PUBLIC

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.	)	
______________________________________	)	

OPPOSITION TO COMPLAINT COUNSEL'S
MOTION *IN LIMINE* AND MOTION TO STRIKE

Respondents Telebrands Corporation, TV Savings, LLC and Ajit Khubani hereby oppose Complaint Counsel's motion *in limine* to preclude evidence concerning certain abdominal EMS devices and to strike the declaration of Dr. Eric Sternlicht from consideration with regard to the motion for summary decision.

ARGUMENT

I. THE ADVERTISEMENTS FOR OTHER EMS DEVICES REFUTE COMPLAINT COUNSEL'S CENTRAL, INCORRECT ASSUMPTION AND ARE THUS RELEVANT.

Complaint Counsel's motion *in limine* to exclude evidence of other EMS devices should be denied because it invokes the same false and misleading assumptions that undermine the central theory of Complaint Counsel's case against Respondents.

As Your Honor is aware from the papers arguing for summary decision, Complaint Counsel has advanced a novel theory of liability in this case. At the heart of this action is Complaint Counsel's theory that consumers who saw the Ab Force commercial invariably recalled the advertisements for Ab Energizer, Fast Abs and AbTronic, and thus believed that the Ab Force ads made the same claims as those made in the advertisements for those three products. Accordingly, for this theory to be sustainable, Complaint Counsel must establish that consumers would make a connection between the Ab Force ads and the three ads cited by Complaint Counsel.

However, Complaint Counsel has offered absolutely no extrinsic evidence to show that this connection existed in consumers' minds. Complaint Counsel could have interviewed the actual purchasers of the products to find out why they purchased the products in order, to establish the connection between the Ab Force ads and the ads for Ab Energizer, Fast Abs or AbTronic. But Complaint Counsel did not. Complaint Counsel also could have had Dr. Mazis question survey participants as to whether they had seen any of the ads for the three products cited. He did not. Consequently, there is no extrinsic evidence Complaint Counsel can point to establish the theory that consumers made the connection between the Ab Force and ads for Ab Energizer, Fast Abs and AbTronic. Instead, Complaint Counsel urges the Court to accept the <u>assumption</u> that consumers made the connection.

The evidence offered by Respondents challenges this incorrect assumption. As Respondents will prove, the commercials identified by Respondents – for the Accusage, the Electrosage, and the Mini Wireless Massage System, among others – were widely and repeatedly broadcast at the same time the Ab Force was advertised, and at the same time

the other three ads cited by Complaint Counsel aired. These commercials made none of the claims alleged by Complaint Counsel, but instead make massage claims, just like the Ab Force. Each of these products works by providing electrical muscle stimulation to the abdominals and other parts of the body, just like Ab Force. In light of this fact, Complaint Counsel's insistence that the Court view this case through the narrow prism of the Ab Energizer, Fast Abs and AbTronic ads is misguided.

The Court should not put on blinders and exclude from consideration the fact that there were other ads that were being broadcast at the same time as those three ads, and that those ads made none of the claims alleged. Nor should the Court accept Complaint Counsel's argument that only these three ads could have been recalled by consumers because the Ab Force ad referred to "other ab belts," and thus "defined the universe for comparisons." (Complaint Counsel's Motion *In* Limine, p. 4). This argument is strained and disingenuous, particularly given Dr. Mazis' testimony in this case. As the Court is aware, Dr. Mazis testified that consumers obtained preconceptions about the Ab Force (if any) from "lots of sources" of information about ab belts and EMS devices, including news stories, conversations with friends and family, seeing an ab belt in use, and from purchasing an ab belt, as well as from other advertising. (Respondents' Memorandum in Opposition to Motion for Summary Decision, pp. 23 – 24). It is expected that he will continue to have the same view at the hearing.

