UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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

RESPONDENTS' APPEAL BRIEF

TABLE OF CONTENTS

PAGE

PAGE

PAGE

PAGE

TABLE OF AUTHORITIES

Cases **Page(s)**

Pages

Constitution

Statutes

Rules of Evidence

Regulatory

Statements

Treatises

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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

STATEMENT OF THE CASE

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Complaint in this action relies upon a novel theory of liability that is unprecedented in cases before the Commission: that consumers who saw Respondents' Ab Force electronic ab belt advertisements would associate the ads for the Ab Force with certain "category beliefs" that consumers formed about ab belts generally from seeing ads for AbTronic, Fast Abs and Ab Energizer, and that from that association consumers would import unlawful claims made in those other advertisements to claims for the Ab Force product. Based on that premise, Complaint Counsel argued that the Ab Force advertisements were illegal, even though the Ab Force advertisements did not expressly make the unlawful claims.

The Complaint further claimed that this consumer association between ads for the Ab Force and ads for the other three products was enhanced by the appearance of the Ab Force product and by the visual depictions of models in the Ab Force advertisements. This theory was predominant in the Complaint, it was repeatedly advanced by Complaint Counsel in argument, and it served as the central basis of support to Complaint Counsel's expert's testimony at the hearing.

The Initial Decision soundly and properly rejected this theory as unproven (Initial Decision ("ID") at pp. 49-51). The Administrative Law Judge ("ALJ") found that there was "little analysis to support the theory" and determined that Complaint Counsel's expert witness "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.'" (ID p. 50). He ultimately concluded that there was "no reliable information" regarding how many consumers would have been exposed to the competitive infomercials, stating:

> **THIS IS NOT CREDIBLE TESTIMONY SUPPORTED BY RELIABLE EVIDENCE.**

(ID p. 51) (emphasis added).

Despite rejecting the core theory of liability advanced in this case, the Initial Decision imposed liability on Respondents under a significantly different theory than that reflected in the Complaint issued by the Commission on September 30, 2003. The ALJ found a violation, purportedly on two bases:

- First, the ALJ improperly viewed all of the ads together (rather than distinguishing elements of various advertisements on an ad-by-ad basis as

directed by Commission precedent) and erroneously concluded that a "facial analysis" of the Ab Force advertising showed that it made four implied claims – that use of the Ab Force resulted in loss of weight, loss of inches, and well-defined abdominals, and that use of the Ab Force was a replacement for regular exercise.

- Second, the ALJ concluded that his facial analysis was consistent with and supported by certain "extrinsic evidence," consisting of a "facial analysis" proffered on the stand by Complaint Counsel's expert witness and a consumer perception study which, Respondents demonstrated, was fatally flawed by its failure to control for pre-existing beliefs.

The Initial Decision should be set aside because it suffers from factual and legal errors that render the ALJ's facial analysis and the purported "extrinsic evidence" subjective and unreliable.

The ALJ's facial analysis is in error because it failed to consider that each advertisement contained different "facial" elements, thus requiring separate analysis of the ads at issue. Moreover, as the record clearly reflects, the Initial Decision simply got wrong several of the key "surrounding circumstances" that contributed to the facial analysis. Finally, the facial analysis is not reliable because it included a consideration of the impact of the three other ab belt ads even though the ALJ rejected the theory that those ads played any role in conveying the asserted claims.

With regard to the "extrinsic evidence" offered at the hearing, none of it is reliable. Not only does the "facial analysis" conducted by Dr. Mazis lack the basic

and necessary indicia of reliability, but also the Initial Decision accepted his facial analysis while at the same time rejecting Dr. Mazis' sole basis of support for two of the four claims at issue – loss of weight and loss of inches. This conclusion should be set aside.

Finally, the copy test offered by Complaint Counsel is fatally flawed for a number of reasons, the most obvious of which is that Dr. Mazis, who conducted the study, admittedly failed to control for survey participants' preexisting beliefs about ab belts. Indeed, at the hearing, Dr. Mazis testified that study participants likely held preexisting beliefs, that those beliefs likely had an impact on the results, and that he made no effort to control for those beliefs. In light of this evidence – admissions by Complaint Counsel's own expert – the Commission's decisions in *Kraft* and *Stouffer* demand that the copy test be rejected as unreliable. Without reliable extrinsic evidence, all that is left is the facial analysis of the ALJ. Although Commission precedent accepts that claims may be found solely through a facial analysis under certain limited circumstances, this is not such a case. Where there is no credible extrinsic evidence in the record which a fact-finder can point in support of the "facial analysis" that is conducted, both Section 5(c) of the Federal Trade Commission Act and the First Amendment to the Constitution of the United States prohibit a governmental finding of deceptive advertising. For this reason alone, the Initial Decision should be set aside.

II. STATEMENT OF RELEVANT FACTS

Respondents Telebrands Corporation ("Telebrands") and its founder, President and CEO Ajit Khubani ("Khubani") are direct response television advertisers, and have been for over two decades (F. 12; Tr. 434). Telebrands sells various products directly to consumers on television either through program-length "infomercials" or through one- or two-minute "spots," and through print advertising, radio advertising, and internet and e-mail advertising (F. 19, 20; Tr. 245-46, 432; JX-1, ¶2). In marketing the products that they sell, Respondents used a variety of different marketing strategies. (F. 23; Tr. 438-43).

Contrary to the findings of the Initial Decision, the Ab Force was Respondents' first effort at marketing an electronic muscle stimulation ("EMS") ab product.[1] In entering into the market for EMS ab products, Respondents sought to

[1] The Initial Decision found that the Ab Pulse product was Respondents' first effort to enter the market, but that finding is incorrect. The evidence in the record demonstrates that the Ab Pulse, which was not an EMS device, actually followed the Ab Force, and the ALJ's conclusion to the contrary is incorrect. Both parties stipulated to certain portions of the deposition testimony of Bala Iyer, a Vice President at Telebrands. (JX-6). In his testimony, Mr. Iyer was asked by Complaint Counsel about the Ab Pulse in the context of an e-mail offered into evidence by the parties at the hearing. (JX-6, Iyer Dep. 43:24 – 44:14). The e-mail was dated February 27, 2002 (CX-31), more than two months after the test Ab Force ads were shot in December 2001 (JX-1), and more than a month after the Ab Force roll-out ads began broadcast in mid-January 2002. (JX-1). The e-mail contained two attachments. The first was an e-mail from a third party that stated, in part: "I would like to give you the status report of the Motorized Massager with programmed massage steps….We also use a IC to create a programmed massage step in which the end user will feel like more or less the same as the ab force….One working prototype sample with the above mentioned function will be ready tomorrow and I will send it to you by UPS." (JX-6, Iyer Dep., 44:13 – 44:14; CX-31). The second attachment is a photograph or illustration of the Ab Pulse product. (CX-2; CX-31).

avoid making unsubstantiated claims and instead marketed the Ab Force using a "compare and save" strategy designed to take advantage of the popularity of such products on the market.

A. The Ab Force was Sold Using a "Compare and Save" Strategy

As the ALJ recognized, the strategy used by Respondents in marketing the Ab Force product was a "compare and save" strategy. As outlined in the Initial Decision, here is how that strategy works: after observing trends in the marketplace and in various channels of advertising, Mr. Khubani will evaluate which products would be appropriate for advertising on television, including steps competitors have taken. (F. 24; Tr. 438). Once a product is identified, and it is determined that the product would be appropriate for television advertising, Telebrands will enter the market as a competitor by offering a similar product at a lower price. (F. 25; Tr. 439-40). Telebrands employs this strategy several times per year (F. 25; Tr. 439-40).

With regard to the Ab Force, the ALJ correctly found that Respondents used "compare and save" strategy. Specifically, the ALJ agreed that Mr. Khubani believed that the category of EMS ab products was "one of the hottest categories ever to hit the industry," and that Mr. Khubani thought he could sell products with the same EMS technology with the same or similar power output to consumers for a significantly lower cost than that offered by other ab belt advertisers. (F. 39, 64; Tr. 266, 540-41). As the Initial Decision reflects, Mr. Khubani was correct. The ALJ found that the Ab Force advertisements **made express, truthful claims** that the Ab Force is technologically comparable to other ab belts and that the Ab Force is

significantly less expensive than those other belts. (F. 65; JX 2-5; CX-1 G; CX-1 H; RX 50-52).

B. The Ab Force was Also Sold Using a "Bandwagon Effect" Strategy.

Although the ALJ specifically found that and that Mr. Khubani **clearly intended to avoid expressly making the asserted claims,** (ID, p. 45; F. 93; Tr. 491), the Initial Decision appears incapable of reconciling that fact with the fact that there was no stated purpose for the Ab Force device in the ads. (ID, p.39). But the Initial Decision's factual findings provide the answer to the question of why Mr. Khubani did not state a purpose for the Ab Force product: he simply didn't need to.

The ALJ properly found that Khubani intended that the advertising statement "I'm sure you've seen those other ab belt infomercials…and everybody wants one" that was found in each of the eight ads at issue would serve as a "point of reference" for the price savings claims found in the Ab Force ads. (F. 88; Tr. 498). This "point of reference" finding is important because it underscores the fact that Mr. Khubani believed he could successfully sell the Ab Force without stating a purpose for the Ab Force device. Indeed, Mr. Khubani testified that this was his intent with each of the ads, even though they each contained different elements and were revised over time. (Tr. 492, 496-98). Mr. Khubani testified that this statement was intended to create a point of reference in consumer minds to the popularity of other ab belts, and was designed to create excitement as part of an "everyone wants one" bandwagon effect. (F. 95; Tr. 491-92). As the Initial Decision clearly recognized, 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. (F. 96; Tr. 373). That bandwagon effect alone is enough to generate sales, as was the case with the Ab Force.

C. The Eight Ab Force Ads Demonstrate that Mr. Khubani Sought to Avoid Making the Asserted Claims.

The Initial Decision recognizes that Mr. Khubani knew he had no substantiation for any of the asserted claims, and the ALJ's findings and the testimony offered into the record reflect that Mr. Khubani took affirmative steps to make sure that any such claims were not made in the advertising. Instead, Mr. Khubani wanted to limit the ads to "compare and save" claims based on price and technology.

Mr. Khubani's intent to create Ab Force ads using a "compare and save" strategy and to generate sales based on the bandwagon effect, without making any of the asserted claims, is confirmed by the evolution of the eight separate advertisements at issue and by the contents of those ads.

Test Radio Ad

- On December 18, 2001, Mr. Khubani drafted an Ab Force radio script for a 60-second radio commercial. (F. 54; Khubani Tr. 480 – 81, 488 – 89). The ad stated that ads for other ab belts "promis[e] to get our abs into great shape fast – without exercise." (CX-39). That statement, however, appears only in the test radio ad for the Ab Force.
- The test radio ad contained none of the visual elements considered in the ALJ's facial analysis.
- The test radio ad was never reviewed by Dr. Mazis, and it was not part of his copy test.

Print Ad

- Also on December 18, 2001, Mr. Khubani created a draft copy of a print ad for the Ab Force product. (CX-35).
- The print ad contained none of the visual elements considered in the ALJ's facial analysis.
- The print ad was never reviewed by Dr. Mazis, and it was not part of his copy test.

Test 60- and 120-Second Television Ads

- Just prior to December 22, 2001, Mr. Khubani arranged for the shoot of two television test ads. (F. 57; Tr. 490; RX-81, Liantonio Dep. At 30, 32-33). He was provided with a script by the producer that contained numerous references to "flatter tummies" and "exercise." (F. 57; Tr. 490; RX-81, Liantonio Dep. At 30, 32-3). He discarded this script, informing the producer that he did not want to make those claims, but only wanted to make price and technology claims. (F. 57).
- The test television ads were not part of Dr. Mazis' copy test.

