

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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

**BRIEF IN SUPPORT OF COMPLAINT COUNSEL'S  
MOTION FOR SUMMARY DECISION**

**I. INTRODUCTION**

Complaint Counsel now moves for Summary Decision, pursuant to Commission Rule of Practice 3.24, against Respondents Telebrands Corp. (“Telebrands”), TV Savings, LLC (“TV Savings”), and Ajit Khubani (“Khubani”). The Complaint alleges the Respondents violated Sections 5 and 12 of the Federal Trade Commission Act (“FTC Act”) in connection with their marketing of the Ab Force, an electronic muscle stimulation (“EMS”) “device” within the meaning of Sections 12 and 15 of the FTC Act.

The uncontroverted evidence in this case reveals that Respondents, through a false and deceptive multi-million dollar national advertising campaign, deceived thousands of United States consumers about the benefits of the Ab Force. Through the use of statements such as “the latest fitness craze” and images of well-shaped individuals applying the Ab Force belt to their abdominal area, Respondents represented Ab Force caused fat, inch, or weight loss; built well-

defined abdominal muscles; and was equivalent to traditional exercise. Respondents most dramatically emphasized this impression through verbal references to “those fantastic electronic ab belt infomercials on TV,” combined with images and graphics nearly identical to three other extensively-aired ab belt infomercials. Collectively, these elements prompted consumers to recall those infomercials’ core efficacy claims and attribute them to the Ab Force device.

As demonstrated below, Respondents’ claims are false and unsubstantiated. Complaint Counsel’s evidence establishes that the Ab Force is incapable of causing the loss of fat, inches, or weight, and cannot cause users to obtain well-defined abs. The Ab Force also cannot duplicate the benefits of traditional exercise. Unfortunately, Respondents’ deceptive marketing campaign was highly successful and caused substantial economic harm to United States consumers. Respondents sold a total of 747,812 units of the Ab Force and took in over \$19 million from their false and deceptive advertising.

Summary decision is appropriate in this case because Complaint Counsel has presented overwhelming and uncontroverted evidence that Respondents made the alleged claims, in violation of Section 5(a) and 12 of the FTC Act. There is no genuine issue of material fact as to whether Respondents made the representations challenged in the Commission’s complaint, or as to whether such representations are false and unsubstantiated.

## **II. STATEMENT OF FACTS**

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

Respondent Telebrands Corp. (“Telebrands”) is a New Jersey corporation. Answer ¶ 1, Complaint Counsel’s Statement of Material Facts as to Which There is No Genuine Issue ¶ 1 (hereafter “CCSF”). Respondent TV Savings, LLC (“TV Savings”) is a Connecticut limited

liability company. CCSF ¶ 2, Answer ¶ 2. Respondent Ajit Khubani is the president, chief executive officer, chairman of the board, and sole owner of Telebrands and the sole member of TV Savings. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of these two business entities, including the acts and practices alleged in the complaint. CCSF ¶ 3, Answer ¶ 3; Khubani deposition (“dep.”) p. 15.<sup>1</sup> Telebrands, which was formed in 1987, sells consumer products primarily through direct response channels such as print or television. CCSF ¶ 4, Khubani dep. 13-14.

Respondents began disseminating radio and print ads for the Ab Force in December 2001. CCSF ¶ 13, Answer ¶ 7. Respondent Khubani testified that he first got the idea for marketing an ab belt when he noticed the AbTronic mentioned in the *Jordan Whitney Report*, a publication that monitors the frequency of TV infomercial airings for the direct response industry. Khubani dep. 28-29. Khubani then decided to market the Ab Force when he saw that ab belts were “one of the hottest categories to hit the market.”<sup>2</sup> Khubani dep. 29. AbTronic, AB Energizer, and Fast Abs were three of the ab belts that were on the market at the time he decided to market Ab Force (Khubani dep. 34), and Khubani stated that he wanted Ab Force to have the same output as Fast Abs and AbTronic (Khubani dep. 43-44.) Having decided to market an ab belt, he was the primary person who created and developed the promotional materials, and he was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign. CCSF ¶ 5, Telebrands Corp., TV Savings, LLC, and Ajit

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<sup>1</sup> Deposition excerpts are set forth in Tab 1 of the Attachments to this Brief.

<sup>2</sup> According to Mr. Khubani, Telebrands often markets products that are similar in function to a popular product being sold on TV, but at a lower price. Khubani dep. 21.

Khubani's Objections and Responses to Complaint Counsel's First Set of Interrogatories, ("Resp. Responses to First Interrogs") Response to FTC Interrogatory No 8 (renumbered Interrogatory No. 14 by respondents) and Response to FTC Interrogatory No 16 (renumbered Interrogatory No. 30 by respondents), Tab 2.

Starting in January 2002, and continuing until April 7, 2002, Respondents also marketed the Ab Force on television, with commercials airing more than 10,000 times on cable, satellite, and broadcast television outlets in major national markets. CCSF ¶ 14, 18; Answer ¶¶ 7, 10. Respondents ran several versions of the TV campaign on a limited basis, and then ran one version for a longer period of time.<sup>3</sup> CCSF ¶ 60, Admissions 24 and 25, Tab 3.

Gross sales for the Ab Force, including accessories such as batteries and gels, exceeded \$19 million. Respondents sold a total of 747,812 units of the Ab Force, generally for \$10 per unit.<sup>4</sup> CCSF ¶¶ 16-17; Resp. Responses to First Interrogs, Response to FTC Interrogatory No 14 (renumbered Interrogatory No. 28 by respondents), Tab 2; Answer ¶ 8.

