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.	)	
	)	

COMPLAINT COUNSEL'S REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

1. The Complaint in this matter issued on September 30, 2003. (CX 1; Complaint date found at www.ftc.gov______).

   Response to Finding No. 1:
   Compliant Counsel have no specific response.

2. Respondents filed their Answer on October 23, 2003 (Answer, available at www.ftc.gov______).

   Response to Finding No. 2:
   Compliant Counsel have no specific response.

3. An initial Scheduling Order was issued by Chief Administrative Law Judge Stephen J. McGuire on November 5, 2003. (Available at www.ftc.gov______). The Scheduling Order was subsequently revised on March 12, 2004 by stipulation of the parties. (Available on www.ftc.gov______).

   Response to Finding No. 3:
   Compliant Counsel have no specific response.

4. Trial commenced in this matter pursuant to 16 C.F.R. § 3.41 on May 4, 2004.

   Response to Finding No. 4:
   Compliant Counsel have no specific response.

5. The last day in which testimony was received was May 6, 2004. The parties subsequently submitted a Third Joint Stipulation on May 14, 2004. (JX 11).

   Response to Finding No. 5:
   Compliant Counsel have no specific response.

6. The parties filed and served Proposed Findings of Fact and Conclusions of Law on June 2, 2004. The parties filed and served Reply Findings of Fact and Conclusions of Law on June 15, 2004.

   Response to Finding No. 6:
   Compliant Counsel have no specific response.

7. The parties submitted oral closing argument in this matter on June 17, 2004.

Response to Finding No. 7:
Compliant Counsel have no specific response.

II. FINDINGS OF FACT CONCERNING THE FACTUAL BACKGROUND OF THIS MATTER

A. THE RESPONDENTS

8. Respondent Telebrands Corporation ("Telebrands") is a New Jersey Corporation with its principal place of business at 79 Two Bridges Road, Fairfield, New Jersey 07004. (JX1, ¶ 2).
Response to Finding No. 8:
Compliant Counsel have no specific response.

9. Respondent TV Savings, LLC ("TV Savings"), a Connecticut limited liability company, was organized on January 22, 2002. (JX 1, ¶¶ 4, 5). From January 22, 2002 to the present, TV Savings has had offices at 81 Two Bridges Road, Fairfield, New Jersey 07004. (JX 1, ¶ 3).

Response to Finding No. 9:
Mr. Khubani testified that TV Savings shared offices with Telebrands. (Khubani, Tr. 282).

10. Respondent Ajit Khubani ("Mr. Khubani") is the president, chief executive officer, chairman of the board, and sole owner of Telebrands. (JX 1, ¶ 7). Mr. Khubani is also the sole member of TV Savings. (JX 1, ¶ 8).

Response to Finding No. 10:
Compliant Counsel have no specific response.

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

Response to Finding No. 11:
Compliant Counsel have no specific response.

12. Mr. Khubani was ultimately responsible for overseeing the marketing and creative design of the challenged Ab Force advertising and promotional campaign. (JX 1, ¶ 11). He was primarily responsible for the creation and development of the scripts for the Ab Force television and radio advertising and the text for the internet and e-mail advertising of the Ab Force product. (JX 1, ¶ 11). Mr. Khubani also set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, ¶ 12).

Response to Finding No. 12:

Compliant Counsel have no specific response.

B. TELEBRANDS AND ITS BUSINESS

13. Telebrands was formed in 1987 as the successor to Direct Connection, which Mr. Khubani formed in 1983. (Khubani Tr. 430). Telebrands is a member of the Electronic Retailing Association, and Mr. Khubani served on the Association's board of directors from 1999 to 2002. (Khubani Tr. 431).

Response to Finding No. 13:
According to Mr. Khubani's testimony, he is a member of the Electronic Retailing Association. He did not testify that, "Telebrands is a member of the Electronic Retailing Association." (Khubani, Tr. 430-431)

14. Telebrands is in the business of developing, marketing, and distributing a wide variety of popular consumer products though direct response advertising. (Khubani, Tr. 431). Telebrands either develops its own products or licenses the right to market those products from inventors. (Khubani, Tr. 438).

Response to Finding No. 14:
Compliant Counsel have no specific response.