Rollout Radio Ad

- In mid-January, 2002, after conducting a standard review of the advertising claims, Mr. Khubani ordered the creation of a rollout version of the radio ad. (CX-42).
- The rollout version made no reference to other ab belts being the latest "fitness craze." (CX-42).
- The rollout version made no statement that the Ab Force was "just as powerful and effective" as other ab belts. (CX-42).
- The rollout radio ad contained none of the visual elements considered in the ALJ's facial analysis.
- The test radio ad was never reviewed by Dr. Mazis, and it was not part of his copy test.

Rollout Television Ads

- In mid-January, 2002, after a standard review of the advertising claims, Mr. Khubani ordered the creation of a final rollout version of the radio ad. (Tr. 490-97).
- The rollout ads made no reference to other ab belts being the latest "fitness craze." (JX-4; JX-5).
- The rollout ads made no statement that the Ab Force was "just as powerful and effective" as other ab belts. (JX-4; JX-5).
- The 120-second rollout ad was not part of Dr. Mazis copy test. Indeed, the only ad at issue that was copy tested was the 60-second rollout television ad. (F. 214; CX-104).

As the ads themselves demonstrate, each ad contained different elements and different statements. In no case, however, were the two or three statements revisited again and again by Complaint Counsel found anywhere than in the test ads that ran for a very brief period of time, and before final review and rollout.

STATEMENT OF THE QUESTIONS PRESENTED

1. In determining that the challenged advertisements made implied claims that were misleading, did the Administrative Law Judge err by basing his determination on a "facial analysis" that was not supported by objective record evidence and that far exceeded the permissible reach of the "facial analysis" doctrine previously recognized by the Commission in *In re Kraft, Inc.,* 114 F.T.C. 40, 121 (1991), *aff'd* 970 F.2d 311 (7th Cir. 1992), *cert. denied,* 507 U.S. 909 (1993), and *In re Stouffer Foods Corp.,* 118 F.T.C. 746 (1994); that is inconsistent with Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c); and that would stretch the "facial analysis" doctrine beyond limits that are consistent with the First Amendment of the Constitution as applicable to commercial speech?

2. In determining that the challenged advertisements made implied claims that were misleading, did the Administrative Law Judge err by basing his determination upon a "facial analysis" by Complaint Counsel's expert, which lacked objective record support, and upon a consumer survey that was fundamentally flawed because it failed to control for participants with pre-existing opinions on the critical issue to be studied?

ARGUMENT

I. THE ALJ'S FACIAL ANALYSIS SHOULD BE SET ASIDE BECAUSE IT IS NOT SUPPORTED BY THE EVIDENCE IN THE RECORD

The ALJ rejected as unsupported by evidence Complaint Counsel's theory of the case, that the references in the Ab Force advertisements to infomercials for three other ab belt products meant that statements made in those other ads created "category beliefs" that impacted consumers' perceptions of the Ab Force ads. (ID p.51).

However, the ALJ erred in concluding, based on "facial analysis," that the advertisements made implied claims. There is no reliable extrinsic evidence of the actual understanding of consumers to support his conclusion. Finally, under these circumstances, a finding that implied claims were made based on "facial analysis" alone fails to measure up to the standards of Section 5(c) of the Federal Trade Commission Act and would be fraught with constitutional difficulties under the Supreme Court's commercial speech cases.

A. The ALJ's Facial Analysis Should Be Set Aside Because It Ignores Critical Evidence and Is Not Supported by the Record.

The ALJ's finding that four implied claims were made is erroneous and should be set aside, because the ALJ made several critical errors in conducting a "facial analysis" of the advertisements. The ALJ:

(1) rejected Complaint Counsel's "indirect effects" theory as not supported by the evidence, but then improperly considered advertisements for other ab products in performing its facial analysis;

(2) failed to distinguish among the eight advertisements for the Ab Force, but erroneously read isolated statements in initial test ads into all the advertisements;

(3) relied heavily, in finding that the implied claims were made, on the absence of any indication of Telebrands' intent. However, the ALJ ignored his own findings on the express claims in the ads, which showed that Telebrands intended to carry out a "compare and save" advertising campaign;

(4) erred in concluding that the Ab Pulse campaign pre-dated the Ab Force campaign and in using this inaccurate timeline to interpret the intent behind the drafting of the Ab Force advertisements. The evidence shows that the Ab Pulse campaign followed the Ab Force campaign, which discredits all the ALJ's findings about intent;

(5) ignored the fact that the evidence introduced by Complaint Counsel, on its face, could justify only two of the four claims the ALJ found on an implied basis. Accordingly, at a minimum, there is no record evidence to support two of the four implied claims found by the ALJ.

1. The analytical framework established by the Commission permits a facial analysis only where the ALJ can conclude with certainty that the evidence presented demonstrates that the ads at issue make the asserted claims on their face.

The Commission distinguishes between express claims and implied claims in evaluating what messages an ad can reasonably be interpreted as containing. *In re Kraft*, 114 F.T.C. 40, 120 (1987), *aff'd,* 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 509 U.S. 909 (1993). Express claims directly state the representation at issue. *Id.* (citing *In re Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987)). Implied claims, by definition, are any claims that are not express.

Implied claims range in a continuum from claims that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.* citing *Thompson Medical*, 104 F.T.C. at 789. While express claims will be "self-evident," implied claims "may or may not be apparent." *Id.* at 121 (citing Federal Trade Commission Policy Statement on Deception, appended to *In re Cliffdale Associates, Inc.*, 103 FTC 176-177 (1984)). The ALJ properly determined in this case that – if they exist at all – the four claims asserted by Complaint Counsel are not express claims (ID p. 39-40).

Because the Commission wants to ensure that "advertisers will not be deterred from conveying useful, accurate information to consumers," it will conclude that an advertisement contains implied claims in advertisements only where the:

> "language or depictions are clear enough to permit [it] to conclude with confidence, after examination of the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances."

Id. (citing *Thompson Medical*, 104 FTC at 789). However, if "based on [an] initial review of the evidence from the advertisement itself, [the Commission] cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable." *Id.* (Citing *Thompson Medical*, 104 FTC at 789; *In re Bristol-Myers Co.,* 102 F.T.C. 21, 319 (1983), *aff'd*, 783 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

The cautionary notes sounded by the Commission against making overreaching facial interpretations are directly applicable in this case. The ALJ made clearly erroneous findings of fact, based his conclusions on incorrect assumptions, and erroneously applied the law to this case.

2. Although he rejected Complaint Counsel's central theory of the case, the ALJ nevertheless considered the other advertisements in making his facial analysis.

The ALJ properly and roundly rejected Complaint Counsel's novel "indirect effects" theory. He then erred by considering the content of the other ab belt infomercials in making his facial analysis of Telebrands ads by implicitly associating the Ab Force ads with the ads for the three other EMS ab products Complaint Counsel brought into issue—AbTronic, Fast Abs and Ab Energizer. By viewing the Ab Force ads through the prism of those other advertisements, the ALJ inappropriately colored his view of the claims made in the Ab Force ads.

a. The ALJ properly rejected Complaint Counsel's central theory of the case.

From the outset of this case, Complaint Counsel advanced a novel theory of liability that pointed primarily not to the claims contained in the Ab Force advertising, but to claims made in advertising for *other* EMS ab belt products. From the Complaint, and through closing arguments, Complaint Counsel argued that Respondents were liable for violations of Sections 5 and 12 of the FTC Act because the Ab Force ads triggered a recollection in consumers' minds of ads for three specific products – AbTronic, Fast Abs, and Ab Energizer – thereby causing

consumers to believe that the Ab Force ads were making the same claims as those made in the other three advertisements.

Paragraph 9 of the Complaint alleges that "[t]hrough advertisements for the Ab Force, respondents represented that the Ab Force was just as powerful and effective as other more expensive EMS devices that were advertised in program-length commercials ('infomercials') during or shortly before the time period in which the Ab Force commercials appeared." (CX-1, ¶ 9). Much of theComplaint focused on ads for the Ab energizer, the AbTronic and Fast Abs, describing the advertising and promotion of those products, how often they aired, how much they cost, how much in sales they generated, and reciting the statements contained in the ads for those products. (CX-1, ¶¶ 11 – 18).

Indeed, this was at the heart of Complaint Counsel's theory at trial. Dr. Michael P. Mazis, Complaint Counsel's advertising expert, took the stand at the hearing and testified that there were two "effects" that had an impact on consumer beliefs. The first effect was a "direct effect," which he described by stating that "even if you had never heard of an ab belt before…you could see the ad and make inferences because there's certain implied claims from the ads…" (Tr. 66). [2]

The second "effect" discussed by Doctor Mazis, and which he described as an "indirect effect," constitutes the core of Complaint Counsel's claim importation theory. Specifically, Doctor Mazis testified that the three ab belt advertisements

[2] As discussed in Section IIA, *infra.*, Judge McGuire erred in relying on Dr. Mazis' opinion with regard to the "direct effect" the Ab Force ads had on consumers because Dr. Mazis' opinion was not reliably supported by sufficient evidence and amounted to nothing more than his own say-so.

brought into issue by Complaint Counsel—Fast Abs, AbTronic and Ab Energizer – created a "category of beliefs" about ab belts in consumers' minds (Tr. 66). He testified that consumers seeing the Ab Force ad, having already formed ab belt category beliefs based on seeing the ads for Fast Abs, Ab Energizer and AbTronic, would associate the Ab Force with the three other ads at issue. (Tr. 61).

Judge McGuire rejected Dr. Mazis' "indirect effects" theory, and in doing so rejected Complaint Counsel's central theory of its case (ID, p. 49 – 51). Judge McGuire properly determined that there was "little analysis" to support the theory, and found that Dr. 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." (ID, p. 50; F. 165, 168, 183, 188 – 192). Based on the scant evidence offered by Dr. Mazis, the ALJ correctly concluded that there was "no reliable information" regarding how many consumers would have been exposed to the infomercials in question, concluding: "This is not credible testimony supported by reliable evidence." ID, p. 51.

b. Having properly rejected the unsupported "indirect effects" theory, the ALJ nevertheless improperly associated the Ab Force ads with other ads in making his facial analysis.

As discussed above, Complaint Counsel repeatedly advanced the association between the Ab Force ads and the others, arguing and presenting evidence that consumers drew the connection and that Khubani intended for consumers to draw that connection. Although he rejected the direct connection, the

ALJ nevertheless considered those ads (ID p. 44), and suggested that those ads influenced the claims Khubani sought to make, stating:

> "[A]lthough 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." (ID p.44).

This conclusion is entirely unwarranted. As the Initial Decision finds (ID p. 50-51), there was never any evidence introduced of the effect on consumers and the ALJ erred by considering the effect of other advertising at all.

B. The ALJ's facial analysis must be set aside because the ALJ failed to distinguish among the eight different ads or the asserted claims, and improperly concluded that all of the ads made all of the claims.

The Ab Force advertising campaign employed different types of advertising media – television, radio, print and internet – and thus contained widely different elements (*e.g.*, visual elements, statements, *etc.*). [See ID pp. 13-15; F. 73-77; 86-97]. Complaint Counsel lumped all of the advertisements together under the broad and irrelevant label of "the Ab Force advertisements." Similarly, Complaint Counsel lumped all of the four alleged implied claims together, without differentiating as to what ad makes what claim – even though their own expert cited different sources of support for the different claims allegedly made.[3] In the Initial Decision, Judge McGuire erred by grouping <u>all</u> claims and <u>all</u> advertisements together, and failed to distinguish what advertisements made what claims.