#### **B. Marketing for the AbTronic, Ab Energizer and Fast Abs**

Infomercials for the AbTronic, AB Energizer, and Fast Abs were heavily aired shortly before and during much of the Ab Force campaign. According to the *JW Greensheet*, a market report that compiles industry data and tabulates the top-ranked direct response commercials on a

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<sup>3</sup> Respondents' TV ads quoted in the complaint consist of two 60 second TV spots and one 120 second TV spot (Compl. Exs. A-F). A fourth TV spot, 120 seconds in length, was not attached as an exhibit to the complaint.

<sup>4</sup> Some ads promoted the Ab Force for \$10 each, but the price was sometimes more because of the number of units offered, the product package offered (*e.g.*, a package with applicator gel or additional batteries), or because consumers paid shipping and handling charges. CCSF ¶ 15, Answer ¶ 7.

weekly basis,<sup>5</sup> an infomercial for one or more of these three ab belts was in the “top 50” every week for a 22 week period from September 15, 2001 through March 2, 2002. For ten of these weeks, one of these products was the “#1” infomercial, and for seven of these weeks, one of them was “#2.” For the week ending January 12, 2002, they were numbers 1, 2, and 3. CCSF ¶ 33, Matsumoto Declaration, Tab 5.

The frequency of the infomercials for these three ab belts is also established by figures provided by the Infomercial Monitoring Service (“IMS”), which records infomercials from national cable and satellite television channels, tabulates what is aired, and creates the IMS Top 25 Infomercial Ranking. CCSF ¶ 22, Catanese Declaration, Tab 6. According to figures provided by IMS, more than 5000 infomercials aired on cable for the AbTronic, AB Energizer, and Fast Abs ab belts before and during the Ab Force marketing campaign. AbTronic infomercials appeared 2,082 times, AB Energizer infomercials appeared 1,693 times, and Fast Abs infomercials appeared more than 1,272 times. CCSF ¶ 23-26, Catanese Declaration. In fact, in early 2002, infomercials for AbTronic, AB Energizer, and Fast Abs were among the most frequently-aired infomercials on cable television. From the week ending January 4, 2002, through the week ending February 8, 2002, IMS ranked one or more of these infomercials in the

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<sup>5</sup> The *JW Greensheet*'s rankings are market reports or commercial publications within the meaning of Rule 803(17) of the Federal Rules of Evidence. The *JW Greensheet*, published by the Jordan Whitney Monitoring Service, tabulates and compiles market data for the direct response television industry, listing, among other information, the “Top Fifty Infomercials” based on “confidential media budgets and Jordan Whitney’s monitoring of national cable and selected broadcast markets.” CCSF ¶¶ 28- 29; Khubani dep. 18-19, 30-31. *Response Magazine*, a trade journal for the electronic direct marketing industry, publishes Jordan Whitney’s Program Rankings for the top ten infomercials and top ten spots monthly. CCSF ¶ 32; Kevin Towers Declaration, Tab 4. In addition, in his deposition, Mr. Khubani indicated that among other sources, he consults the *JW Greensheet* on a weekly basis to “look at the top sellers on the half-hour infomercials and also the spots.” Khubani dep.19.

top ten every week. CCSF ¶ 27, Catanese Declaration.

The advertising for these three ab belts made express and strongly implied claims that consumers using the devices would lose weight, fat, and inches; gain well-developed abdominal muscles; and achieve all of this without the need for strenuous exercise. The AbTronic infomercials claimed, for example,<sup>6</sup> that ab belt was an “electronic dream machine that will show you immediate improvement without strenuous time-consuming workouts. You’ll develop that six-pack you’ve always wanted in the easiest way imaginable.” (*Hudson Berkley* Compl. Ex. 2 at 13, 27, 38; Towers Declaration, Tab 4) The infomercial also included numerous testimonials, stating in essence that consumers who used the ab belt lost several inches on their waist (*Hudson Berkley* Compl. Ex. 2 at 19, 32-33), and stated “[y]ou’ll see how the AbTronic System gives you the results of 600 sit-ups in just 10 minutes without any effort” (*id.* at 3-4).

Similarly, the AB Energizer ads claimed that ab belt was “absolutely incredible for people who want tighter abs and want to lose inches around the midsection” (*Electronic Products* Compl. Ex. 2 at 29-30; Towers Declaration, Tab 4), and “with a touch of a button, you can go from flab to rock-hard abs” (*Electronic Products* Compl. Ex. 2 at 22, 39, 50, 62). The advertising further stated that the “secret is AB Energizer’s electronic impulses that stimulate your abs so they contract and relax as if you’re doing a situp. **[ON SCREEN: Up to 700 Muscle**

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<sup>6</sup> The claims included here are an illustrative sample and not an exhaustive summary of the claims made by the marketers of those devices. Those marketers’ representations are set forth in greater detail in the complaints filed in *Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (filed May 7, 2002) (AbTronic); *Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (filed May 7, 2002) (Fast Abs); and *Federal Trade Commission v. Electronic Products Distribution, LLC, et al.*, 02CV0888 H(AJB), (filed May 7, 2002) (Ab Energizer), all of which are attached to the Towers Declaration, Tab 4.

**Contractions 10 Minutes!]** Now you can get up to 700 muscle contractions in just 10 minutes and get the tone and definition you've always wanted.” *Id.* at 62, 63. And testimonialists who used the ab belt made claims such as “I’ve lost 40 pounds. I’ve gone from a waist 37 to a waist 34.” *Id.* at 30-31.

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

All of these infomercials contained extensive footage of well-sculpted male and female models wearing the belts over their abdominal areas. These images were displayed on the screen while the infomercial hosts repeatedly represented that the devices caused weight, inch, or fat loss; built well-developed abs; and were an effective substitute for exercise. *See* tapes attached as Exhibits A-C to Towers Declaration.