1. The Direct Response Advertising Industry

15. Direct response advertising typically describes a product and offers the consumer a vehicle to order the product directly by telephone, by internet or through a mailing address. (Khubani, Tr. 431 - 432). Unlike most traditional advertising, direct-response advertising allows a consumer to order the product directly from the advertiser. (Khubani, Tr. 432). The direct response industry is significant in scope, and includes every form of advertisement to which a customer responds by ordering the product directly, including the internet, catalogues, direct mail, credit card inserts, print media, radio, and television. (Khubani, Tr. 434, 441).

Response to Finding No. 15:
Complaint Counsel have no specific response.

16. Direct-response television ("DRTV") advertising generally takes three forms. One is long-form commercials, also called "infomercials." (Khubani, Tr. 432). These are typically program-length commercials, typically 28 minutes, 30-seconds in length. (Khubani Tr. 432). Another form is short-form spot DRTV, which are commercials that are typically 30-seconds, 60-seconds, 90-seconds or 120-seconds in length. (Khubani, Tr. 432). Finally,

DRTV may take the form of live shows, many of which are broadcast 24-hours per day, 7 days a week. These include QVC, Home Shopping Network and Shop NBC. (Khubani, Tr. 432 - 433).

Response to Finding No. 16:
Complaint Counsel have no specific response.

17. A variety of factors determine the placement of infomercials and short form commercials, and there are certain constraints on the placement of infomercials. (Khubani, Tr. 507-517).

Response to Finding No. 17:
Complaint Counsel have no specific response.

18. One factor determining the placement of television advertising is cost. (Khubani, Tr. 510-511). Television ad time is priced according to supply and demand, and the cost of television time is more expensive during high demand hours. (Khubani, Tr. 510-511). There are also times when viewership is smaller and media time is less expensive. (Khubani, Tr. 510-511). This includes, for example, remnant time, which is media time that has gone unsold. (Khubani, Tr. 511).

Response to Finding No. 18:
Mr. Khubani did not testify that "the cost of television time is more expensive during high demand hours." He answered yes to Counsel's question that there are times on TV that an advertisement would cost more at one time of the day versus another time of the day and gave the example of the Super Bowl as a high-profile event that would cause in increase in demand, but Mr. Khubani did not testify that a certain time, or hour of the day, would cost more. Mr. Khubani testified that remnant time, or last-minute, unsold time for spots is available through all day parts, such as prime time or daytime. (Khubani, Tr. 510 - 511).

19. Related to the cost factor are availability factors. Television time is identified in the industry by blocks or day parts. (Khubani, Tr. 511-512). Mr. Khubani testified that in his experience, there are several identifiable day parts for weekdays and weekend days. On weekdays, there are early fringe, daytime, prime time, late night and overnight day parts. (Khubani, Tr. 511). On weekend days, there are early morning, daytime, late night and overnight day parts. (Khubani, Tr. 511). Mr. Khubani testified that prime time runs from 8:00 p.m. to 11:00 p.m. (Khubani, Tr. 511). The weekday daytime period runs from 9:00 a.m. to 3:00 p.m. (Khubani, Tr. 513).

Response to Finding No. 19:
Complaint Counsel have no specific response.

20. Infomercials are not typically aired in prime time, but have historically aired at times when rates were very low. (Khubani, Tr. 512). Evidence was introduced showing that infomercials typically run during the overnight day part, which is typically 2:00 a.m. to 6:00 a.m., and during the early morning weekend day part, which is typically 6:00 a.m. to 8:00 or 9:00 a.m. (Khubani, Tr. 513-514).

Response to Finding No. 20:
Mr. Khubani testified that infomercials are also shown throughout the weekend and provided the example of CNBC having an unsold spot at 2:00 in the afternoon and filling it with an infomercial. (Khubani, Tr. 513).

2. Telebrand's Marketing Practices

21. Telebrands has employed all three types of DRTV – infomercials, short form and live television – at some level in its history, but relies primarily on short form and long-form commercials. (Khubani, Tr. 433). Mr. Khubani testified that short-form commercials are most effectively used to advertise simple products typically sold for $20 or less. (Khubani, Tr. 433 - 434).

Response to Finding No. 21:
Complaint Counsel have no specific response.

22. Telebrands has marketed hundreds of products throughout its history and has had a number of successful products that have sold three to 15 million units each. (Khubani, Tr. 435).

Response to Finding No. 22:
Complaint Counsel have no specific response.