[3] Dr. Mazis clearly stated that only two of the four alleged claims could be found on the face of the Ab Force ads. Tr. 61-62.

There are eight different advertisements at issue in this action:

(1) a 60-second, shortly-run "test" television advertisement;
(2) a 60-second, roll-out television advertisement, which contains different elements than those found in the test commercial;
(3) a 120-second, shortly-run "test" television advertisement;
(4) a 120-second, roll-out television advertisement, which contains different elements than those found in the test commercial;
(5) a shortly-run "test" radio advertisement;
(6) a roll-out radio advertisement, which contained different statements than the test radio advertisement;
(7) a print advertisement; and
(8) an internet advertisement.

(JX-2 – 9; CX-1-A through H).

Each of these advertisements contains different elements that will, when taken together within each advertisement, provide an overall net impression for each advertisement. For example, the radio advertisements obviously contain no visual elements, and the print ads contain a single visual element consisting of a small photograph. (CX-1-G). By contrast, the television advertisements contain numerous visual elements, but even within the broad category of Ab Force television advertising, there are visual differences between each of the television advertisements (two of which are twice the length of the other two commercials). (Compare JX-2 and 4 with JX-3 and 5). The test ads (both for television and for radio) contain significantly different statements than those found in the roll-out versions of those advertisements. (Compare JX-2 and 3 with JX-4 and 5). Indeed, each of the advertisements contains statements that are different from those found in other ads, and in some cases those differences are significant.

The Initial Decision simply fails to make any distinction between the advertisements in most cases. For example, although the Ab Force name is present in all of the advertisements, Judge McGuire found that "while the Ab Force name, 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" the Ab Force advertising makes the asserted claims. (ID, p. 41). But it is impossible to discern how the name or any other elements found within the four corners of the eight different advertisements interact, because the Judge made no effort to distinguish among those elements.

For example, after discussing the element of the Ab Force name, the Judge turned to the "visual images." (ID, p. 41 – 42). But in doing so, he addressed the visual images contained only in the television advertisements. (ID, p. 41-42). The visual elements of the print ad go unaddressed. (ID, p. 41-42).

Indeed, at pp. 41-42 of the Initial Decision the confusion underlying the "facial analysis" conducted by the ALJ is most manifest. At the bottom of page 40, the Initial Decision recognizes: "'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,'" citing *Thompson Medical*, 104 F.T.C. at 793, n. 17. The Initial Decision continues by observing that a facial analysis "does not involve the effect of individual words, phrases, or individual images." (ID p. 40-41.)

But the Initial Decision then goes forward to do exactly that – mixing disparate elements from various advertisements with no measured consideration of

how those elements might come together in any particular advertisement. For example, the visual images that are discussed in the last paragraph on page 41 of the Initial Decision obviously are derived from the television advertisements, but they are given no significance by the ALJ in the absence of the statements that are described on the top of page 42. And those statements come from a variety of sources. The first statements discussed are from the test radio ad, which is then followed by a discussion of the roll-out radio ad which did not include the "no exercise" language to which the ALJ attached significance. The test television and radio ads are discussed with attention to the phrase "latest fitness craze" which the ALJ then admits was not included in the roll-out version of the two advertisements. He then wraps various phrases – "abs into great shape fast – without exercise," "latest fitness craze," "latest craze," "powerful technology," and "powerful and effective" – together concluding that they strongly and clearly imply that the Ab Force is a fitness or exercise device and that they convey "the impression that the Ab Force is designed to provide health, weight loss, fitness, or exercise benefits." (ID, p. 42.) The problem, of course, is that in no advertisement were all of these phrases ever combined together, and as the ALJ himself recognizes, in some cases (the radio ads) were unaccompanied by any visual elements. And the TV test ads, which contained one or more of these snippets, only ran for a relatively short amount of time, generating a tiny fraction of sales.

As a result of this failure to distinguish among the advertisements, all of the Ab Force advertisements were viewed through the narrowed prism of the television

advertisements, the only advertisements addressed by Dr. Mazis, and the advertisements most attacked by Complaint Counsel. Consequently, it is apparent that the "net impression" Judge McGuire had of the television advertisements (and which were improperly viewed as a group rather than as four separate advertisements) was erroneously attributed to the print, radio and internet advertisements, as well. This alone warrants setting aside the facial analysis made by the ALJ, but it is not the only reason to set aside that facial analysis.

C. Because the "indirect effect" theory was rejected, there was no reliable basis to conclude that the advertising made claims of weight loss or that the Ab Force was a replacement for regular exercise.

Although Judge McGuire properly rejected the "indirect effects" opinion of Dr. Mazis as not being supported by evidence, and thus rejected the heart of Complaint Counsel's "importation theory," he nevertheless improperly ignored critical testimony by Dr. Mazis that two of the four asserted advertising claims may only be perceived as a result of these "indirect effects."

Dr. Mazis testified that consumers would perceive two of the four challenged claims (the claim that use of the Ab Force would lead to well-defined abs, and the claim that use of the Ab Force would lead to a loss of inches) as a result of both the "direct effects" and the "indirect effects" he described. (Tr. 61, 66). But Dr. Mazis then testified that the remaining two asserted claims (that use of the Ab Force leads to weight loss, and that use of the Ab Force is a substitute for exercise) may be perceived by consumers only because of so-called "indirect effects":

A. I think, for example, they [the television ads] communicate the idea that if you use the Ab Force, you will get well-developed abdominal muscles, and if you use the Ab Force, you'll lose inches around the waist. I think those are the two most prominent claims that come across. And secondly—

Judge McGuire: are these claims, the two you just referred to, implied claims or express claims?

A. Implied claims. They're all—all through the visual imagery. And then secondly, because of the association with other ab belts that made some other claims, people may also perceive Ab Force as also being associated with those elements, and the other two would be that it's a substitute for exercise. Now, it doesn't even say that or show that in the ads, but because of the association with this ab belt category, people may perceive that. There may be many transference over to the Ab Force as well.

And the other element has to do with losing weight. Again, it doesn't say anything explicitly about losing weight, but because of the association with previous ab belt ads, that other ab belt companies—their infomercials made those claims, people may perceive that those characteristics also associate with Ab Force.

Judge McGuire: So, then, these are all implied claims, right?

A. They are all implied claims. And the first two I mentioned I think are more—are stronger, they are more obvious because of the visual imagery. The second two I mentioned are really more because of the association with the product category of ab belts.

(Tr., 61 – 62).

In summary, Dr. Mazis testified that the only way consumers may perceive the asserted weight loss and exercise claims is through their association of the Ab Force television ads with ads for the three other products about which Dr. Mazis testified—Fast Abs, AbTronic and Ab Energizer. At no time did Dr. Mazis testify that consumers may perceive these claims as a result of "direct effects," *i.e.*, elements contained within the four corners of the advertisements themselves. In fact, Doctor

Mazis implicitly rejected that notion, testifying that these claims were not stated or even shown in the advertisements themselves. (Tr. 61). Similarly, Dr. Jacoby rejected the idea that the advertisements could reasonably be interpreted as making weight loss or exercise claims on the basis of a review of the advertising, or based on the "indirect effects" about which Dr. Mazis testified. (Tr. 347-49).

Thus, there exists absolutely no evidence in the record to support the assertion that the television advertising could reasonably lead consumers to perceive that those ads made claims about weight loss and exercise.

D. The ALJ's facial analysis also failed to properly consider the express and truthful "compare and save" claims that are predominant in each of the Ab Force ads.

The ALJ's facial analysis must be set aside also because he wrongly concluded that because the purpose of the Ab Force is never identified in any of the advertisements, an analysis of whether the alleged claims are implied must be undertaken. This conclusion could only be reached, however, by sweeping aside the compare and save strategy and by ignoring the predominant, express, and truthful claims regarding technology and cost, claims the Initial Decision expressly recognizes (F. 65). The ALJ did just that, erroneously determining that the only express claims that would matter would be those that explained the purpose of the device advertised (and ignored the only express statement regarding purpose), even though—as the ALJ recognized—the overall technology and cost comparisons were intended, truthful, and express.

1. Judge McGuire properly found that the Ab Force product was sold using a compare and save strategy and was intended to take advantage of the popularity of these products, but then wrongly concluded that there was no "purpose" to the sale.

In the Initial Decision, Judge McGuire determined that the Ab Force ads expressly claimed (1) that the product was technologically comparable, and (2) offered at a lower cost. This is called a "compare and save" strategy. As Mr. Khubani described, and the ALJ seemed to recognize, in such a marketing strategy, you have a bandwagon effect and you must have the point of reference. He accepted a number of proposed findings establishing that this was a compare and save based on bandwagon. The ALJ correctly found:

- Mr. Khubani uses a variety of marketing strategies. (F. 23)
- Mr. Khubani will observe trends in the marketplace and in various channels of advertising and will evaluate which products would be appropriate for advertising on television, including steps competitors have taken. (F. 24)
- If Telebrands believes it has a competitive advantage, it will compete with products already on the market. (F. 25)
- Several times per year, Telebrands will identify an existing product and will enter the market as a competitor by offering the similar product at a lower price. (F. 25)
- Mr. Khubani believed that this was "one of the hottest categories ever to hit the industry" (F. 64).
- Mr. Khubani believed 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. (F. 39)
- 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 belts.
- Mr. Khubani testified that the statements made in the Ab Force ads were included to serve as a point of reference for his price savings claims. (F. 93)
- 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. (F. 96)

- Mr. Khubani testified that statements in the ad were intended to create excitement as part of an "everyone wants one" bandwagon effect. (F. 95).

This strategy was accepted by the ALJ and never challenged by Complaint Counsel. Indeed, Judge McGuire found that "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'." (F. 40).

2. Although Respondents conducted a campaign of truthful "compare and save" advertising, the Judge erroneously determined that there was no stated "purpose" for the product.

In the Initial Decision, the judge found that, apart from the price savings statements (F. 99), and the brief statement RELAXING MASSAGE (F. 100, 101), there "are no other written statements in the advertisements about the purpose or effect of the Ab Force." (F. 102). The Initial Decision then goes on to state "[i]ndeed, the purpose of the Ab Force is never expressly stated in any of the advertisements," (ID, p. 39; F. 97, 102), and that "such an absence of any identified purpose may be considered in determining an ad's claims." (ID, p. 43)(emphasis added). In support, the ALJ cited *Thompson Medical*, 104 FTC at 648. But that case is cited only for the fact that the Commission considered "the absence of any elements giving a contrary impression, such as express disclosures." This approach misreads *Thompson Medical*, and it discounts the overwhelming—and, as the Judge found—express claims relating to technology and price.

In the Ab Force advertising, as the Judge recognized, there are a number of elements (including express statements and reinforcing visuals) that convey the impression that the product being offered is being offered because (1) everyone wants one, (2) it is the same technology, and (3) it is offered at a lower price. A review of the television advertising at issue reveals that the overwhelming claim being made is that that the Ab Force uses the same technology as used in other popular ab belts advertised in infomercials, but is available at a much lower cost than others on the market because of advances in technology and arrangements with the manufacturer. As the Judge found, these claims were express and, more importantly, they were truthful (F. 39, 40).

E. There is no evidence in the record to support the ALJ's conclusion that Respondents intended to make the asserted claims.