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

A facial review of the Ab Force ads amply evidences that Respondents' ads claimed Ab Force would cause loss of weight, inches, or fat; build well-developed abs; and be an effective alternative to exercise. The ads used images of well-shaped bodies to reinforce the message and referenced the other ab belts seen on TV, and some referred to the latest fitness craze or otherwise referred to exercise.<sup>7</sup>

The radio ad, for example, stated in part: "Have you seen those fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs into great shape fast - without exercise! . . . . The Ab Force is just as powerful and effective as the expensive ab belts on TV - designed to send just the right amount of electronic stimulation to your abdominal area . . . . Get the amazing electronic Abforce belt - the latest fitness craze for just \$10." Complaint Exhibit H.

The TV advertisements also referred to "those fantastic Electronic Ab Belt infomercials on TV." CCSF ¶ 19-21. Each of the TV ads then made some comparison of the Ab Force's power and efficaciousness to the other ab belts advertised on TV. For example, one stated "The Ab Force is just as powerful and effective as those expensive ab belts sold by others." Compl. Ex. A and B. Another stated "The Ab Force is just as powerful and effective as those ab belts

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<sup>7</sup> Respondents claim the ads represent that the Ab Force is to be used for massage because, in one of the TV ads, the phrase "massage" appears on the screen for a maximum of two seconds. The phrase, which appears only in writing, is barely noticeable and does not alter the net impression created by the ad. *See, e.g., Removatron v. FTC*, 884 F.2d 1489, 1497 (1<sup>st</sup> Cir. 1989) (Commission looked to the overall common sense net impression, not just to qualifiers).



sold by other companies on infomercials.” Compl. Ex. C and D. The longer spot stated that “The Ab Force uses the same powerful technology as those expensive ab belts – capable of directing 10 different intensity levels at your abdominal area.” Compl. Ex. E and F.

Respondents have admitted that by referencing “those expensive ab belts,” they “were comparing [Ab Force] to other ab belts that sell for as much as \$120, and the AbTronic is the one that sells for \$120.” Khubani dep. 43-44. In addition, two of the TV ads made the same reference to the “latest fitness craze” as the radio ad. Complaint Exhibits A-D.

The TV ads also contained images of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions. Compl. Exs. A-F; CCSF ¶ 18, Answer ¶ 10. These images included a close-up of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles.<sup>8</sup> *Id.* One of the limited-run commercials started with a close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. Complaint Exh. C and D, CCSF ¶ 18, Answer ¶ 10.

Extrinsic evidence, although not needed after a facial review of the ads, corroborates that Respondents made these claims. Michael Mazis, Ph.D., Professor of Marketing at Kogod School of Business, American University, performed a facial analysis of the Ab Force ads as part of his Expert Report dated, January 29, 2004 (“Mazis Export Report”), Tab 7.<sup>9</sup> He concludes that

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<sup>8</sup> A “production job sheet” obtained from Telebrand’s TV production company indicates that they specifically hired a “girl with great abs,” and a talent confirmation sheets indicate that a model were instructed to “Please have abs looking their best” and “Seeing your abs is important.” Liantonio dep. 64-65.

<sup>9</sup> When the Commission turns to extrinsic evidence to determine the meaning of an ad, the evidence can consist of “expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.” *Cliffdale Associates*, 103 F.T.C. 110, 174, 176 (1984) (Policy Statement on

viewers of advertising for the Ab Force are likely to perceive that the product causes loss of inches around the waist and causes well-developed abs, and that such viewers may also perceive that Ab Force causes weight loss and is an effective alternative to exercise. Mazis Expert Report, 4-5.

Dr. Mazis states that claims about inch loss and well-developed abs are communicated by elements within the four corners of the Ab Force ads, *e.g.*, pictures of trim, well-developed models wearing and using the belt and the name of the product itself, “Ab Force.” Dr. Mazis refers to these elements as “direct effects.” Mazis Rebuttal Report 2, par.2; 5, par.5; 12 par. 21, Tab 8. According to Dr. Mazis, those who had not seen another ab belt infomercial “would just base [their] perceptions on what was in the commercial and the commercial shows these – the ab belt around the abdomen. It shows a lot of trim people, fit, tight abs – at least that’s the way they appear; they have rock hard abs. And its not – people – sometimes it’s said a picture says a thousand words. I mean it’s not too difficult for people to discern what the message is here. You put the belt around you; you get tight abs.” Mazis dep. 49.

Dr. Mazis further explained that the name Ab Force means that “It works on your abdominals” and further, “[S]ome people could interpret the word “force” as it makes your abdominals a force which . . . might mean it makes them really great.” Mazis dep. 51. Respondents’ marketing expert, Jacob Jacoby, Ph.D., agrees that the name “Ab Force” itself means something to consumers and “it is very possible that consumers are making inferences from the name and the repetition and hammering of the name that they should be taking that

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Deceptive Acts and Practices )(“Deception Statement”).

name into account. . . .” Jacoby dep. 63-64.<sup>10</sup>

In addition to these direct effects, references within the Ab Force ads to infomercials for other ab belts may create consumer perceptions that the Ab Force can cause results claimed in the other belts’ infomercials. Dr. Mazis refers to these references to the ads for other products as “indirect effects.” Mazis Rebutal Report 2, par. 2; 3, par.2; 5, par.5; 12, par. 21, Tab 8. At his deposition, Dr. Mazis explained the difference between direct and indirect effects in the Ab Force advertising:

First the advertising for Ab Force contains numerous depictions of well-muscled men and trim women with well-defined abdominal muscles. And then it goes on - and discusses what I’m calling direct effects; that is, the depictions that occur in the Ab Force commercials themselves, those are the direct effects, and then the other effect. Second, advertising for Ab Force exploits consumers awareness of claims made in the advertising for other EMS ab belts and these are indirect effects. So you’ve got these two effects, both direct effects and indirect effects.