23. The Ab Force product campaign, while successful, sold approximately 750,000 units and was not as successful as many other Telebrands products. (Khubani, Tr. 437; JX 1, ¶ 25).

Response to Finding No. 23:
Complaint Counsel have no specific response.

24. Telebrands uses a variety of strategies in determining whether to market a product. (Khubani, Tr. 438 - 443).

Response to Finding No. 24:
Complaint Counsel have no specific response.

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

Response to Finding No. 25:
Complaint Counsel have no specific response.

26. Mr. Khubani testified that if Telebrands believes it has a competitive advantage and/or strategy for competing, Telebrands will compete with products already in the market. (Khubani, Tr. 439).

Response to Finding No. 26:
Complaint Counsel have no specific response.

27. Several times per year, Telebrands markets products by identifying existing popular products in the market and will enter the market as a competitor by offering that product at a lower price. (Khubani, Tr. 439 - 440).

Response to Finding No. 27:
Complaint Counsel have no specific response.

28. Mr. Khubani testified that once Telebrands decides to market a product, it undertakes several steps to bring that product to the marketplace. (Khubani, Tr. 440 - 443).

Response to Finding No. 28:
Complaint Counsel have no specific response.

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

Response to Finding No. 29:
Complaint Counsel have no specific response.

30. Telebrands typically runs test ads for 30 to 40 products per year; about 10% of which it expects will be successful. (Khubani, Tr. 442 - 443).

Response to Finding No. 30:
Complaint Counsel have no specific response.

31. This test advertising may take the form of print, radio, television or direct mail advertising, or a combination of such advertising, depending on the product and circumstances. (Khubani, Tr. 441).

Response to Finding No. 31:
Complaint Counsel have no specific response.

32. Test advertisements are disseminated to the public for a short period of time, typically a week or two. (Khubani, Tr. 440).

Response to Finding No. 32:
Complaint Counsel notes that the initial Ab Force television advertisements (AB-B-60 and AB-B-120) were cleared for broadcast nearly 96 times. (JX 1 ¶ 24). The ads were aired most of January 2002. (RX 60).

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

Response to Finding No. 33:
Complaint Counsel have no specific response.

34. Mr. Khubani testified that before a full-fledged, expensive nationwide campaign is rolled out, Telebrands undertakes a thorough review of its advertising and its acquisition plans so as to minimize risks of loss and ensure compliance with applicable regulations. (Khubani, Tr. 442). This includes a review of intellectual property, production plans, and a compliance review of any rollout advertising. (Khubani, Tr. 442). Once this review has been conducted, and any changes made to the advertising or production line, the advertising is rolled out to the public.

Response to Finding No. 34:
Complaint Counsel have no specific response.

C. EMS AB PRODUCTS ON THE MARKET DURING THE RELEVANT TIME PERIOD

35. Electronic muscle stimulation ("EMS") devices use electronic impulses and are intended to cause stimulation of the muscles. (JX 1, ¶ 15).

Response to Finding No. 35:
Complaint Counsel have no specific response.

36. Mr. Khubani became personally aware of EMS devices in 1999, when he was treated with EMS technology after a biking accident. (Khubani, Tr. 444 - 445).

Response to Finding No. 36:
Complaint Counsel have no specific response.

37. There is ample evidence in the record that there were a number of EMS ab products being advertised on television at or before the time the Ab Force was introduced in December 2001, and which were sold on television throughout the time the Ab Force was advertised.

Response to Finding No. 37:
Mr. Khubani testified that the AbTronic, Fast Abs, and Ab Energizer, Electrogym and Slendertone Flex ab belts were advertised on television. He testified that he saw the Slendertone Flex advertised on QVC. The testified that a number of other EMS devices were advertised but they were not ab belts.

38. There is also ample evidence in the record that the advertising for these products ran the gamut from promises of weight loss and six-pack abs to milder claims of relaxing massage.

Response to Finding No. 38:
In addition to the AbTronic, AB Energizer and Fast Abs, Mr. Khubani testified about the SlenderTone Flex and the Electrogym ab belts. The Slendertone Flex television spot produced by the Respondents bears the date of November 10, 2003. (Khubani, Tr. 447; RX 79). Mr. Khubani described this spot as "very similar" to the presentation for Slendertone Flex that he aw on QVC. (Khubani, Tr. 447; RX 79). The television spot for Slendertone Flex suggests that use of the product may be an effective alternative to exercise: "You mean I don't have to do sit-ups

anymore?" (Khubani, Tr. 447; RX 79). If Slendertone Flex is relevant at all to the issues in this proceeding, it is evidence that all of the ab belt devices identified by the respondents contained some core claims similar to those in the advertisements for the AbTronic, AB Energizer and Fast Abs ab belts.