In addition to an examination of the visual elements and statements contained in the ads, Judge McGuire stated that "[a]n analysis of the surrounding circumstances behind the development of the challenged ads contributes to this facial analysis." (ID p. 43). It is clear from the Initial Decision that in considering the surrounding circumstances that contributed to his facial analysis, the ALJ considered the existence of advertising for other ab belts, as well as Respondents' intent in creating the advertising. (ID p. 44).

At the outset, it is important to note that Judge McGuire agreed that "Khubani clearly did not want to make health, weight loss, fitness and exercise claims expressly," but he nevertheless determined that Mr. Khubani intended to make those

claims impliedly. (ID p. 45). In reaching that determination, Judge McGuire stated that "Respondents' intent to make the alleged claims is demonstrated from an examination of [two things:] [1] Respondents' prior experience marketing another ab belt, the Ab Pulse, and [2] from the process of drafting the Ab Force advertisements." (ID p. 44). But the ALJ made a serious factual error in construing Respondents' intent. The ALJ determined that Respondents intended to implicitly make the asserted claims because Respondents' failed in an initial effort to successfully market a "massaging" product, the Ab Pulse, and, having so failed, Respondents sought to enter a popular category by relying on the name, visual images and statements to implicitly make those very same false and misleading claims." But in this regard, the ALJ made several significant factual and legal errors:

- The Ab Pulse was introduced after Ab Force, so it could not have had any affect whatsoever on the Ab Force campaign. Consequently, the ALJ was wrong to conclude that Khubani intended to make implicit claims because he had failed at selling a product that only made massage claims.
- The ALJ improperly disregarded evidence of Respondents' intent to market the product under a "compare and save" strategy.
- The ALJ improperly disregarded the clear and substantial evidence that Respondents wanted to avoid the very claims asserted.

1. The ALJ's finding that the Ab Pulse was marketed before the Ab Force is incorrect, and fatally undercuts the ALJ's findings with regard to intent.

The ALJ simply got the chronology of the Ab Pulse campaign wrong. In fact, as Complaint Counsel well knows, and is clear from the record, the Ab Pulse campaign came after the Ab Force campaign, which began in January 2002. (JX-6, Iyer depo. pp. 43-44 and CX-31; F. 46, 58, 62). There is absolutely nothing in Judge

McGuire's findings, or in the portions of the Record cited in the findings regarding the marketing of the Ab Force (ID, Sect. II(B)(1)(e)(i), p. 15 – 16) to support the erroneous conclusion that Respondents advertised the Ab Pulse before marketing the Ab Force.

The ALJ cited three sources of evidence to support his findings regarding the Ab Pulse: (1) the videotaped copies of the Ab Pulse and Ab Force commercials, (2) the testimony of Mark Golden, and (3) the testimony of Mr. Khubani.

There is no production code date on the digital copy of the Ab Pulse commercial offered by Complaint Counsel. (CX-2). Consequently, the videotapes themselves do not support the conclusion that the Ab Pulse campaign preceded the Ab Force campaign.

The testimony of Mark Golden, who oversees marketing operations at an inbound telemarketing firm (CCT), is similarly unhelpful. Golden was involved in the inbound telemarketing sales for Telebrands on the sale of two of its products, the Ab Force and the Ab Pulse. (Tr. 191). CCT also provided telemarketing services for the Ab Energizer product. (Tr. 191). The only evidence elicited from Mr. Golden regarding the chronology of the sales of the products were:

- That CCT handled sales of the Ab Energizer first (Tr. 191),
- That the Ab Force was sold in "early 2002" (Tr. 207),
- And that the Ab Energizer was sold "approximately six months or thereabouts" before the Ab Force (Tr. 208).

No evidence was presented through Mr. Golden that the Ab Pulse preceded the Ab Force on the market.

Finally, Judge McGuire relied on the testimony of Mr. Khubani, but only for the proposition that the Ab Pulse campaign was a failure. (Tr. 281). But Complaint Counsel's exploration of the Ab Pulse ended there, and at no time during his testimony did Mr. Khubani testify that the Ab Pulse was offered for sale before the Ab Force. In short, there is nothing in the record to support the finding that the Ab Pulse was marketed before the Ab Force campaign began. The error in finding that the Ab Pulse campaign preceded the Ab Force campaign is a significant one because Judge McGuire placed tremendous emphasis on the timing of the Ab Pulse campaign in reaching his conclusion that Respondents intended to implicitly make the challenged claims. (ID, p. 44 - 45). Specifically, after describing the similarities between the Ab Pulse ad and the Ab Force ads, Judge McGuire wrote that

> "Respondents' first attempt to enter the market by selling a 'massaging ab belt' and differentiating it from other 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.*"

(ID, p. 44)(emphasis added).

Judge McGuire went on to write that "[w]hile 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." (ID, p. 45)(emphasis added).

What the ALJ indicates he thought occurred in this case was that Respondents, having failed to successfully promote a product, then ratcheted up the claims in an effort to drive sales. While this may be true in many advertising cases

that come before the Commission, in this case, and as discussed more thoroughly below, Mr. Khubani did the opposite—with each successive draft, he pared down the advertising to avoid claims that he knew he could not support, and to showcase those claims he intended to convey from the outset: technology and price.

As the record shows, the ALJ incorrectly found that the Ab Pulse was Respondents' first attempt to sell an ab belt product; it was the second. Therefore, the ALJ was wrong to conclude that Khubani intended to make implicit claims because he had failed at selling a product that only made massage claims.

2. Respondents intended to create advertisements containing express "compare and save" claims, and which specifically avoided claims that the Ab Force would improve fitness.

Ignoring the express "compare and save" claims, Complaint Counsel has argued, and the ALJ found, that certain individual phrases and images conveyed an altogether different impression to consumers. In doing so, however, the Initial Decision pays disproportionate attention to the language contained in "test" advertising that was used to gauge whether the product should be marketed in the first place, and which was later revised prior to full roll out of the advertising and the product to the public. The Initial Decision also focuses in large measure on the introductory statements in the ads, which were drafted in order to create consumer identification with the EMS ab product category and to highlight the price advantage of the Ab Force.

The evidence introduced at trial demonstrates that the exact opposite is true. Mr. Khubani rejected draft text presented to him by Ms. Liantonio that contained

exercise and "flatter tummy" claims, and instead shaped the advertising to focus on the "compare and save" message. The record reflects that the advertising was ever-changing, culminating in final rollout of advertising that studiously avoided the challenged claims and instead focused on a comparative advertising message that is unchallenged in this case.

a. The Initial Advertising

As discussed above, the essence of the message that Mr. Khubani envisioned for the Ab Force was "compare and save." On December 18, 2001, Mr. Khubani created the first Ab Force ads, drafting a script for a 60-second test radio commercial and a print advertisement for testing. (Tr. 480 – 481; CX-1H; CX-34). In the initial test ads, Mr. Khubani decided to refer to the highest price point on the market for similar products as a point of reference, and he decided that he would make a reference to the benefits touted by competitors for their products as another point of reference. (Tr. 486 - 487).

The language contained in the first part of the test radio advertisement ("They're the latest fitness craze to sweep the country, but they're expensive, selling for up to $120 each.") was created to present a point of reference to other EMS ab products being sold on the market at the time. (Tr. 479). The price of the Ab Force was intended to be a point of reference to other products because a comparison of the Ab Force to other products presented the idea of a significant savings. (Tr. 487). Mr. Khubani also included other language – later changed – ("Have you seen those fantastic electronic ab belt commercials on TV? They're amazing, promising to get

our abs into great shape fast without exercise") in order to serve as a reference point to consumers by providing a description of other EMS ab products on the market. (Tr. 487 - 488).

The print advertising, though differently worded, also created two points of reference for consumers. The first point of reference was the statement "Electronic ab belts are the latest craze that are sweeping the country. These are the same type of ab belts that you've seen nationally advertised, similar to those sold on television by other for as much as $100 and more, but during this nationwide promotion, you can own the amazing Ab Force electronic ab belt for the unbelievable price of $10." (CX-34). This language served as a point of reference to other EMS ab products available on the market at that time. (Tr. 488).

The second point of reference was contained in the statement, "How can we afford to sell amazing Ab Force electronic ab belts for the unbelievable price of $10?" (CX-34). Mr. Khubani testified this was also a point of reference to other EMS ab belts, with an emphasis on price. (Tr. 488).

There were significant differences between the test radio ad and the print ad with regard to the points of reference to other EMS ab products, and these differences highlight the weakness of Complaint Counsel's argument that Respondents intended to convey the challenged claims. First, the language in the beginning of the radio ad ("Have you seen those fantastic electronic ab belt commercials on TV? They're amazing, promising to get our abs into great shape fast without exercise") does not appear in any other advertisement for the Ab Force

(compare CX-1H and JX-2; JX-3; JX-4; JX-5). Nor does it appear in the print advertisement, which was drafted the same day by Mr. Khubani. (Compare CX-1H and CX-34).

In looking at the test radio and print advertisements as a whole, it is clear that the overwhelming message is that the Ab Force is technologically similar to other EMS ab products on the market, but is significantly less expensive than those other products. This was the heart of the "compare and save" campaign crafted by Mr. Khubani, and it is the express, clear message conveyed in these earliest of ads for the Ab Force.

The Initial Decision focused on the introductory language of the test radio ad, which simply states that other products made certain advertising claims related to exercise. But this overlooks two things. First, the introductory statement found in the test radio ad does not make promises that the Ab Force provides the same benefits, but only refers to promises made in other ads, and then only as a point of reference to those products. Second, the Initial Decision avoids the fact that the print ad was created contemporaneously with the radio ad, but contains language that is significantly different from that found in the test radio ad. These differences in the test radio script and the print ad were merely the result of Mr. Khubani's drafting process, a process that selected test ad language on the basis of "what sound[ed] best." (Tr. 489 - 490). Moreover, that difference in language belies the insinuation

that the test radio script embodied Respondents' intent to convey the challenged claims.[4]

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

b. The Test Television Spots

In addition to the test radio ad and the print ad, in late December 2001, Telebrands and Collette Liantonio of Concepts TV Productions, Inc. created two test television commercials for the Ab Force product. One spot was a 60-second commercial later given the production code AB-B-60. (JX-1, ¶¶ 22- 23). A second spot was a 120-second commercial later given the production code AB-B-120. (JX-1, ¶ 24; Tr. 22 - 23).

[4] The test radio advertisement ran for a very brief period of time and generated the fewest orders of any of the advertisements challenged. Specifically, the test radio ad ran generated 211 orders, which was less than six-one-hundredths of one percent of the total Ab Force orders. (Tr. 493 – 494; RX-61). Similarly, the print advertisement ran for one week in February 2002 and again for a week in March 2002, generating a total of 6,871 orders, or approximately two percent of all Ab Force orders placed. (JX-1, ¶ 34; RX-61).

(i) The decision to reject a draft script that contained challenged claims demonstrates the intent to affirmatively avoid any such claims.

In creating this advertising, Mr. Khubani took actions that are clearly inconsistent with the finding in the Initial Decision that Respondents intended the Ab Force commercials to contain the challenged implied claims.

First. When Mr. Khubani spoke with Ms. Liantonio about the script for the commercials, he told her that the Ab Force product was going to be the least expensive of its type on the market, and that Telebrands would therefore compete with others in the marketplace based on price. (JX-6, Liantonio Dep. 54 - 57). Consequently, Mr. Khubani instructed Ms. Liantonio that the script should not contain any claims other than claims concerning price. (JX-6, Liantonio Dep. 56 – 57; Tr. 490 - 491).