Mazis dep. 22-23. As Dr. Mazis further explained, the direct and indirect effects are interrelated because “if consumers would have seen the previous ab belt commercials, they – they know something about ab belts and how ab belts work and what – what – the claims might have been and that may have an impact on their perceptions of the current advertising. . . .” *Id.*

Consumers also “could have become aware of these other ab belts through exposure to advertising, discussions with other people who had seen advertising for other EMS ab belts, and point-of-purchase displays of EMS ab belts in stores.” Mazis Rebuttal Report at 3. *See also*, discussion at Mazis dep. 32-33.

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<sup>10</sup> Dr. Jacoby made his statement as an objection to Dr. Mazis’ use of the name “Ab Force” in a copy test questionnaire designed for this matter. In essence, he was concerned that consumers who participated in the copy test would take away certain claims just by the name itself. As discussed above, we agree the name itself conveys the challenged claims.

In his report, Dr. Mazis opines that the Ab Force is taking advantage of the claims made for other EMS ab belts. Mazis Expert Report at 9, par. 19, Tab 7. Dr. Mazis bases his conclusion on the similarities between the Ab Force ad and the marketing for the other three ab belts:

There are depictions of well-muscled men and trim women with well-defined abdominal muscles in the advertisements for Abtronic, AB Energizer, and Fast Abs. The models in the Ab Force ads are similar to the models shown in ads for the other EMS ab belts. Also, the brand names are similar – Ab Force, AbTronic, AB Energizer, and Fast Abs.

Mazis Expert Report at 8, par. 19.

He also observes that “the four EMS ab belts would appear to consumers to be substantially similar and to produce comparable results.” *Id.* at 9, par. 20. He notes that, according to the FTC’s complaints against the marketers of AbTronic, AB Energizer, and Fast Abs, all three of those products were heavily advertised during the period immediately preceding and coinciding with the Ab Force marketing campaign. “As a result,” he opines, “the broadcast of infomercials for AbTronic, AB Energizer, and Fast Abs is likely to have had an impact on consumers’ perceptions of the Ab Force infomercials especially since the ads for Ab Force specifically referenced ‘those fantastic electronic ab belt infomercials on TV’” *Id.* at 8, par. 16. The Ab Force ads “‘exploit’ consumers’ existing beliefs about EMS ab belts that were developed from exposure to the numerous infomercials seen on television. *Id.* at 9, par. 20. “Therefore,” he concludes:

[C]onsumers are likely to perceive advertisements for the Ab Force as representing that using Ab Force results in well-defined abdominal muscles and in a loss of inches around the waist. These are the principal claims in the ads for AbTronic, AB Energizer, and Fast Abs. . . . In addition, consumers may perceive that advertisements for Ab Force convey the impression that using Ab Force leads to weight loss and that Ab Force is an effective alternative to regular exercise.

These are claims that appear in some of the ads for other EMS ab belts, but these claims are not as prominent as claims that use of the products produce well-defined abdominal muscles and in a loss of inches around the waist.

*Id.* at 10, par.21. His conclusion is supported by Respondents' own experiences. An inbound telemarketing company receiving calls for the Ab Force campaign sent two emails to a media placement consultant asking for answers to frequently-asked questions. Prasad dep. 60-63. One of the questions "customers usually ask" was "How does [Ab Force] differ from other ab electronic exercising machines?" *Id.*

Dr. Mazis' opinion is based on "categorization" theory, noting "Consumer behavior researchers have long relied on categorization theory to explain how consumers use existing knowledge of a product class to form impressions of new, similar products. Studies have also shown that novices, who possess little product knowledge, are most likely to rely on existing categories to form such impressions[.]" Mazis Rebuttal Report at 2, par. 3, Tab 8. Dr. Mazis then quotes from an article attached to his Rebuttal Report that set forth the categorization theory and tested it:

According to the categorization approach, if a new stimulus can be categorized as an example of a previously defined category, then the affect associated with the category can be quickly retrieved and applied to the stimulus. Mita Sujan, "Consumer Knowledge: Effects on Evaluation Strategies Mediating Consumer Judgments," *Journal of Consumer Research*, Vol. 12 (May 1985), p. 31.

At his deposition, Dr. Jacoby agreed that the categorization theory has been generally accepted in the scientific community.<sup>11</sup> Jacoby dep. 13. He also acknowledged that the Sujan

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<sup>11</sup> Although Dr. Jacoby recognized categorization theory as a generally accepted scientific theory in his deposition, in his expert report he criticized Dr. Mazis' facial analysis as "unsupported conjecture." Jacoby Dec. at 9-10, par. 21, Tab 9. He coined the term "importation theory," a term that Dr. Mazis never uses, called it a "novel theory" and criticized Dr. Mazis' analysis because "importation" theory has never been subject to peer review and publication and

article had been peer-reviewed and it had appeared in a journal that he had described as “the [consumer behavior] field’s leading peer reviewed scholarly journal.” *Id.* at 12, 13. Dr. Jacoby explained categorization theory as follows: “Well, individuals see something, some information from the outside world and categorize it, as I said, into what they already know in their minds, place it in a certain category, where it may not belong.” *Id.* at 11.

Or, as Dr. Mazis explained:

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

Mazis Rebuttal Report at 4, par. 3, Tab 8.