As to the Electrogym, Respondents point out that a long-form IGIÁ commercial for another product contained an offer of a free Electrogym ab belt with the purchase of the other product, which they incorrectly identified as the Accusage. Respondents' Post Trial Brief at 12. The Electrogym was actually featured in a long-form commercial for the IGI'A Electrosage (RX 72), not the Accusage.(RX 74). In the Electrosage commercial, it was described as offering "a great workout." (RX 72; Khubani, Tr. 451). The commercial also pointed out that "other ab belts sell for over $120." (RX 72; Khubani, Tr. 451). Finally, the fact that the Electrogym was offered as a free gift with the purchase of another EMS product such as the Electrosage indicates that IGIÁ realized consumers would regard it as separate and distinct from its primary product in the commercial - *i.e.*, an ab belt and not simply an EMS massager. In fact, the announcer describes the Electrogym Deluxe Belt as "a totally unique system." (RX 72; Khubani, Tr. 451). In short, the IGIÁ commercial treats the Electrogym as in a different category than its massage product.

39. Specifically, in December 2001, Mr. Khubani was aware that there were a number of EMS ab products being marketed through DRTV, at retail, and through displays at trade shows. (Khubani, Tr. 445 - 474).

Response to Finding No. 39:

Mr. Khubani testified that he saw the Slendertone Flex on QVC in the Fall of 2001 (Khubani, Tr. 447). He did not testify that it was advertised during that time frame more than the one time that he saw it. Mr. Khubani testified that there was an Emson EMS product advertised,

he did not know the full name of the product until Counsel later showed him a list and asked him if that was the product he was referring to. (Khubani, Tr. 449, 463). Mr. Khubani did not testify whether the Emson device was an ab belt or whether it was ever advertised in the United States. (Khubani, Tr. 449). Mr. Khubani testified that there were a "number of products" advertised by IGIÁ. (Khubani, Tr. 449). He did not name the IGIÁ Electrosage, and did not say that he saw the ad for the IGIÁ ElectroSage until after Counsel played the ad for him. (Khubani, Tr. 450). The ElectroSage is not an ab belt; it is a cable and leads device. (Towers, Tr. 304 - 305). Mr. Khubani also identified advertisements for the Accusage and the Mini Wireless Electric Massager. Neither the Accusage nor the Mini Wireless Massage System are ab belts. (Towers, Tr. 301, 302). Mr. Khubani did not testify that he was aware of televison, print, radio, internet or email advertisements for any other specific products. (Khubani, Tr. 445 - 474).

40. In addition to the AbTronic, Ab Energizer and Fast Abs devices identified in the Complaint, Mr. Khubani saw a number of television advertisements for EMS ab products.

    Response to Finding No. 40:
    Please see Response to Finding No. 39

41. Mr. Khubani recalled that an EMS ab product called the SlenderTone Flex was advertised on QVC in the fall of 2001. (Khubani, Tr. 446 - 447). Mr. Khubani testified that the claims he saw on QVC were similar to the claims made in the SlenderTone Flex commercial shown at trial, with the exception that the product was not touted as FDA approved on QVC as it was in the commercial that later aired. (Khubani, Tr. 447 – 449; RX 79).

    Response to Finding No. 41:
    Complaint Counsel have no specific response.

42. He was also aware of an EMS ab product from Emson called Cyber Body that was advertised on television, (Khubani, Tr. 449), as well as products called Flex Tone and Gym Form that were advertised on television prior to the marketing of the Ab Force. (Khubani, Tr. 474).

    Response to Finding No. 42:

Respondents did not introduce copies of the advertisement for these products or any evidence to confirm that these products were ab belts or to corroborate Mr. Khubani's refreshed recollection that these products were advertised on televison prior to the Ab Force televison campaign.

43. Mr. Khubani also remembered a number of EMS ab products advertised on television by IGIÁ, a competitor of Telebrands that was heavily marketing EMS ab products. (Khubani, Tr. 449 - 450).