Given the fact that consumers may develop preconceptions about products like the Ab Force from a variety of sources, including other advertising, it is not irrelevant that there were a number of other products being advertised that were similar to the Ab Force. Complaint Counsel makes much of the technical argument that the Electrosage,

Accusage, Mini Wireless Massage System and others were not "ab belts." While focusing on technical differences, Complaint Counsel ignores the fact that each of the products used similar depictions as those found in the Ab Force ads. Well-muscled men and trim women were prominently featured using those products on their abs in each of the commercials. Each of the ads made it clear that the product used electrical stimulation to cause muscle contractions. An overall view of the challenged ads reveals that they were remarkably similar in both product advertised and overall advertising feel to that of the Ab Force product and ads. The argument that these ads could have had "no bearing" on consumers' perceptions defies common sense and Dr. Mazis' testimony.

Complaint Counsel also challenges the Slendertone Flex ad as irrelevant because it was not sold at or before the time of the Ab Force. But Complaint Counsel has identified the Slendertone Flex as an EMS device that was possibly sold at or before the time of the Ab Force. (Exhibit A, Complaint Counsel's response to Interrogatory No. 9). Certainly Complaint Counsel cannot deny that the Slendertone Flex had received 510(k) approval prior to the time the Ab Force was sold, and presents no evidence to refute Mr. Khubani's statement that he considered the Slendertone Flex when he decided to market the Ab Force. (Khubani Declaration, ¶ 8, previously submitted in Opposition to Complaint Counsel's Motion for Summary Decision).

However, even if Slendertone Flex had not been advertised at the time of the Ab Force (a fact that is certainly not conclusively established by Kevin Towers' declaration), it was certainly advertised prior to Dr. Mazis' consumer survey, which began in December 2003. As Respondents have argued, Dr. Mazis' survey is flawed because it does not take into consideration consumers' preconceptions about ab belts or other EMS

devices. If Complaint Counsel is correct, then the Slendertone Flex was advertised as recently as November 2003, less than a month before the survey. Although Dr. Mazis decided to control for and eliminate from the survey any participant who saw a news story on ab belts, he did not identify and control for those who saw any advertising. It is possible, then, that participants who saw the Slendertone Flex commercial – which makes no weight loss or other challenged claims – was a larger segment of the control group than the test group, thus skewing results. The Slendertone Flex ad is just one piece of evidence that demonstrates the procedural and methodological flaws of the Mazis survey, and should be admitted on that basis alone.

II. COMPLAINT COUNSEL'S MOTION TO STRIKE IS MOOT

Your Honor has already denied the motions for summary decision. Therefore, Complaint Counsel's motion to strike the declaration of Dr. Sternlicht from consideration in deciding that motion is moot. Therefore, the motion to strike should be denied.

However, to the extent that Complaint Counsel's motion is seen as a reiteration of its motion to exclude Dr. Sternlicht from testifying at the hearing, Respondents have previously submitted an opposition to that separate motion. As discussed in that brief, Dr. Sternlicht was identified for the sole purpose of rebutting opinions first hinted at by Dr. Delitto in his deposition, and then formally offered in his "Correction to the Record." His opinions regarding the ability of the Ab Force to provide certain benefits was not contained in his expert report, and his comparison of the Slendertone and Ab Force products (technically and in terms of efficacy) were offered only at and after the time of his deposition. From these newly arrived at opinions, Complaint Counsel fashioned an argument in its motion for summary decision that there is no evidence that the Ab Force

provides any benefits. Because Complaint Counsel's previous position had been that the Ab Force did not provide certain benefits associated with the alleged claims (e.g., loss of weight, fat and inches; that Ab Force is a substitute for exercise; and that Ab Force gives users "six-pack abs"), Respondents are entitled to rebut Complaint Counsel's new, sweeping attack on the benefits offered by the Ab Force product. Moreover, Complaint Counsel's argument that the designation of Dr. Sternlicht was untimely ignores the rules governing the designation of a rebuttal expert set forth in the Commission Rules. Under those Rules and persuasive case law, as discussed in Respondents' brief, the identification of Dr. Sternlicht was timely. Thus, Complaint Counsel's companion motion should be denied.

Dated: April 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2004, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing Opposition to Complaint Counsel's Motion *in Limine* and Motion to Strike to be filed and served as follows:

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

Donald S. Clark, Secretary
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(2) two (2) paper copies served by hand delivery to:

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

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

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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.

____/s/ Theodore W. Atkinson______
Theodore W. Atkinson

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