Second. Mr. Khubani expressly rejected a draft script provided to him that contained several exercise and weight-related claims. Specifically, Ms. Liantonio—who had not seen the Ab Force product, and who had not seen any ads for other EMS ab products (JX-6, Liantonio Dep. 30 -33)—presented Mr. Khubani with a draft script the morning of the shoot that contained the following introduction:

> "Do you wish you could get into shape fast without exercise? Wouldn't you love to have a flatter tummy without painful sit-ups? There are millions of Americans just like you who have discovered the power of those amazing Electronic Ab Belts advertised on television."

(JX-6, Liantonio Dep. 35 – 36; RX-34).

When Ms. Liantonio showed Mr. Khubani the script, Mr. Khubani saw that Ms. Liantonio had made "all the claims I didn't want to make—you know, flatter tummy, without painful sit-ups and so on…" (Tr. 490). Mr. Khubani testified that when he saw the script he "knew I had to rewrite the script." (Tr. 490). He testified that he did not want to make those or similar claims because "we didn't possess substantiation to make those claims." (Tr. 490). Consequently, Mr. Khubani discarded Ms. Liantonio's draft and rewrote the scripts while Ms. Liantonio finished setting up for the shoot. (Tr. 484 – 486; 490 – 491; JX-6, Liantonio Dep. 56-57). The new script completely eliminated Ms. Liantonio's opening and instead opened with point-of-reference statements similar to those found in the print advertisements. (Tr. 486 – 489; JX-2; CX-1B; JX-4).

There could hardly be any clearer evidence of Respondents' desire to avoid the challenged claims than the fact that when presented with such claims in a draft script, Mr. Khubani rejected that script out of hand in favor of a rewritten script that avoided any such claims. Moreover, the fact that Mr. Khubani expressly told Ms. Liantonio to avoid claims other than price—a fact corroborated by Ms. Liantonio—provides ample evidence that Respondents sought to avoid the very claims they are now charged with making.

(ii) The language challenged was intended merely to serve as a point of reference to other EMS ab products.

The opening statements contained in the test commercials have been attacked by Complaint Counsel from the beginning of this case as a key element triggering

consumers' association with the ads for AbTronic, Ab Energizer and Fast Abs. But the evidence presented at trial shows that Respondents intended only to create a point of reference with EMS ab products generally, and to create excitement about the product that would drive sales.

The openings to the test commercials state: "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." (Tr. 491; JX-2; CX1-B; JX-3).

Mr. Khubani testified that he intended to accomplish two things with this language. First, he intended that this opening would serve as a point of reference for consumers by providing a description of the other EMS ab products on the market at the time, and would appeal to consumers by touting the price savings as the primary benefit of the Ab Force. (Tr. 486 - 489).

Second, Mr. Khubani testified that because sales of products of this cost and type are typically "impulse purchases," he intended the language to create excitement in consumers. (Tr. 491 - 492). This effort to create a desire on the part of consumers to purchase the product because "everyone else wants one" is called a bandwagon effect. (Tr. 492).

Dr. Jacoby, who was called by Respondents as an expert in this case, testified that the language used in the ads was consistent with the concept of creating a "bandwagon effect." (Tr. 373 - 375). As he described it, 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. (Tr. 373). Dr. Jacoby testified that as a result of the bandwagon effect created by this language, it was not necessary that consumers actually saw any ads for AbTronic, Ab Energizer and Fast Abs in order to create consumer desire for the Ab Force. (Tr. 374 - 375). No evidence was offered to rebut Dr. Jacoby's opinion in this regard.

Consequently, Respondents did not need to refer to or cause an association with the AbTronic, Ab Energizer and Fast Abs ads in order to generate interest leading to sales, and any argument that such language was intended to refer to those products because sales could not be generated otherwise misses the intended purpose and practical effect of the language.

(iii) The use of slim models is not inconsistent with Respondents' intent to limit the Ab Force ads to "compare and save" claims.

Complaint Counsel has alleged that the intent to make these claims is also inferred from the use of models with slim bodies and well-defined abs. There are two responses to this line of attack that demonstrate that there were legitimate reasons for using attractive models in the television advertisements that had nothing to do with an alleged intent to convey the challenged claims.

First, Mr. Khubani has testified that thin models were used in order to demonstrate the Ab Force product in use and causing involuntary muscle contractions. (Tr. 518). Indeed, Complaint Counsel's own witness, Dr. Mazis,

admitted that he had previously agreed in his deposition that thin models were useful so viewers "could see the product vibrating more or something…" (Tr. 149 - 150).

Second, from Ms. Liantonio's point of view, it was important to see the abs of the models and to make sure that the models' abs were attractive because the product being advertised was a belt. (JX-6, Liantonio Dep. 62 - 70). She stated that in hiring the models she specified that they have attractive abs because that was the area the shooting would focus on. (JX-6, Liantonio Dep. 62 - 70). When cross-examined by Complaint Counsel as to why she did not use obese people in the advertisements – a curious question given the prevalence of attractive people in television advertisements for all sorts of products and services – Ms. Liantonio testified that using obese people would constitute "negative advertising," which was not appropriate in her opinion. (JX-6, Liantonio Dep. 65 - 66).

c. The Rollout Advertising

Additional evidence that Respondents took measures to avoid making the challenged claims and instead sought to present the Ab Force using a "compare and save" strategy was demonstrated by the steps Respondents took after the test advertising was introduced. In addition to the changes made between the test radio ad and the print ad, and the change made by Mr. Khubani to the draft script presented to him by Ms. Liantonio, Telebrands undertook a comprehensive review of its advertising campaign and made additional changes to the advertising after speaking with compliance counsel about the advertisements. These changes were

made as part of the typical review undertaken by Telebrands prior to the full rollout of any product marketing campaign.

Although the test advertisement results were limited,[5] they were deemed successful by Telebrands, which decided to rollout the product to the public in a nationwide campaign. Before undertaking the rollout however, and consistent with Telebrands' general practice, (Tr. 440- 443), Telebrands engaged in a detailed review of the Ab Force product and advertising, including everything from a review of all intellectual property associated with the product to legal review to ensure compliance with all applicable laws and regulations. (Tr. 495).

As a result of that process, in early January 2002, a number of minor changes were made to the radio and television advertisements. (Tr. 495). First, the television scripts were revised to change the phrase "latest fitness craze" to "latest craze." (Tr. 495; compare JX-2 with JX-4; JX-3 with JX-5). This language is similar to that found in the print advertisement, and does not contain a reference to fitness or exercise. (Compare CX-34 and JX-4). Again, Mr. Khubani testified that the introductory language of both ads was intended to introduce points of reference for the consumers. (Tr. 485 - 496).

Second, the phrase "just as powerful and effective" was changed to "uses the same powerful technology as." (Compare JX-2 with JX-4; JX-3 with JX-5). Mr.

[5] 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). The total number of orders placed through the test commercials was approximately 1.4% of the total number of orders placed for the Ab Force during the entire campaign. (Khubani Tr. 493 – 494; JX-1 ¶¶ 26 – 28; RX-61).

Khubani testified that this language in both ads were intended as references to the fact that Ab Force used the same technology as other EMS ab products on the market. (Tr. 497).

Moreover, the radio advertisement was revised to remove the entire opening statement about other ab belts "promising to get our abs into great shape fast without exercise." (Compare CX-1H and RX-49).

Even before these minor changes were made, that overwhelming message conveyed by the Ab Force ads was a comparative advertising message that drew a comparison between the Ab Force and other EMS ab products on technology, and distinguished them on price. The evolution of the advertising away from the language most strenuously challenged by Complaint Counsel demonstrates that, at the very least, Respondents intended to avoid the claims asserted and present the products using a "compare and save" strategy.

II. THE EXTRINSIC EVIDENCE CITED IN THE INITIAL DECISION IS UNRELIABLE AND DOES NOT SUPPORT THE CONCLUSIONS REACHED.

Separate and apart from his own facial analysis of the Ab Force ads, the ALJ also cited the testimony of Dr. Michael Mazis as supporting the conclusion that the Ab Force advertisements conveyed the asserted claims. Specifically, the ALJ stated that Dr. Mazis had testified that "the implied claims are established through direct effects of 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." (ID, p. 48). However, none of

this extrinsic evidence is sufficiently reliable or objective to support the conclusion that the asserted claims were made in each of the Ab Force ads.[6]

First, because the ALJ roundly rejected the "indirect effects" theory that made up part of Dr. Mazis' facial analysis as unproven, there is no extrinsic evidence in the record that supports Dr. Mazis' facial analysis that the Ab Force ads made weight loss and exercise claims.

Second, the fact that Dr. Mazis believed there were certain "direct effects" that supported two of the claims—well-defined abs and loss of inches—does not constitute reliable or objective evidence that consumers would likely perceive those two claims. His facial analysis, which was formed after he reviewed the allegations of the Complaint, is the kind of subjective "say so" evidence that is routinely rejected by federal courts in other cases, and which should be rejected here as an extrinsic, independent source of evidence.

Finally, as recognized by the ALJ, the copy test Dr. Mazis conducted was marred by a significant flaw in the controlling for pre-existing beliefs. However, the ALJ was incorrect that those flaws were not sufficient to draw the copy test results into doubt. As Dr. Mazis himself recognized, the existence of pre-existing beliefs was sufficient to result in very high "false positives" in the control group. Because Dr.

---

[6] At the outset, it is important to note that all of the extrinsic evidence offered in this case relates only to the test and rollout versions of the television advertisements. Dr. Mazis did not review any of the print, radio or internet advertisements at issue, but limited his opinions to television advertisements. (Tr. 123-24; 134; 181-83). Indeed, Complaint Counsel offered no extrinsic evidence regarding any of these advertisements. Consequently, there is no extrinsic evidence in the record to support the conclusion that the print, radio or internet ads made any of the asserted claims.

Mazis admittedly did not control for those beliefs, and because the copy test suffered from other flaws as well, it cannot serve as a reliable extrinsic basis for the conclusion that consumers would perceive the asserted claims from viewing the Ab Force television ads.

A. Because the "indirect effects" theory was rejected as unreliable, there is no support for two of the four asserted claims in Dr. Mazis' facial analysis.

Dr. Mazis' facial analysis of the Ab Force ads included an opinion that two of the four claims were supported by the "indirect effects" theory, which has soundly been rejected by the ALJ. As discussed above, Dr. Mazis testified, after identifying the key "elements" in the Ab Force television ads, that "visual imagery" would lead consumers to believe that use of the Ab Force results in well-defined abdominal muscles and loss of inches around the waist. (Tr. 60 – 61). However, Dr. Mazis limited his opinions regarding the two remaining asserted claims of weight loss and exercise, describing them as secondary claims that consumers may perceive "because of the association with a belts that made some other claims…" (Tr. 61). Because the ALJ rejected the "indirect effects" theory, there is no extrinsic evidence in the record to support the conclusion that the Ab Force television ads made the asserted claims of weight loss or exercise. Accordingly, the conclusion that these claims are supported by extrinsic evidence must be set aside.

B. Dr. Mazis' facial analysis must be set aside because it is biased, subjective, and not based on reliable evidence.

At the trial in this matter, Dr. Mazis offered a facial analysis of the four Ab Force television commercial at issue, which were shown to Dr. Mazis in Court.

(Mazis, Tr. 47 - 67). Dr. Mazis offered the opinion that certain visual and verbal elements in the Ab Force ads would have two effects on consumers. The first is, as Dr. Mazis described it, and as previously discussed, an "indirect effect" (Mazis, Tr. 66 - 67).