Response to Finding No. 43:
Mr. Khubani testified that "IGIÁ was a big player in the EMS category." He did not identify any IGIÁ products as "EMS ab products."

44. Among the IGIÁ products of which Mr. Khubani was aware before marketing the Ab Force were the IGIÁ Mini Wireless Massage, the Accusage, the Electros age, and the Electro Gym. (Khubani Tr. 449 - 460). Videotape copies of these ads were maintained by Telebrands in its video library, and were shown either in whole or in part at trial. (RX 72; RX 73; RX 74; RX 77).

Response to Finding No. 44:
Complaint Counsel have no specific response.

45. Many of these products were advertised nationally on television with some frequency. The Jordan Whitney Greensheets, which were relied on by Complaint Counsel in this case, reflect that a number of other EMS ab products were airing with some frequency (although the Greensheets are only reliable to show ads are being aired with some frequency). These include the Electrosage was listed as a top-ranking Direct Response Spot in almost every weekly report from September 15, 2001 to March 4, 2002. (CX 73 p. T011038; CX 74, p. T011027; CX 75 p. T011016; CX 76 p. T011003; CX 77 p. T011162; CX 78 p. T011147; CX 79 p. T011131; CX 80 p. T011114; CX 81 p. T011100; CX 82 p. T011086; CX 83 p. T011073; CX 84 p. T011062; CX 85 p. T011339; CX 86 p. T011327; CX 87 p. T011315; CX 88 p. T011301; CX 90 p. T011409; CX 91 p. T011395; CX 92 p. T011381; CX 93 p. T011367; and CX 95). The Accusage was listed as one of the Top Forty Direct Response Spots in the Greensheets for the weeks of December 24, 2001 (CX 86 p. T011328) and January 14, 2002 (CX 88 p. T011309). It was also listed as an Ongoing Direct Response Spot in the Greensheets for January 21, 2002 through March 4, 2002. (CX 89 p. T011295; CX 90 p. T011415; CX 91 p. T011402; CX 92 p. T011388; CX 93 p. T011373; CX 94 p. T011358; CX 95 p. T011512). Finally, the IGIÁ Electro-Gym, another ab belt device, was

listed as one of the Top Direct Response Spots in the Jordan Whitney Report for December 31 through February 11, 2002 (CX 87 p. T011315; CX 88 p. T011301; CX 89 p. T011296; CX 92 p. T011382); and was listed as an Ongoing Direct Response Spot in the Jordan Whitney Report for the weeks of January 28, 2002 through March 4, 2002 (CX 90 p. T011416; CX 91 p. T011403; CX 92 p. T011389; CX 93 p. T011407; CX 94 p. T011352; CX 95 p. T011506).

Response to Finding No. 45:

None of the listed products were described by Mr. Khubani as "ab" products; the Electrogym described above as "another ab belt" is the only one of the listed devices that is an ab belt. Respondents' statement that "the *Greensheets* are only reliable to show ads are being aired with some frequency" conflicts with the testimony of Mr. Khubani, who personally relied on the *Greensheets* to see the top selling products advertised via television infomercials and spots. (Khubani, Tr. 248, 525). He also testified that Telebrands used the *Greensheets* to convince retailers to sell Telebrands products. (Khubani, Tr. 531).

Complaint Counsel objects to the phrase "many [IGIÁ] products were advertised nationally on television with some frequency" to the extent that it may be meant to suggest that products other than the Electrosage were widely advertised. Of the four IGIÁ products identified above, only the Electrosage was widely advertised— and that product was not an ab belt, or widely advertised in infomercials. (RX72; Towers, 302-03). Accusage appeared only once in the spot rankings, at number 31. (CX86, T011328). This product was not "listed as one of the Top Forty Direct Response Spots in the *Greensheets*" in January, 2002, as Respondents incorrectly assert. (CX 88, T011309.) Most of the documents cited by Respondents do not state that IGIÁ's Accusage or Electrogym products "were advertised . . . with some frequency." These documents simply state that Accusage or Electrogym products had been "monitored by *Greensheet* or appear[ed] among [its] rankings during the past ninety days." (CX 89, T011295; CX 90,

T011415; CX 91, T011402; CX 92, T011388; CX 93, T011373; CX 94, T011358; CX 95, T011512).

