

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

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

**MEMORANDUM IN SUPPORT OF RESPONDENTS'
MOTION TO COMPEL PRODUCTION OF A DOCUMENT OR,
IN THE ALTERNATIVE, TO PRECLUDE TESTIMONY OF A WITNESS**

The Procedural Context

The present proceeding was initiated by the issuance of a Complaint which asserts that the sellers of an EMS ab belt called the Ab Force made various advertising claims for the product which were false and misleading. The three claims identified as problematic by the Complaint are (1) that the Ab Force causes loss of weight, inches, or fat, (2) that it causes well-defined abdominal muscles and (3) that use of the product is an effective alternative to exercise. The Respondents have denied that they made those claims and this case will be principally fought out on that issue. However, Complaint Counsel carry the burden of proving that those claims, if made, were false and misleading and, in an effort to carry that burden, have retained

Dr. Anthony DeLitto, a professor at the University of Pittsburg in the School of Health and Rehabilitation Sciences. Doctor DeLitto analyzed the Ab Force and came to the conclusion that the device was incapable of providing the benefits which the Complaint asserts were claimed for it. During the deposition of Doctor DeLitto, it came to light that he had previously been asked to analyze three other devices – the AbTronic, Ab Energizer and Fast Abs EMS ab belts – that are specifically referenced in the Complaint in this matter as being relevant to the claims made against the marketers of the Ab Force. Doctor DeLitto reduced his analysis to a written document which was provided to FTC Staff within the last year or so. Although counsel for Respondents had previously served a request for production of documents that requested the production all documents "relating to any investigation conducted by you or on your behalf relating to any advertising claims or representations relating to the Ab Force product, or any other EMS device," (emphasis supplied) that document had not previously been identified by Complaint Counsel in their response to the Request for the Production of Documents.

When Doctor DeLitto described the document during the deposition and counsel for Respondents attempted to inquire into the nature of the analysis conducted by Doctor DeLitto, Complaint Counsel instructed Doctor DeLitto not to respond on grounds of privilege. Respondents' counsel objected and requested the production of the document. (Copies of the relevant pages of the deposition transcript are attached hereto). At the end of the deposition, counsel for the two sides had a brief discussion and Complaint Counsel advised that they would review

their position and convey, in a few days, a final position on whether the report would be produced. On Wednesday, March 3, 2004, Complaint Counsel advised counsel for Respondents that they would be unwilling to produce the document, basing their position on grounds of privilege.

Argument

The Document Is Relevant And Must Be Produced or Doctor DeLitto Should Be Precluded From Testifying

The importance of the document to Respondents' defense of this action cannot be overstated. Although the major issue in the litigation is whether the claims described in the Complaint were, in fact, ever made, in the event it is determined that the claims were made, Complaint Counsel must still prove that the claims were false and misleading. Doctor DeLitto is their principal – perhaps only – means to do that. The fact that he has conducted an analysis of the three ab belts that are particularly described in the Complaint in this matter and rendered a report to the FTC Staff on the results of his analysis virtually compels the conclusion that such a document is of critical importance in any subsequent cross-examination of Doctor DeLitto.

Although Complaint Counsel objected to the efforts of Respondents' counsel to get Doctor DeLitto to even describe the purpose of the test that he conducted on the other ab belts, it strains credulity to suggest that it was not exactly the same kind of analysis that was conducted on Ab Force. And, surely, if that is the case, his analysis of other EMS ab belts in order to determine issues that are substantially similar to the issues in this case virtually requires the conclusion that the document is highly relevant.

That the document was not identified specifically in response to the request for production of documents served by Respondents on October 23, 2003, has already substantially prejudiced the Respondents since there was no opportunity to review the document prior to the deposition of Doctor DeLitto. Indeed, after review of the document, it may be necessary to ask that the deposition of Doctor DeLitto be reopened for the limited purpose of asking him questions about his prior analysis of the other EMS ab belts. That Doctor DeLitto claims not to have relied on his analysis of the other ab belts in formulating his analysis of the Ab Force should quickly be dismissed as irrelevant. The relationship between advertising for the other ab belts and the advertising for Ab Force at issue in this case is apparent on even the most cursory review of the Complaint.

Nor is this a case where the invocation of privilege is appropriate. The production of the document would not implicate pre-decisional privilege issues. This is merely the expertise of an outside consultant being applied to questions that are identical to the questions on which he is testifying in the present case. Complaint Counsel surely cannot be surprised that such a report would be requested. What is surprising, however, is that the report was not previously identified with sufficient specificity to identify the need to seek a ruling on the matter until after the formal close of discovery.

In the event that Complaint Counsel choose to continue to withhold Doctor DeLitto's prior work on an identical issue, given the clear relevance to the matter at issue in this case, Doctor DeLitto should be precluded from testifying out of fairness

to the Respondents who would be severely prejudiced in their ability to cross-examine Complaint Counsel's expert witness.

Conclusion

For the reasons discussed above, Complaint Counsel should be ordered forthwith to produce the DeLitto report or Doctor DeLitto should be precluded from testifying.

Respectfully submitted,

Edward F. Glynn

/s/ 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

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