The second effect is what Dr. Mazis called a "direct effect," meaning that even if consumers had never seen any other ab belt advertisement, elements within the four corners of the Ab Force television ads would convey to consumers the idea that the Ab Force causes weight loss and was a substitute for exercise. (Mazis, Tr. 61 – 62, 66 - 67). In particular, he testified that consumers could "make inferences because there's certain implied claims in the ads, because of seeing the models and seeing the pulsating effect of the vibrations of the—of the ab belt, and these people look very fit, very trim, and it has the name Ab Force." (Mazis, Tr. 66).

As discussed below, these direct "effects" are not supported in any way by the evidence in this case, and Dr. Mazis did not attempt to explain how his expertise was relevant to his opinions, or show how his opinions were logically related to that expertise. Moreover, Dr. Mazis' testimony was hopelessly tainted by potential bias, and should not be afforded any weight on that basis alone.

1. Dr. Mazis' facial analysis regarding visual elements and the "Ab Force" name are nothing more than unacceptable "say so" opinion.

There is no question that the opinions of experts will be considered only where they are adequately supported. *Thompson Medical*, 104 F.T.C. at 790: "[T]o be adequately supported [the] opinions that describe empirical research or analyses [must

be] based on a generally recognized marketing principles or other objective manifestations of professional expertise." (*Id.*, at 790)(emphasis added). And while the ALJ is correct in stating that experts may testify based on their experience in their given field (ID, p. 48), the Commission has determined that an expert's testimony is of little value if it does not meet a standard set forth above: "Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts, and thus may be of little value in resolving conflicts." *Thompson Medical*, 104 F.T.C. at 790.

The admissibility of expert testimony is specifically governed by Commission Rule 3.43(b), which states that "irrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b)(1). Rule 702 of the Federal Rules of Evidence, cited by the ALJ (ID, p. 48), provides another, similar framework for analyzing the reliability of expert testimony. Under Rule 702, such testimony is admissible if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

Rule 702 was amended in 2000 primarily in response to two Supreme Court decisions, *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Those decisions established that the admission of scientific and technical evidence depends on whether such evidence is reliable and relevant.

In the context of expert opinion testimony, a primary focus of federal cases since *Daubert* has been that "unverified statements that [are] unsupported by any scientific method ... [provide] no basis for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence ...." *Rogers v. Ford Motor Co.*, 952 F. Supp 606, 615 (N.D. Indiana 1997) (expert testimony that offers nothing more than a bottom line conclusion is excluded).

In order for an expert's opinion to be reliable under Rule 702, it must be based on sufficient facts or data. *See Elcock v. Kmart Corp.*, 233 F.3d 734 (3rd Cir. 2000) (expert economist excluded because model relied on assumptions "wholly without foundation in the record"); *Coffey v. Dowley Manufacturing, Inc.*, 187 F. Supp 2d 958 (M.D. Tenn 2002) (expert opinion is rejected in part because it is based on "guestimations"). The expert's opinion must provide some basis on which to examine the reliability of the report. See *Donnelly v. Ford Motor Co.*, 80 F. Supp 2d 45, 50 (E.D.N.Y. 1999) ("Without some explanation of the data, studies or reasoning [an expert] employed, his conclusion is simply inadmissible *ipse dixit*").

A mere assertion of an expert's qualifications, conclusions and an assurance of reliability is <u>not</u> enough to allow a court to consider an expert's proffered opinion to be reliable. *See Daubert v. Merrill Dow Pharmaceuticals Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (on remand). In deciding whether to admit expert testimony, the Commission's foremost objective should be to rule out "subjective belief or unsupported speculation." *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994)(applying Rule 702).

While an expert witness may rely on his experience as the basis for his testimony, if the expert is resting solely or primarily on experience, "then he must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion and how that experience is reasonably applied to the facts." *Id.*; *Nemir v. Mitsubishi Motors Corp.*, 200 F.Supp.2d 770, 774 (E.D. MI 2002). "The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable." *Nemir v. Mitsubishi Motors Corp.*, 200 F.Supp.2d at 774. An expert is required to employ "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. at 1176.

No such standard of reliability is present here. Although he was accepted as a qualified expert (i.e., as someone who was qualified in the area of consumer perception)(F. 148, 151), there is nothing in the record to connect Dr. Mazis expertise and experience in his field to the specific opinions he rendered in this case. Notably, his central opinion—that consumers would perceive certain claims from the Ab Force television ads because they would associate those ads with ads for other ab belt products – was rejected as unsupported by the ALJ. (ID, p. 51). Similarly, Dr. Mazis pointed to nothing in his expertise to reliably support his "direct effects" theory.

Dr. Mazis made no effort to explain how his experience conducting research and testing concerning other types of products, or his experience teaching consumer behavior, led him to the conclusion that consumers would take away the four claims

asserted by Complaint Counsel. Nor did he offer to explain why that experience is a sufficient basis for his opinion, or how that experience was reasonably applied to the facts.

Consider Dr. Mazis' testimony concerning "direct effects" that was cited in the Initial Decision:

> [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 make inferences because there's certain implied claims in the ads.

(Tr. 66). This is pure tautology. He testified that consumers would perceive the claims because the claims are there. But he never attempted to explain how he was able to determine that claims were there in the first place. Instead, he identified two elements in the ads: (1) visual imagery and (2) the name Ab Force.[7] How does he apply his expertise to these elements, or explain how his expertise allows him to determine that these are key elements that impact consumer behavior? He did not say. Instead, he testified that "[v]isual images are really more important than verbal messages, because they really remain in people's memories,"[8] (Tr. 59), and, regarding

---

[7] In offering his facial analysis regarding "direct effects," Dr. Mazis, unlike the ALJ, steered clear of any opinion regarding the statements made in the ads. He only identified statements made in the ads as elements that would trigger the "indirect effects" theory, which the ALJ ignored. Consequently, in making *his* facial analysis, the ALJ went beyond the opinion of Complaint Counsel's expert in this case. This is just one example of inconsistency that exemplifies the subjective nature of the facial analyses in this case.

[8] Respondents also note that Dr. Mazis did acknowledge in his testimony that he had agreed with Respondents that there was a legitimate reason to use people with relatively little fat: so viewers "could see the product vibrating more or something…" (Tr. 149 - 150). Indeed, Dr. Mazis agreed that in viewing the advertisement for the Ab Force, he could see the product causing the muscles to twitch on the models used in the ads. (Tr. 150). This testimony corroborates Mr. Khubani's testimony that the

the name, that "[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." (Tr. 60).

In short, his opinion that the visual imagery and the name "Ab Force" would likely cause consumers to believe that the ads made certain asserted claims amounts to nothing more than unreliable, unverifiable, and unacceptable say-so evidence, the very type of evidence that the Commission in *Thompson Medical* deemed worthless. *Thompson Medical*, 104 F.T.C. at 790. Indeed, the very type of expert-versus-expert disagreement the Commission warned against was on display. Dr. Jacob Jacoby, who was called by Respondents and who is equally qualified in the areas of consumer behavior, testified that the words "ab" and "force" may have several meanings that consumers would take away, but he could not identify any particular meaning that consumers would take away because there was no basis to determine such a perception. (Tr. 405 - 406).

2. Dr. Mazis' facial analysis was hopelessly tainted by potential bias.

There is another problem with Dr. Mazis' facial analysis that goes beyond his failure to explain how his experience leads to the opinion reached, why that experience is a sufficient basis for the opinion, and how that experience is reasonably applied to the facts. In addition, the objectivity of Dr. Mazis' opinions regarding the "direct effects" of the Ab Force ads and the identification of the claims consumers would perceive were potentially shaped by his interactions with Complaint Counsel.

---

only way to visually illustrate the product working was to demonstrate the product on slim models. (Tr. 518).

It is undisputed that Dr. Mazis' facial analysis was formed after he had consulted with Complaint Counsel and after he had been provided by Complaint Counsel with the Complaint and other selected information. (Tr. 115 – 116). Not coincidentally, the Complaint provided to Dr. Mazis asserted that the Ab Force ads made the very four claims Dr. Mazis would identify as being made as part of his so-called "facial analysis." Instead of consulting with a marketing expert to determine what claims were being made and then seeking issuance of a Complaint, Complaint Counsel did the opposite. This potential for bias alone should be sufficient to cause the Commission to pause in determining the reliability of Dr. Mazis' "direct effects" testimony. When combined with the fact that Dr. Mazis did not attempt to explain how his expertise led to his facial analysis, this potential for bias should cause the Commission to conclude that the facial analysis by Dr. Maxis should be set aside.

C. The copy test Complaint Counsel relied on does not establish that the Ab Force advertising made the asserted claims.

Other than the subjective, potentially biased and unreliable "facial analysis" tendered by Dr. Mazis, the only other basis for the theory of liability – indeed, the only empirical intrinsic evidence offered by Complaint Counsel regarding consumers' perceptions of the Ab Force advertising – is a mall-intercept copy test. However, as discussed below and proven at trial, that survey suffers from a number of fatal flaws that preclude a determination that the survey constitutes a reliable measure of consumers' perceptions of the ads at issue.

1. Methodological flaws in the copy test render the results unreliable.

The Initial Decision cites a copy test conducted by Dr. Mazis in support of the conclusion that the television advertisements made the four claims asserted by Complaint Counsel. Respondents note as a preliminary matter that this copy test was more limited than Dr. Mazis' facial analysis, which did not consider the print, internet or radio ads, but only considered the four television ads at issue. The copy test is even narrower in scope than Dr. Mazis' facial analysis: it copy tested only the 60 second rollout ad, one of the four television advertisements at issue in this case. Consequently, the scope of the copy test excluded seven of the eight advertisements at issue (*see* Section IB, *supra*). Thus, even if the copy test were reliable, it would only be extrinsic evidence that one of the eight ads at issue made the claims asserted.

But the copy test is far from reliable. As noted by Dr. Jacoby, the copy test suffers from a number of flaws that draw into serious question the reliability of the copy test results. These flaws range from an improperly selected sampling universe (Tr. 352-55), to leading open-ended and closed-ended questions (Tr. 389-92), to the unexplained exclusion of 81 respondents, the exclusion of which significantly impacted the results of the survey (Tr. 357-66).

However, there is one flaw that serves as a central, overriding flaw that is absolutely fatal to the reliability of the survey: Dr. Mazis' admitted failure to control for pre-existing beliefs of survey participants. As the ALJ recognized (ID p. 54-55), Dr. Mazis completely failed to control for the closed-ended questions, or to control for the open-ended questions. Where the ALJ erred, however, is in determining that

Dr. Mazis did not need to control for pre-existing beliefs even when Dr. Mazis testified he did.

a. A reliable survey must control for background "noise," including pre-existing beliefs.

Generally speaking, "the quality of any consumer research offered as evidence will be evaluated in the totality of the circumstances ...." *Kraft*, 114 F.T.C. at 127 n. 13. If the methodology of a consumer survey is fundamentally unsound, then that survey cannot assist the Commission in deciding whether an advertisement communicates a particular claim to consumers. Thompson Medical, 104 F.T.C. at 794-95; Sterling Drug, 102 FTC 395, 754 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984). As the Commission noted in *Stouffer*, 118 F.T.C 746, "[t]he Commission's practice is, in this regard, consistent with that of most federal courts when evaluating surveys purporting to assess the meaning that consumers take from ads." *Id.*, at 808.

Federal courts have widely recognized the need for consumer surveys to adjust for so-called "background noise," *i.e.*, extrinsic factors, pre-existing beliefs, general confusion or other factors, other than the stimulus at issue, that contribute to a survey's results. *See, e.g.*, *Smith Kline Beecham Consumer Healthcare L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 2001 U.S. Dist. LEXIS 7061 at *38-39 (S.D.N.Y. June 1, 2001). Thus, the Federal Judicial Center notes: "It is possible to adjust many survey designs so that causal inferences about the effect of a trademark or an allegedly deceptive commercial become clear and unambiguous. By adding an appropriate control group, the survey expert can test exactly the influence of the stimulus." *Reference Manual on Scientific Evidence*, 250 (Federal Judicial Center 1994).