46. Mr. Khubani was personally familiar with each of these products, and testified that each of these products relied on the same EMS technology as the Ab Force, e.g., they all used electrical stimulation to cause involuntary muscle contraction in the same manner as the Telebrands product. (Khubani, Tr. 452 – 455).

Response to Finding No. 46:
The quoted testimony refer only to the two devices identified in RX 72, the IGIÁ Electrosage, which is not an ab belt and the electrogym. (Khubani, Tr. 451 - 454).

47. He also testified that each of these commercials showed the product advertised being used on parts of the body other than the abdominals. (Khubani, Tr. 460).

Response to Finding No. 47:
Complaint Counsel have no specific response.

48. Mr. Khubani was also aware of other EMS devices sold on the market prior to the marketing of the Ab Force. He specifically recalled an ab belt called the Rio Ab Belt being sold at a drugstore overseas, and being marketed in the United States at a trade show in January 2001, several months before the Ab Force entered the market. (Khubani, Tr. 464).

Response to Finding No. 48:
Mr. Khubani testified that he saw the Rio Ab Belt at the Chicago housewares show in January 2001. (Khubani, Tr. 464). He did not testify that it was being marketed or sold in the United States at that time or that it was ever marketed or sold in the United States.

49. He was also aware of two other products called AbGymnic and Absolute Abs, but was not certain whether he was aware of those products prior to December 2001. (Khubani, Tr. 465). Mr. Khubani also saw additional products, the ElectroFlex, the ElectroTone and the Omron Sports Massager at a housewares show in Chicago in January 2002. (Khubani, Tr. 466).

Response to Finding No. 49:
Mr. Khubani did not testify that any of the products listed above were ever marketed or sold in the United States prior to the time he started marketing the Ab Force.

50. Mr. Khubani testified that a number of these products were sold on television, as well as in retail, and through catalogue sales. (Khubani Tr. 474).

Response to Finding No. 50:

There is no evidence that the products that Mr. Khubani professed to recall were widely advertised before or during the time period in which Ab Force was advertised and sold. (*See, e.g.,* Khubani, Tr. 466-68).

51. Complaint Counsel has acknowledged that a number of EMS devices were sold before or at the time the Ab Force was being marketed, and admitted that there may have been others that were being sold before or at the time the Ab Force was marketed. (RX 80, Interrogatory No. 9).

Response to Finding No. 51:

Complaint Counsel have no specific response.

52. The ads shown at trial for the IGIÁ products (the Accusage, the Electrosage, the Electro Gym and the IGIÁ Mini Wireless Massager) contained statements concerning relaxing massage and toning. (Khubani Tr. RX 72; RX 73; RX 74; RX 77). Mr. Khubani recalled that the EMS ab products being marketed at the time made a variety of statements, from weight loss and rock hard abs (AbTronic, A Energizer and Fast Abs) to massage, toning and strengthening claims. (Khubani, Tr. 471 - 472).

Response to Finding No. 52:

The description, "the IGIÁ products . . . contained statements concerning relaxing massage and toning" is inaccurate and inconsistent with the evidence Respondents submitted for one of the four IGIÁ products—specifically, the IGIÁ ab belt, Electrogym. At trial, Respondents played an infomercial for the Electrosage that contained a statement suggesting that use of the Electrogym ab belt was an effective alternative to exercise; the infomercial states that the Electrogym ab belt offers "a great workout." (RX 72; Khubani, Tr. 451).

D. TELEBRANDS DECIDES TO ENTER THE EMS AB PRODUCT MARKET

53. In Mr. Khubani's estimation, the market for EMS ab products had become saturated by late 2001, and was reaching its maturity. (Khubani, Tr. 461). Mr. Khubani testified that by late 2001 many competitors had entered the market for EMS ab products. (Khubani, Tr. 461). Mr. Khubani described this as the time at which price points for competing products begin to drop, and which Mr. Khubani decided was the beginning of the decline of popularity of the product category with consumers. (Khubani, Tr. 478 - 479).

Response to Finding No. 53:
Complaint Counsel have no specific response.

