate fencing in remedy in a litigated Part III matter.

21. Previous consent agreements entered into with named respondents to a proceeding do not constitute a "history of prior violations" and thus cannot form the basis for imposing broad fencing in relief, particularly where there is no evidence that any of the consent agreements involved a finding of liability against Respondents.

22. Relief designed to remedy Respondents' unlawful activities and to require Respondents to cease and desist from certain activities is appropriate.

23. The Order entered is necessary and appropriate to remedy the violations of law found to exist.



## ORDER

### I.

**IT IS ORDERED** that, for purposes of this Order, the following definitions shall apply:

- A. “Commerce” shall mean commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- B. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. “Electronic muscle stimulation device” or “EMS device” shall mean any appliance or machine, or any accessories thereof, used to stimulate the muscles of the human body with electricity.
- D. “Device” shall mean any “device” as that term is defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
- E. Unless otherwise specified, “Respondents” shall mean Telebrands (a corporation); TV Savings (a limited liability company), their successors and assigns and their officers; Ajit Khubani, individually and as president of Telebrands and sole member of TV Savings; and each of the above’s agents, representatives, and employees.

### II.

**IT IS FURTHER ORDERED** that Respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Ab Force device or any substantially similar device in or affecting commerce, shall not represent, in any manner, including through the use of pictures, demonstrations, testimonials, or endorsements, expressly or by implication, that:

- A. any such device causes or promotes loss of weight, inches, or fat;
- B. any such device causes or promotes well-defined abdominal muscles;

- C. use of any such device for any period of time is an effective alternative to regular exercise; or
- D. any such device makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

### III.

**IT IS FURTHER ORDERED** that Respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any EMS device, shall not make any misrepresentation, in any manner, including through the use of pictures, demonstrations, testimonials, or endorsements, expressly or by implication, that:

- A. any such device causes or promotes loss of weight, inches, or fat;
- B. any such device causes or promotes well-defined abdominal muscles;
- C. use of any such device for any period of time is an effective alternative to regular exercise; or
- D. any such device makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

### IV.

**IT IS FURTHER ORDERED** that Respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ab Force, any other EMS device, or any device, product, service, or program promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits shall not make any representation, in any manner, expressly or by implication, about weight, inch, or fat loss; muscle definition; exercise benefits; or the health benefits, safety, or efficacy of any such 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.

V.

Nothing in this Order shall prohibit Respondents from making any representation for any device that is specifically permitted in labeling for that device under any premarket approval application or premarket notification approved or cleared by the Food and Drug Administration.

VI.

**IT IS FURTHER ORDERED** that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall, for five years after the last date of dissemination of any representation covered by this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. all advertisements and promotional materials containing the representation;
- B. all materials that were relied upon in disseminating the representation; and
- C. all tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

**IT IS FURTHER ORDERED** that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondents shall deliver this Order to current personnel within thirty days after the date of service of this Order, and to future personnel within thirty days after the person assumes such position or responsibilities.

### VIII.

**IT IS FURTHER ORDERED** that Respondents Telebrands and TV Savings and their successors and assigns shall notify the Commission at least thirty days prior to any change in the corporation or limited liability company that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondents learn less than thirty days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

### IX.

**IT IS FURTHER ORDERED** that Respondent Khubani shall notify the Commission of the discontinuance of his current business or employment or of his affiliation with any new business or employment. The notice shall include Respondent Khubani's new business address and phone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

### X.

**IT IS FURTHER ORDERED** that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall, within sixty days after the date of service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.


**XI.**

**IT IS FURTHER ORDERED** that this Order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this Order that terminates in less than twenty years;
- B. this Order's application to any Respondent that is not named as a defendant in such complaint; and
- C. this Order if such complaint is filed after the Order has terminated under this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or not upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ORDERED:

  
Stephen J. McGuife  
Chief Administrative Law Judge

September 15, 2004  
Washington, D.C.