Consumer surveys are not credible where they fail to properly control for the effect of "noise" such as preconceptions or bias. *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 761-62 (D.N.J. 1994) ("It is clear that in a false advertising action survey results must be filtered via an adequate control mechanism...."). Controls are an essential feature of reliable survey evidence because they enable the surveyor to separate the wheat (the effect of the advertisement, alone, on the participant) from the chaff (the effect of "the participant's prior knowledge and/or prior (mis)conceptions"). *See id.* at 749.

The ALJ recognized that the Commission follows a similar approach. In *Kraft*, 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), the Commission rejected as unreliable a copy test which failed "to correct for pre-existing 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. *Id.*, 114 F.T.C. at 131 n. 19. Specifically, the Commission found that

> No measures were used in the [expert's] survey to correct for pre-existing or inherent survey bias. *Compare Thompson Medical*, 104 FTC at 807-08 (control measures used with both aided and unaided recall questions to minimize bias). The apparent 45 percent response rate suggesting that an imitation superiority message was taken by survey participants may well be attributable to consumers' prior exposure to the "Skimp" ads, which did contain an explicit comparison to imitation slices, and which were disseminated extensively prior to the "Class Picture/5 ounce" ads.

Id.

Indeed, this case is similar to this portion of the decision by the Commission in *Kraft* in this respect: the existence of other, heavily disseminated advertising may have contributed to consumers' exposure to previous claims, thus influencing their

results. The Commission noted that the relatively high response rate was an indication of such bias in the survey, and the survey was appropriately disregarded as unreliable.

Unlike the decision in *Kraft* however, there is another element that favors the finding that the survey is unreliable in this case: Complaint Counsel's own expert agrees that pre-existing beliefs should have been controlled for, and that the high response rates from the control group were the result of pre-existing beliefs.

b. Dr. Mazis admitted that pre-existing beliefs played a significant role in this copy test, but erroneously made no effort to control for those pre-existing beliefs.

Dr. Mazis admitted that pre-existing beliefs played a significant role in this copy test, and admitted that he made no effort to control for such pre-existing beliefs because "random assignment" would have ensured that survey participants with pre-existing beliefs would have been evenly distributed between control and test groups.

When asked whether he typically makes any effort to screen for pre-existing beliefs in a study of this type, Dr. Mazis answered that he did:

> That's why we use a control group. That's the point of the control group. That's why it was included….The use of the control group is an attempt to essentially remove pre-existing beliefs as a possible cause of the results we see.

(Tr. 157). In this case, Dr. Mazis believed that there is a strong possibility that survey participants may have had pre-existing beliefs about EMS ab products. Indeed, his facial analysis very much depended on the existence of pre-existing beliefs on the part of consumers. And there is no question that Dr. Mazis believed that these pre-

existing beliefs would have had a material impact on the reactions of people seeing the test ad for the Ab Force. (Tr. 152 - 153).

Despite his significant admission that (1) consumers would likely have had pre-existing beliefs about these type of products, and (2) that pre-existing beliefs should be controlled in copy tests such as this, Dr. Mazis dismissed any concern about the failure of the control ad to actually control pre-existing beliefs in this case. He declared that detecting and controlling for pre-existing beliefs was not "relevant" because randomization would ensure that those study participants who held pre-existing beliefs would be assigned equally to the test and control groups. (Tr. 152-153): "[T]here's a lot of ways people could be influenced, and the assumption is that those people would be randomly distributed across the two groups, the test and control group. So it didn't seem necessary to me." (Tr. 152).

Thus, it was not that Dr. Mazis believed pre-existing beliefs were not important in this case—they were, and he admits they were—but he dismissed the need for a control by opining that people with pre-existing beliefs would have been sorted evenly between the test and control groups. However, Dr. Mazis offered no explanation whatsoever as to how those participants who had pre-existing beliefs about ab belts would have been sorted evenly by random assignment. Instead, he offered the conclusory statement that such participants would have been equally divided, thus affecting the results for each group "equally." (Tr. 152-153).

Although Dr. Mazis believed that pre-existing beliefs would have an impact on consumers, he admitted that his control ad was not effective in controlling pre-

existing beliefs, as shown by the "relatively high" numbers of participants in the control group who detected the asserted claims. (Tr. 108).[9]

Thus, Dr. Mazis, by his own testimony, established that (1) where pre-existing beliefs would impact the results of a copy test, they must be controlled in some way; (2) consumers were likely to have pre-existing beliefs based on the heavily aired ads for other infomercials and other sources; (3) consumers who took the copy test in this case likely had pre-existing beliefs about EMS ab belts, and those beliefs likely would have impacted the results of the study; and (4) the pre-existing beliefs were, in his opinion, the reason why there were high "false positives" in the control group.

Because Complaint Counsel's and Dr. Mazis' central theory was that "indirect effects" caused consumers to perceive the asserted claims, Dr. Mazis did not run away from—and in fact, freely admitted—that pre-existing beliefs played a direct role in consumer responses. But he was simply wrong in believing that people with pre-existing beliefs would be equally assigned through random assignment.

As Dr. Jacoby noted at the hearing, if Dr. Mazis was correct that "random assignment" would have resulted in an even spread between the groups, then random assignment should have ensured that the test and control groups would have been of equal size. (Jacoby Tr. 379 - 380). Instead, there was an uneven split between the test and control group participant numbers (179 participants in the test group, 210

[9] Dr. Jacoby testified that this approach failed to control at all for pre-existing beliefs held by consumers. (Tr. 376 - 379). Dr. Jacoby testified that reliance on "random assignment" was unfounded, and that there was absolutely no basis for the opinion that random assignment would evenly divide those with pre-existing beliefs into the test and control groups. (Tr. 378 - 379).

participants in the control group), resulting in an assignment of 46% of the study participants in the test group and 54% in the control group. (Jacoby Tr. 379 - 381).

More significantly, Dr. Mazis proceeded from the false assumption that the impact of preconceptions could be mitigated by random assignment, comparing it to age or gender. (MaTr. 90). However, as Dr. Jacoby explained, while all participants share age and gender characteristics, it cannot be presumed that all participants would have held preconceptions regarding ab belts. (Tr. 378 - 379). Dr. Jacoby explained that it was easily possible that a larger percentage of test group participants held negative preconceptions about EMS ab products than the control group. (Tr. 379). The effect of such a disproportion between the test and control groups would tend to skew the results in favor of detection of the asserted claims. (Tr. 378 - 381).

c. Even though Dr. Mazis admitted that pre-existing beliefs played a significant role in this copy test and that he did not control for those pre-existing beliefs, the ALJ erroneously concluded that there was no evidence of pre-existing beliefs.

Dr. Mazis' admissions are stunning because they admit to errors that the Commission in *Kraft* deemed so sufficient as to render the entire copy test unreliable. Unlike *Kraft*, there is testimony in this case by no less than Complaint Counsel's own expert witness that, yes, pre-existing beliefs likely existed in the minds of consumers and, yes, they likely would have had an impact in this case and, yes, he did not bother to control for those beliefs. Despite these unmistakable admissions, however, the ALJ in this case disregarded these facts. As a result, the conclusions reached regarding the copy test controls are unsupported by anything in the record.

In doing so, the ALJ relied on the language of *Stouffer* that "*Kraft* teaches that the failure of a consumer survey to control for pre-existing beliefs about the alleged advertising claim introduces a potential for bias, and indeed that this *may* be a critical defect." (ID, p. 55, citing *Stouffer*, 118 F.T.C. at 810)(emphasis in original)). The Commission in *Stouffer* went on to write:

> In any event, there must be evidence of pre-existing bias to find that failure to control for such bias is a critical defect. In *Kraft*, there was evidence that (i) a large portion of consumers had a pre-existing belief with regard to the superiority claim, and (ii) this pre-existing belief had likely biased the consumer survey results relied upon by complaint counsel. In the present case, the preponderance of the evidence indicates that, to the extent that consumers have any pre-existing beliefs about the sodium content of Lean Cuisine entrees, they likely believe that such products are high in sodium, not low. Further, Stouffer cites no evidence that pre-existing beliefs affected the survey results attained by Dr. Zinkhan; respondent's objections to the study are wholly theoretical.

Stouffer, 118 F.T.C. at 810. In this case, Complaint Counsel's own expert witness admitted that there was evidence of pre-existing bias (Tr. 107-08), and that this pre-existing bias likely effected the results of the consumer survey by resulting in a high number of false positives. *id.*

The ALJ appears to dismiss this testimony, but not because he adopted Dr. Mazis' untenable and unsupportable "random assignment" theory. Instead, the ALJ appeared to reject Dr. Mazis' recognition of pre-existing beliefs in his survey because (1) "there is insufficient empirical evidence of the existence, extent or impact of those pre-existing beliefs" (ID, p. 56), and (2) the false positives in the control ads were not the result of "pre-existing beliefs," but of other flaws in the control ad. (ID, p. 58 – 59).

(i) The record contains evidence of pre-existing beliefs

The ALJ is simply incorrect that there is insufficient evidence in the record that there were pre-existing beliefs on the part of consumers regarding EMS ab belts. In addition to Dr. Mazis' testimony discussed above, where he attributes the number of "false positives" to pre-existing beliefs, there is hard evidence in the record of such bias.

There is such evidence. Dr. Mazis made an effort to identify from the survey results those participants who had seen, read or heard a news story about ab belts within the 30 days prior to the study, and to exclude those participants who held negative views of ab belts as a result. (Tr. 154 - 155). Specifically, Dr. Mazis asked participants whether, in the 30 days prior to the survey, they had "[s]een, read, or heard a news story about or featuring an abdominal belt device." (CX-58, Exh. D thereto, Main Questionnaire, Q.7). Survey respondents who answered the question by stating they had seen, read or heard a news story within the past 30 days were asked in Question 8, "[a]s best you can remember, what did the news story or stories say about ab belts?" (Tr. 155; CX-58, Exh. D thereto, Main Questionnaire, Q.8). Those who held negative views about ab belts based on those news stories were excluded from the survey. (CX-58, ¶ 41).

In the end, 41 respondents out of the total surveyed reported having negative pre-existing beliefs about EMS ab belts prior to coming into the survey. (Tr. 154 – 155). As the ALJ found, these 41 survey participants "were removed out of prudence to avoid potential bias due to" recent news stories about EMS ab belts. (F. 247). As

Dr. Mazis testified that there were a number of other sources of potential pre-existing beliefs. These sources include television advertising, print advertising, radio advertising, internet advertising, retail packaging, word-of-mouth communication, and news stories. (Tr. 153 - 154). Dr. Mazis' decisions about what issues to control for and what to ignore prejudices the results of his study beyond repair (Tr. 394-97).

(ii) The Initial Decision does not favor one possible reason for high false positives over another.

The Initial Decision sidesteps concerns regarding pre-existing beliefs by suggesting (but not specifically finding) that the unusually high false positives were the result of elements in the control ad—such as visual elements and the Ab Force name—that directly affected consumers' perceptions of the asserted claims even as it recognizes that Dr. Mazis attributed the relatively high numbers to pre-existing beliefs about ab belts. (F. 218 – 222). The Initial Decision, however, did not specifically find that the high number of positive responses in the control ad were the result of these flaws, but merely suggested that "[t]he higher numbers…could also result from the direct effects which remained in the control ad." (ID, p. 54).