54. In late 2001, Mr. Khubani became aware through contacts in Asia that Telebrands could obtain from a manufacturer an EMS device comparable to those being sold for a landed cost of approximately two dollars. (Khubani, Tr. 444). This struck Mr. Khubani as an opportunity, because he knew that some EMS ab products were being sold for as much as $120, and he could sell an EMS ab product on the market for ten dollars at the five to one cost to price margin needed to make the products a successful one. (Khubani, Tr. 444). Mr. Khubani believed that if he could sell an EMS ab product on the market for ten dollars, it would be significantly below the price point of any competitor and could therefore prove to be a successful product. (Khubani, Tr. 444).

Response to Finding No. 54:
Complaint Counsel notes that Mr. Khubani testified that the EMS ab belt that was being sold

for $120. was the AbTronic. (Khubani, Tr. 267).

1. Telebrands Contacts the Manufacturer

55. In approximately December 2001, Mr. Khubani contacted a factory about manufacturing the Ab Force product. (Khubani, Tr. 263 - 264). The eventual manufacturer of the product was Max Concepts. (Khubani Tr. 264).

Response to Finding No. 55:
Complaint Counsel have no specific response.

56. The functional elements of the Ab Force product were developed by the manufacturer. (Khubani, Tr. 264).

Response to Finding No. 56:
Complaint Counsel have no specific response.

57. During the development of the Ab Force product, Mr. Khubani learned that the manufacturer of the Ab Force was also the manufacturer of the AbTronic and the Fast Abs products. (Khubani, Tr. 266).

Response to Finding No. 57:
Complaint Counsel have no specific response.

58. Mr. Khubani asked the manufacturer if the Ab Force product had the same current output as AbTronic and Fast Abs, and was informed by the manufacturer that it did. (Khubani, Tr. 266). Mr. Khubani testified that he 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" (the AbTronic sold for $120). (Khubani, Tr. 267).

Response to Finding No. 58:
Complaint Counsel have no specific response.

2. The "Ab Force" Name

59. Mr. Khubani testified that he chose the name "Ab Force," because it was designed to work primarily on the abdominal area and because it was "catchy, sort of like Air Force." (Khubani, Tr. 264).

Response to Finding No. 59:
Complaint Counsel have no specific response.

60. At trial, Mr. Khubani identified a sell sheet for the Ab Force. (Khubani, Tr. 476; RX-39). The sell sheet was an advertisement Telebrands produce in early January 2002 to present to retailers for potential sale to the retail trade. (Khubani, Tr. 476 - 477). The sell sheet for the Ab Force displays the name "U.S. Ab Force," which Mr. Khubani stated was the entire trademark name planned for use with the product, and the name by which he referred to the product from time to time. (Khubani, Tr. 476 – 478).

Response to Finding No. 60:
Complaint Counsel have no specific response.

61. The sell sheet shows the name "U.S. Ab Force" in striped, sweeped lettering super-imposed on four stars. (RX 39).

Response to Finding No. 61:

On the sell sheet below the name U.S. Ab Force it says, "Electronic Ab Belt." It also includes a large photo with the Ab Force on a muscular stomach and says "Abs." The sell sheet includes smaller pictures of the Ab Force on "thighs," "waist," and "arms." The sell sheet does not include the words massage, EMS, or electrical muscle stimulation. (RX 39). Consumers never saw the sell sheet. (Khubani, Tr. 477).

62. Similarly, the User's Manuals that accompanied the Ab Force package show the product name in sweeped lettering superimposed on four stars. (RX 45; RX 46).

Response to Finding No. 62:

Complaint Counsel have no specific response.

3. Telebrands Prepares to Test the Product on the Market in a Comparative Advertising Campaign

63. Consistent with its typical business practice, Telebrands decided to test the product through test television, print and radio advertising.

Response to Finding No. 63:

Complaint Counsel have no specific response.

64. In deciding upon a marketing strategy, Mr. Khubani considered a number of factors. (Khubani, Tr. 478).

Response to Finding No. 64:

Complaint Counsel have no specific response.

65. One of the factors Mr. Khubani considered was the fact that Telebrands was a late entrant to the marketplace. (Khubani, Tr. 478). In order to overcome this late entry, Mr. Khubani believed he would have to sell his product at the lowest possible price. (Khubani, Tr. 479). Given the fact that the landed cost of the product was two dollars, Mr. Khubani believed he could sell the Ab Force for $10 per unit. (Khubani, Tr. 479).

Response to Finding No. 65:

Complaint Counsel have no specific response.