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

Respondents’ claims that Ab Force will cause loss of weight, inches, or fat; build well-developed abs; and is an effective alternative to exercise are false. To begin, the United States Food and Drug Administration (“FDA”), which has jurisdiction over EMS abdominal belts marketed to “affect the structure or function of the body” (CCSF ¶ 37, Affidavit of Robert Gatling, ¶ 3 and Exhibit A thereto, Tab 10 ), has not approved the Ab Force device for these purposes. With limited exceptions, prior to being marketed in the United States, FDA requires

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has never been generally accepted in the scientific community. *Id.* at 8. However, as Dr. Mazis noted and as Dr. Jacoby later admitted, “Contrary to Dr. Jacoby’s speculation, the idea that consumers frequently associate new products (such as Ab Force) with familiar products (for example, EMS ab belts such as AbTronic, AB Energizer, and Fast Abs) is not a ‘novel theory’ or unsupported conjecture.’ ” Mazis Rebuttal Report at 2, par. 3, Tab 8.

such devices to receive FDA “premarket approval,” which is a determination from the FDA that the device is substantially equivalent to a legally marketed device. CCSF ¶ 37, Affidavit of Robert Gatling, FDA ¶ 6. FDA’s import alert (IA #89-01), entitled, “Electrical Muscle Stimulators and Iontophoresis Devices,” states that electrical muscle stimulators are misbranded when any of the following claims are made: girth reduction; loss of inches; weight reduction; cellulite removal; bust development; body shaping and contouring; and spot reducing. The FDA considers devices making these claims misbranded in violation of the Federal Food, Drug, and Cosmetic Act because to date no devices have been approved to make these claims.<sup>12</sup> CCSF ¶ 38, Affidavit of Robert Gatling, FDA ¶ 10, Tab 10. In May of 2002, FDA sent Telebrands a letter stating that the AB Force is a medical device subject to FDA jurisdiction and regulation and that it may be in violation of the Federal Food, Drug, and Cosmetic Act due to its failure to obtain FDA marketing clearance before selling the Ab Force. CCSF ¶ 37, Affidavit of Robert Gatling, FDA ¶ 10.

Moreover, Complaint Counsel’s scientific expert, Dr. Anthony Delitto, Ph.D.,<sup>13</sup> a

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<sup>12</sup> FDA does recognize that EMS devices have valid uses: “Doctors may use electrical muscle stimulators for patients who require muscle re-education, relaxation of muscle spasms, increased range of motion, prevention of muscle atrophy, and for treating other medical conditions which usually result from stroke, serious injury, or major surgery. The effect of using these devices is primarily to help a patient recover from impaired muscle function due to a medical condition, not to increase muscle size enough to affect appearance.” CCSF ¶ 40, Affidavit of Robert Gatling, FDA, ¶ 13.

<sup>13</sup> Dr. Delitto is an Associate Professor and Chairman of the Department of Physical Therapy, School of Health and Rehabilitation Sciences, University of Pittsburgh and Vice President for Education and Research, Centers for Rehab Services, University of Pittsburgh Medical Center. Dr. Delitto spends the majority of his time conducting research related to the efficacy and effectiveness of treatment interventions, which include therapeutic EMS. Dr. Delitto has published over 50 peer-reviewed studies and 19 non-peer reviewed publications, including book chapters, commentaries, and conference proceedings. CCSF ¶ 41, Delitto Expert

physical therapist who has taught courses and conducted extensive research regarding the application and uses of EMS, concurs that EMS devices in general, and the Ab Force device specifically, cannot cause or even assist in the loss of weight, inches, or fat from the human body. It is well known that, to lose one pound of weight, the average individual must take in approximately 3,500 fewer calories than he or she expends. *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1274. This means one must exercise, or expend calories, or restrict caloric intake in order to lose weight, and that if EMS were to cause fat loss it would have to aid in expending calories. Dr. Delitto notes that, “[t]here is no scientific evidence that demonstrates that use of EMS devices can burn calories to the degree of volitional exercise and in fact it probably uses only a fraction of the calories ... therefore it will not be factor in any weight loss.” CCSF ¶ 46, Delitto Expert Report. Nor is he “aware of any biophysical mechanism that would cause EMS to eliminate fat under the skin.” CCSF ¶ 47, Delitto Expert Report .<sup>14</sup>

The Ab Force EMS device also cannot cause well-defined abdominal muscles. In order to achieve well-defined or so called “six-pack” abdominal muscles, most persons first would have to substantially reduce the amount of fat over their abdominal muscles. CCSF ¶ 51, Delitto Expert Report. As described above, however, the Ab Force cannot appreciably reduce body fat. Further, in order to obtain greater definition of the abdominal musculature a person would have to increase the size of the Rectus Abdominis muscle, which is the largest muscle in the abdomen. When a person exercises a muscle, the first effect of the exercise is a strengthening of the

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Report, Tab 11.

<sup>14</sup> One must lose weight to decrease the circumference of the waist or thigh area. *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1274.



muscle. Once the muscle becomes stronger, if the person continues to overload the muscle by exercising it vigorously over an extended period, the muscle will not only increase in strength but could also become larger, which is clinically referred to as “hypertrophy. CCSF ¶ 48, Delitto Expert Report. The Ab Force cannot cause a muscle contraction strong enough to overload the muscles, and therefore it cannot strengthen muscles enough to develop hypertrophy. CCSF ¶ 49, Delitto Expert Report. Additionally, there is no evidence that EMS devices in general can induce substantial hypertrophy of muscles, even under overload training conditions. CCSF ¶ 50, Delitto Expert Report.