It is impossible to reconcile how the Initial Decision could disregard Dr. Mazis' central testimony that pre-existing beliefs likely had an impact on the survey results in favor of a finding that other flaws in the control ad could have been the cause of the high false positives.[10] The evidence of 41 dropped participants because

[10] The Initial Decision correctly refused to accept as unsupported the "indirect effects" theory that (1) the three ads identified by Complaint Counsel—for AbTronic, Fast Abs and Ab Energizer—created category beliefs in consumers, (2)

they held pre-existing beliefs is more evidence on record of the existence of pre-existing beliefs than was ever introduced in *Kraft*. There the Commission looked at evidence of how heavily the other Kraft commercials ran and concluded that there may have been pre-existing beliefs, and threw out the survey. Here there is concrete evidence in the form of survey participant responses that demonstrate the existence of pre-existing beliefs. The Initial Decision is incorrect in stating that they need not be considered in this case.

III. WHEN NEITHER FACIAL ANALYSIS NOR EXTRINSIC EVIDENCE SUPPORTS A FINDING THAT IMPLIED CLAIMS WERE MADE, THE INITIAL DECISION RUNS AFOUL OF SECTION 5(C) OF THE FTC ACT AND THE FIRST AMENDMENT PROTECTIONS FOR COMMERCIAL SPEECH

As demonstrated above, there is no basis here for finding that implied claims were made based on a facial analysis, and there is no reliable extrinsic evidence that consumers actually took such claims away from the advertisements. Under these circumstances, if the Commission nonetheless were to conclude that implied claims were made, its decision would be inconsistent with Section 5(c) of the FTC Act, 15

---

those who saw the three ads also saw the ads for the Ab Force, and (3) the Ab Force ads triggered these category beliefs generated by these three other ads. It is not inconsistent for the Commission to accept the ALJ's rejection of this theory while also accepting, as shown in the record, the existence of pre-existing beliefs. Dr. Mazis' theory relied and depended on there being a single source for consumers' category beliefs: the ads for AbTronic, Fast Abs, and Ab Energizer. But there need not be a specific source for pre-existing beliefs about ab belts generally. For example, it is possible that the 41 respondents who were dropped never saw one of those three ads, but only heard about ab belts (even ab belts other than these three) from any number of sources, including word of mouth, ads, or, as seen in this case, news stories.

U.S.C. § 45(c) and threaten to violate the First Amendment protections applicable to commercial speech.

The Commission will find that implied claims have been made only where "the language or depictions [of the advertisement] 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 (emphasis added). On the other hand, "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." *Id.* (emphasis added).

The phrase "conclude with confidence" does not describe the quantum of proof required. The Commission makes this determination based on the weight of the probative evidence, and need not satisfy any higher evidentiary standard, such as "clear and convincing evidence." Thus, the "conclude with confidence" test is a subjective measure that looks into the minds of the Commissioners and determines their degree of assurance that an implied claim may be found on the face of the advertisement alone.

There is remarkably little precedent that supports the Commission in finding the existence of implied claims without reliance on extrinsic evidence which provides objective information about consumer understanding.

-- At the Commission level, there are only three cases: *In re Kraft*, 114 F.T.C. 40 (1991); *In re Stouffer Foods Corp.*, 118 F.T.C. 746 (1994); and *Novartis Corp.*, 127 F.T.C. 580 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000).

-- At the appellate level, there is only one decision that has upheld the FTC's approach. *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 509 U.S. 909 (1993). In *Kraft*, the Seventh Circuit held that under the specific circumstances of that case, the First Amendment was not violated when the FTC determined that implied claims were made without reliance upon extrinsic evidence, "so long as those claims are reasonably clear from the face of the advertisement." 970 F.2d at 319. In reaching this conclusion, the court relied on *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), and *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Although it upheld the agency's action, the court plainly was troubled by the Commission's approach and warned of problems to come if the agency attempted to apply that doctrine more broadly in future cases.

> Our holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception. Along those lines, the Commission would be well-advised to adopt a consistent position on consumer survey methodology – advertisers and the FTC, it appears, go round and round on this issue -- so that any uncertainty is reduced to an absolute minimum.

Id. at 321.

In this appeal, Telebrands does not challenge the Commission's ability to engage in facial analysis and to find, in an appropriate case, the existence of implied claims without reliance on extrinsic evidence, as occurred in *Kraft* and *Stouffer*.

However, we submit that, as the Seventh Circuit suggested in *Kraft*, the FTC's ability to find implied claims without objective evidence in the record of consumer perceptions must be limited to a narrow category of cases. Were that approach applied broadly to cases like the current matter, in which the alleged implied claims are not readily apparent but have to be teased and constructed out of background elements, substantial constitutional problems would be presented under the Supreme Court's recent First Amendment cases concerning regulation of commercial speech.

Two immediate problems would be presented if the Commission were to follow a practice that did not require, in the broad run of cases, that the record contain some objective evidence of consumer reactions in order to support a finding that an implied claim is made. The court in *Kraft* did not have to consider these two problems, but they are squarely presented in this case.

First, the "conclude with confidence" test for dispensing with extrinsic evidence makes this crucial determination turn upon a review of the subjective beliefs of the members of the Commission as to strength of their conclusion. In essence, the Commission appears to follow a "we know it when we see it" rule when it bases a determination on a facial analysis, without reference to evidence of the understanding of actual consumers. The legality of this approach is questionable in light of the core principle of administrative law that a reviewing court may not base its decision on an

inquiry into the minds and hearts of the agency heads in determining whether or not to uphold their decision. *United States v. Morgan*, 313 U.S. 409, 422 (1941).[11]

Characterization of an implied claim as "conspicuous" or "reasonably clear" after a facial analysis does not solve the problem of the need to rely on the subjective mindset of the decision-maker. This formulation simply states a conclusion and provides no basis by which a reviewing court can engage in a meaningful review of the Commission's action.

Second, the problems with the "we know it when we see it" aspect of facial analysis are clearly framed when this approach is considered in combination with Section 5(c) of the FTC Act, 15 U.S.C. § 45(c), which provides that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." An FTC determination that a certain implied claim was made presumably should be treated as "conclusive" by a reviewing court under this provision. However, if that finding itself was not based on objective evidence of record, but rested on the intuitive judgment of the Commissioners, there is no basis on which a challenger could obtain meaningful appellate review of the FTC's decision. This outcome would contradict the core principle that agency decisions are presumed to be subject to appellate review. It thus clearly illustrates the difficulties that would be presented if the FTC were to rely on facial analysis, without objective evidence, in any but the most extreme cases.

---

[11] *See Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Cir. 1999) (rejecting the FDA's effort to justify its decisions about label disclosures for dietary supplements on an "I know it when I see it" basis, without providing objective criteria to justify its action).

In identifying these problems with the "facial analysis" approach, we do not suggest that *Colgate-Palmolive* and *Zauderer* are not good law. Both cases continue to stand for the proposition that the Commission may, in a narrow category of cases, find that an implied claim was misleading without commissioning a consumer survey. However, neither case stands for the proposition that the agency may, in every case, dispense with objective evidence of consumer understanding in determining whether an implied claim was made.

As the Supreme Court stated in *Zauderer*:

> [D]istinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. . . . Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

471 U.S. at 645-646. The concurring circuit judge in *Kraft* explicitly noted that the situations in which the FTC may lawfully resolve a case based on "facial analysis", without consideration of extrinsic evidence of consumer protections, are sharply limited. 970 F.2d at 328 ("[N]either this case nor *Zauderer* gives the FTC leave to ignore extrinsic evidence in every case. . . . All *Zauderer* tells them is that extrinsic evidence is not needed when the "possibility of deception is as self-evident as it is in [*Zauderer*].")

The limited permissible scope of the "facial analysis" approach is confirmed by several Supreme Court commercial speech decisions handed down since *Kraft*. These decisions clearly demonstrate the problematic nature of a rule that would have

commercial speech burdened based on nothing more than the intuitive judgment of agency decision-makers and without objective record evidence whether a particular claim was implied.

Regulation of commercial speech must satisfy heightened or "intermediate" scrutiny. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). The government agency seeking to uphold a restriction on commercial speech must carry the burden of justifying it. *E.g., Edenfield v. Fane*, 507 U.S. 7621, 768-769 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). The government must show that the allegedly deceptive speech is either inherently likely to deceive or must provide record evidence that a particular form or method of advertising has in fact been deceptive. *In re R.M.J.*, 455 U.S. 191, 202 (1982).

In particular, the Supreme Court has held that where there is a risk that a governmental restriction may snare truthful and non-misleading expression along with fraudulent or deceptive commercial speech, the agency must demonstrate that its restriction serves a substantial governmental interest and is designed in a reasonable way so that no more commercial speech than necessary is restricted. *Edenfield v. Fane*, 507 U.S. at 770-771. *See R.M.J.*, 455 U.S. at 203 (restrictions designed to prevent deceptive advertising must be "narrowly drawn" and "no more extensive than reasonably necessary.")

Under the *Edenfield* standard, the facial analysis test must be applied with great care in order to avoid constitutional problems. By foregoing review of evidence that

would directly address the questions of whether an alleged implied claim had been made, the facial analysis test runs an inherent risk of restricting protected speech based on its own unsupported intuition, when the actual effect of the advertisement on consumers could be determined through readily available types of objective evidence. If this doctrine is to survive, its use must be limited to the truly egregious cases.

This matter is particularly ill-suited for treatment under the facial analysis approach. This case simply is not like *Kraft* or *Stouffer*, where the implied claims were closely linked to the explicit claims and were self-evident. Where the finding that a deceptive implied claim was made rests on no more than the agency's say-so, the requirement of Section 5(c), that a finding be "supported by evidence", is not satisfied. Similarly, the Commission would tread dangerously close, if not overstep, the constitutional requirement that it must provide record evidence to show that a particular form of commercial speech has in fact deceived consumers.

Here, the ALJ stretched the notion of facial analysis far beyond where it had previously been applied by the FTC and into ground that is fraught with First Amendment risks. Accordingly, the Commission should reverse the decision below.

CONCLUSION

For the reasons stated, the Complaint should be dismissed. An appropriate Order is attached.

Respectfully submitted,

_____

Edward F. Glynn, Jr.
Theodore W. Atkinson
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-8000

Attorneys for Respondents
Telebrands Corp., TV Savings, LLC,
and Ajit Khubani

Dated: November 3, 2004

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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

ORDER DISMISSING COMPLAINT

The Commission, having heard the Appeal by Respondents and the Cross-Appeal by Complaint Counsel from the Initial Decision, dated September 15, 2004, filed by the Chief Administrative Law Judge in this matter, and good cause appearing therefore, it is hereby

ORDERED that the Complaint in this matter be and the same hereby is **DISMISSED.**

By direction of the Commission.

_____
Donald S. Clark
Secretary

ISSUED: _____, 2004

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2004, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing RESPONDENTS' APPEAL BRIEF to be filed and served as follows:

(1) an original and twelve (12) paper copies filed by hand delivery and an electronic copy in Microsoft Word format filed by e-mail to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Rm. H-159
Washington, D.C. 20580
E-mail: secretary@ftc.gov

(2) one (1) paper copy served by hand delivery and e-mail to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Rm. H-112
Washington, D.C. 20580

Constance M. Vecellio, Esquire
Senior Counsel
601 New Jersey Ave., N.W.
NJ-2115
Washington, D.C. 20580
cvecellio@ftc.gov

(3) by e-mail to:

James Reilly Dolan
Assistant Director
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580
jdolan@ftc.gov

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

_____

Edward F. Glynn, Jr.

#529701