The Ab Force is not an effective alternative to volitional exercises such as sit-ups, leg raises, weight lifting, or squats. Dr. Delitto conducted empirical testing on the strength of the contractile force produced by the Ab Force device. He tested the Ab Force on 20 individuals, ten men and ten women, to determine whether it was capable of producing a contraction strong enough to move or “approximate” the rib cage to the pelvis as would occur in the first part of a sit-up. Delitto Deposition, pgs. 89-92. When a person contracts his or her abdominal muscles to do a sit-up the first thing that happens is the pelvis moves toward the rib cage, next the shoulders are lifted from the floor. The Ab Force is too weak to produce a contraction capable of causing movement of the pelvis toward the rib cage. CCSF ¶ 49. Therefore, the Ab Force is not an effective alternative to a sit-up.<sup>15</sup> Nor, is the Ab Force is an effective alternative to thigh

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<sup>15</sup> The subjects were lying on their back wearing the Ab Force belt around their waists. Electrical muscle stimulation is often considered uncomfortable and even described as noxious. Delitto Expert Report ¶ 30. The goal was to get as many participants as possible to tolerate the maximum output of the device. Delitto dep. 98. Six of the 20 participants were not able to tolerate the highest level of the Ab Force device. Delitto dep. 102. In fact, the Ab Force did burn one subject. The burn was superficial and resolved in 7 days. Delitto Expert Report ¶ 31.

exercises such as leg raises or squats that also require a person to pull against gravity. Dr. Delitto's empirical testing demonstrated that the Ab Force produced a contraction too weak to lift the leg though the air against gravity. With so little muscle contractile force being generated as a result of the use of the Ab Force, the use of the Ab Force device would not replace exercises such as weight lifting or squats. CCSF ¶ 53, Delitto Expert Report.

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

Respondents have not introduced any evidence that contradicts the extensive scientific evidence Complaint Counsel has introduced. In fact, Respondents admit that they do not possess any evidence that Ab Force will cause users to develop well-defined abdominal muscles, lose weight, inches of girth, or body fat, that it is an effective alternative to regular exercise, or that it will tone, strengthen, or firm the abdominal muscles. Respondents Admission 1 -6. Nor have they identified an expert on this issue during discovery. Rather, they assert that there is accepted evidence that EMS products substantially similar to Ab Force can provide cosmetic and other benefits and may improve abdominal muscle tone and strengthen and firm abdominal muscles. CCSF ¶ 51-56.

Although other devices may provide benefits, there is no evidence Ab Force does. According to Dr. Delitto, EMS is an established treatment typically used in physical therapy to strengthen muscles after injury or surgery, which involves the application of electrical current to the human body in order to cause skeletal muscle contractions. EMS is commonly used on persons with musculoskeletal conditions such as knee injuries or post surgery or on patents with neurological conditions such a stroke. CCSF ¶ 40. Therapeutic EMS devices are much larger

and deliver a much stronger current than the Ab Force belt.<sup>16</sup> Dr. Delitto tested the Ab Force using a current meter to ascertain the peak current and found that the highest RMS current delivery of the

Ab Force is never more than 0.20 milliamps of true RMS current.<sup>17</sup> Clinical EMS units that are used for strengthening purposes have RMS current outputs in the range of 30-100 milliamps RMS. CCSF ¶ 41. This means that they are about 100 times stronger than the Ab Force device.

In addition, only four non-prescription (over-the-counter) EMS devices have been cleared by FDA for toning, strengthening, and firming abdominal muscles. CCSF ¶ 40. Respondents provided the technical specifications of one of these devices, the Slendertone Flex. According to the technical specifications, the Slendertone Flex has a biphasic symmetrical waveform with a phase duration of 200 microseconds and a pulse duration of 400 microseconds. Dr. Delitto compared the Slendertone Flex with the Ab Force, which has a pulse duration of 43.8 microseconds on mode 3, its strongest mode. Dr. Delitto concluded that the pulse duration of the Slendertone Flex is nearly ten times stronger than the pulse duration of the Ab Force and that this means the Ab Force is nearly ten times weaker than the Slendertone Flex. CCSF ¶ 44,

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<sup>16</sup> For example, the EMS unit Dr. Delitto uses with patients is a large console unit that sits on a treatment table. Delitto Deposition, pg. 14. It is plugged into the wall while the Ab Force uses only a small battery. *Id.*

<sup>17</sup> Phase charge is one of the most important factors in an EMS device's ability to elicit muscle contractile force capable of overloading a muscle. Phase charge measures the electrical charge contained in the pulses of current delivered from the EMS device. A device's RMS current, or root means square current, is another way to determine if the device produces current levels sufficient to overload a muscle. RMS current represents values proportional to phase charge. Delitto Expert Report ¶¶ 23, 24.

Correction to the Record of Testimony of Dr. Anthony Delitto, Ph.D., Tab 12. Thus, the Ab Force device, which has not been cleared by the FDA for such functions, cannot even contend that it is substantially similar to an FDA-approved device.

### **III. SUMMARY DECISION STANDARD**

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adikes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The provisions of FTC Rule 3.24 are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts. *Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972).

The Supreme Court has elaborated on this standard, holding that where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment must satisfy the evidentiary burden that it would bear at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). If the moving party meets its burden, the opposing party must come forward with specific facts showing there is a genuine issue for trial. *See Matsushita*, 475 U.S. at 585-88. The opposing

party must show more than a metaphysical doubt as to the material facts. *Id.* The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby*, 477 U.S. at 247-48.

Whether a marketing practice complies with the laws or regulations enforced by the FTC is a question of law that can be resolved on summary decision. *See FTC v. Bonnie & Co. Fashions*, 1992-2 Trade Cases (CCH) ¶ 69,980 (D.N.J. 1992) (on summary judgment, court decided care label did not comply with Care Labeling Rule); *see also United States v. Union Circulation Co.*, 1982-83 Trade Cases (CCH) ¶ 65,052 at 70,862 (N.D. Ga. 1982) (on summary judgment, court found defendants' practices to violate the FTC's Cooling Off Rule), *citing United States v. Reader's Digest Ass'n*, 662 F.2d 955, 963 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); *see also FTC v. U.S. Sales Corp.*, 785 F. Supp. 737 (N.D. Ill. 1992), *aff'd sub nom. FTC v. Vlahos*, 51 F.3d 275 (7<sup>th</sup> Cir. ).

As set forth below, there is no genuine issue as to any material fact relating to whether Respondents made the representations challenged in the complaint. In addition, there is no genuine issue as the fact that these representations were false and unsubstantiated. Thus, Complaint Counsel is entitled to summary decision as a matter of law.

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

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

An advertisement is deceptive under section 5 of the Federal Trade Commission Act if it contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984), *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984); *see also* Letter

from James C. Miller, III, Chairman, Federal Trade Commission to Hon. John T. Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983) ("*Deception Statement*"), reprinted in 103 F.T.C. 174, 175. A representation is material if it "is one which is likely to affect a consumer's choice of or conduct regarding a product." *Deception Statement*, 103 F.T.C. at 182; see also *Thompson Medical*, 104 F.T.C. 648, 816-817 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Advertising claims are presumed to be material if they are express or if they pertain "to the central characteristics of the product," such as its purpose, safety, or efficacy. *Deception Statement*, 103 F.T.C. at 182. As described above, respondents represented that the Ab Force will cause loss of weight, inches, or fat, cause well-defined abdominal muscles, and is an alternative to regular exercise. Because these are claims about the purpose or central characteristics of the product, they are presumed to be material. *Deception Statement*, 103 F.T.C. at 182. These claims were likely to affect a consumer's decision whether to purchase the Ab Force. If unsubstantiated or false, these claims would likely mislead reasonable consumers considering such a purchase.

An objective claim for a product carries with it an implied representation that the advertiser possessed and relied upon a reasonable basis at the time that the claim was made. *Thompson Medical*, 104 F.T.C. at 813 & n.37; *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 865-66 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); see also Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984) ("*Substantiation Statement*"). Absent specific evidence indicating what consumer expectations would be, the Commission assumes that consumers expect a "reasonable basis" for product claims. A reasonable basis for objective product claims is determined by weighing six factors: (1) the type

and specificity of the claim; (2) the type of product; (3) the consequences of a false claim; (4) the benefits of a truthful claim; (5) the ease and cost of developing substantiation for the claim; and (6) the level of substantiation experts in the field believe is reasonable. *Substantiation Statement*, 104 F.T.C. at 839-40; *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). The precise formulation of the “reasonable basis” standard is determined on a case-by-case basis.

Section 12 of the FTC Act prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, or cosmetics. 15 U.S.C. § 52.<sup>18</sup> A “false advertisement” is any advertisement that is “misleading in a material respect.” 15 U.S.C. § 55; *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9<sup>th</sup> Cir. 1994) . Any advertisement whose express or implied message is false, or if the advertiser lacked a reasonable basis for asserting that the representation was true, is considered a false advertisement, *Pantron I*, 33 F.3d at 1096 (citing *In re Thompson Medical Co., Inc.*, 104 F.T.C. 648, 818-19 (1984)), and the dissemination of such an advertisement constitutes an unfair or deceptive act or practice in violation of Section 12. 15 U.S.C. § 52(b).

## **B. Respondents’ Advertising Violates Sections 5 and 12**

### **1. The Evidence Is Uncontroverted That Respondents Made the False Claims Challenged in the Complaint**

As demonstrated above, there is no *genuine* issue of material fact as to the falsity of the claims in Respondents’ advertising.

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<sup>18</sup> The Ab Force is a “device” for purposes of Section 12. *See* 15 U.S.C. § 55(d) (defining “device” as including “an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . (3) intended to affect the structure or any function of the body of man”); *see also* CCSF ¶ 39.

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

When the language of or depictions in an ad are clear enough to permit the Commission to conclude with confidence that a claim, whether express or implied, is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). If, after examining all the elements of an ad and the interaction between them, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis, alone, will permit the Commission to conclude that the ad contains the claim. *Stouffer Foods Corp.*, 188 F.T.C. 746, 798 *citing Kraft, supra at 121* and *Thompson Medical Co.*, 104 F.T.C. 648, at 789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

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

Moreover, the evolution of the ads demonstrates the Respondents' intent to promote the device to cause inch, weight or fat loss, develop well-sculpted abs, and be an effective alternative to exercise. Telebrands routinely markets products similar in function as to those already being promoted successfully on TV. Respondent Khubani decided to "cash in" on the ab belt market



after noticing a mention of AbTronics in industry market reports and after determining that ab belts, including AbTronic, AB Energizer, and Fast Abs, were “one of the hottest categories to hit the market.” In addition, the radio ad specifically stated “get ... into great shape fast - without exercise.” And one of the TV spots opened with a man doing crunches. “While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made.” *Novartis Corporation*, 127 F.T.C. 580, 683 (1999).

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

Respondents cannot avoid liability simply by avoiding direct statements as to a product’s efficacy if the net impression of the ad still invokes those claims. The Commission previously has recognized that companies “may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs.” *See Stouffer Foods Corp.*, 118 F.T.C. 746 (1994); *see also Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (“That the belief is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive”).

The Complaint in this matter alleges that Respondents represented, either expressly or by implication, that Ab Force could produce the same results touted in deceptive infomercials for AbTronic, AB Energizer, and Fast Abs. As the complaints in those three matters allege, the core messages of those infomercials were that users could achieve weight loss, fat loss, and inch loss, get well-developed abs, and obtain results that were equivalent to volitional exercise. The Respondents’ use of visual images and graphic styles nearly identical to those used in the infomercials for the other three ab belts combined with verbal references to “those fantastic

electronic ab belt infomercials on TV” were likely to compel consumers familiar with infomercials for the other three ab belts to recall those core efficacy claims and attribute them to the Ab Force device.

As discussed above, Dr. Mazis concludes that references within the Ab Force ads to infomercials for other ab belts can create consumer perceptions that the Ab Force can cause results claimed in those infomercials for the other belts, *e.g.*, loss of weight and inches, and well-developed abs without the need for exercise. Applying the well-developed categorization theory, Dr. Mazis points out that consumers who have seen a previous ab belt commercial would view a new ad with the perspective of the previous ad, especially if the images are similar. Dr. Mazis further states that if the number of airings of the previous commercial was substantial, the likelihood of such an indirect effect on consumers is greater. Since these three ab belt infomercials were among the most frequently aired for much of Ab Force’s life, one can only conclude that many consumers in fact did categorize the Ab Force belt into the same category as the other three belts. And more to the point, it strains credulity for Respondents to argue that consumers did not because it is exactly that “hot category” the Respondents wished to cash in on.

## **2. The Evidence Is Uncontroverted That Respondents Made the Unsubstantiated Claims Challenged in the Complaint**

Similarly, there is no *genuine* issue of material fact that Respondents lacked substantiation before making the challenged claims. Complaint Counsel must show that “the advertiser lacked a reasonable basis for asserting that the message was true.” *Thompson Medical*, 104 F.T.C. at 818-19. Once Complaint Counsel has established its *prima facie* case, the burden shifts to Respondents to demonstrate that they had in their possession and relied on at

the time of the claim adequate substantiation.<sup>19</sup> *United States v. Alpine Industries, Inc.*, 353 F.3d 1017 (6<sup>th</sup> Cir. 2003).

Complaint Counsel, through the testimony of Dr. Delitto, has met its burden. The Ab Force is too weak to perform the claimed functions and it has not been approved by the FDA for those functions.

Respondents, to the contrary, admit that they did not possess and rely on, at the time, adequate substantiation for the challenged claims (instead asserting they did not need substantiation because they did not make the challenged claims). Nor have they even identified a scientific expert during the litigation to opine that Ab Force does perform the claimed functions. The materials they assert support the general notion that EMS devices can provide benefits is not relevant because their device is not nearly as powerful as those devices. Accordingly, they cannot meet their burden of proof, and the claims are unsubstantiated in violation of Sections 5 and 12 of the FTC Act.

### **C. All Respondents Are Liable for Section 5 Violations**

The common ownership and control of the two corporate respondents by the individual respondent is also undisputed. Respondent Ajit Khubani owns and controls both corporate respondents, each of which played a role in the process of making and/or marketing the Ab Force. CCSF ¶¶ 3, 7; Answer ¶ 3, 4. Mr. Khubani was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign and was the primary person who created and developed the promotional materials. He was primarily

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<sup>19</sup> We do not address in this case the level of substantiation needed because Respondents admit they do not have substantiation directly relevant to the challenged claims.

responsible for the creation and development of the Ab Force advertising. CCSF ¶ 5, Resp. Responses to First Interrogs, Response to FTC Interrogatory No 8 (renumbered Interrogatory No. 14 by respondents) and Response to FTC Interrogatory No 16 (renumbered Interrogatory No. 30 by respondents), Tab 2. Mr. Khubani set the pricing strategy for the Ab Force, directed the placement and dissemination of the advertising, and decided when the Ab Force would no longer be marketed or sold. CCSF ¶ 6, Resp. Responses to First Interrogs, Response to FTC Interrogatory No 16 (renumbered Interrogatory No. 30 by respondents), Tab 2. Mr. Khubani developed the idea for marketing an ab belt, chose the name Ab Force, contacted the factory that made the Ab Force, and discussed specifications for the Ab Force with the factory. Khubani dep. 27, 36-40.

Because of the common ownership and control of these companies, and their inter-related functions with respect to the marketing of the Ab Force, each should be considered part of a cooperative effort. Relief is thus necessary and proper against both corporate respondents and the individual respondent. Corporate respondents acting in concert to further a common enterprise each should be liable for the acts and practices of the others in furtherance of the enterprise. *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1<sup>st</sup> Cir. 1973) (treating all defendants as single economic entity where dealings between defendants were not at arms length); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (common enterprise found where individuals were transacting an integrated business through a maze of interrelated companies). *Accord Martin v. Deiriggi*, 985 F.2d 129 (4<sup>th</sup> Cir. 1992); *Barber v. Kimbrells, Inc.*, 577 F.2d 216 (4<sup>th</sup> Cir.), *cert. denied*, 439 U.S. 934 (1978); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 268-69 (6<sup>th</sup> Cir.), *cert. denied*, 400 U.S. 926 (1970).

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

## **VI. CONCLUSION**

Rule 3.24(a)(2) of the Commission's Rules of Practice states that a party is entitled to summary decision if the "pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." The uncontroverted record plainly demonstrates that Respondents have violated Sections 5(a) and 12 of the FTC Act through their dissemination of false and unsubstantiated claims. Accordingly, the FTC respectfully requests that this Court grant summary decision against Respondents.

Respectfully submitted,

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