66. Another factor he considered in developing a marketing strategy was whether the claims he could make about the product were substantiated. (Khubani, Tr. 479). Mr. Khubani was aware that the Ab Force was technologically comparable to other products on the market, and decided to make that a focus of the advertising. (Khubani, Tr. 479).

Response to Finding No. 66:

Mr. Khubani testified that the factory that made the Ab Force was making the AbTronic and admitted that he referred to the Ab Tronic in the Ab Force advertisement, "They were, indeed, making the product for one of the other products, the one I referred to in the advertisement." (Khubani, Tr. 479 - 480). He testified that he had been told by the factory that the Ab Force had the same output as the Abtronic and the Fast Abs belts. (Khubani, Tr. 540-541).

67. With those two factors in mind, Mr. Khubani drafted the test advertising as "compare and save" comparative advertising, whereby a reference was made to other products in the category with respect to technology, and a focus was maintained on the price advantage of the Ab Force. (Khubani, Tr. 486 - 487).

Response to Finding No. 67:

Mr. Khubani drafted the Ab Force television advertisements to compare the Ab Force to ab belts such as the AbTronic. He admitted that the AbTronic was the "the one I referred to in the advertisement." (Khubani, Tr. 479 - 480).

68. Mr. Khubani testified that in selling a product on the basis of comparative advertising, a point of reference must first be established. (Khubani, Tr. 486 - 487). Mr. Khubani decided to refer to the highest price point on the market for similar products ($120) as a point of reference. (Khubani, Tr. 486 - 487). He also decided that he would make a reference to the benefits touted by competitors for their products as another point of reference. (Khubani, Tr. 487).

Response to Finding No. 68:

Complaint Counsel notes that the AbTronic was sold for $120. (Khubani, Tr. 267).

E. THE TEST ADVERTISEMENTS

69. On December 18, 2001, Mr. Khubani drafted a script for a 60-second test radio commercial. (Khubani, Tr. 480-481; CX 1 H). On that same day, he also drafted a print advertisement. (Khubani, Tr. 480; CX 34). Mr. Khubani drafted the print ad after the radio script. (Khubani, Tr. 488 - 489).

Response to Finding No. 69:

Mr. Khubani testified that he drafted a "couple of ads" on December 18, 2001, "One was a script for a radio commercial. Another was a copy for a print ad." (Khubani, Tr. 480). He did not testify that the either ads were "test" ads. In fact, these ads elicited orders from consumers. (JX 1 ¶ ¶ 32, 34).

1. The Radio Test Advertisement

70. Mr. Khubani testified that 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. (Khubani, Tr. 479). He testified that he wanted to make the price point a reference to other products because a comparison of the Ab Force to other products presented the idea of a significant savings. (Khubani, Tr. 487).

Response to Finding No. 70:

Mr. Khubani admitted that he was referring to the AbTronic ab belt. He testified, "Well, my advertisements were comparing it to a $1 -- the Ab Force to $120 belt, and the Abtronic was the $120 belt. So, I wanted just to make sure that the claim I was making in the advertisement was truthful. (Khubani, Tr. 267).

71. Mr. Khubani also included other language ("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. (Khubani, Tr. 487 - 488).

Response to Finding No. 71:

Complaint Counsel have no specific response.

72. There are, of course, no visual images accompanying the radio advertisement.

Response to Finding No. 72:
Complaint Counsel have no specific response.

2. The Print Advertisement

73. The print advertisement was also drafted December 18, 2001, but contained significantly different language than in the radio script drafted the same day. (CX 34).

Response to Finding No. 73:
The print advertisement contained similar message to the radio advertisement. The print advertisement stated, "How can we afford to sell amazing AbForce Electronic Ab Belts for the unbelievable price of Just $10?. . . . These are the same type of Electronic Ab Belts that you've seen nationally advertised, similar to those sold on television by others for as much as $100 and more! . . . Using sophisticated electronic technology, the Abforce sends just the right amount of electronic stimulation to your abdominal region. . . . The Abforce is just as powerful and effective as those ab belts sold on television." (CX 34).

74. The print advertisement contains two points of reference to other products on the market. The first is 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). Mr. Khubani testified that this was a point of reference to other EMS ab products available on the market at that time. (Khubani, Tr. 488).

Response to Finding No. 74:
Mr. Khubani testified that this was a point of reference to other products but never used the term EMS. Moreover, the reference in the ad is to ab belts. The word belt appears three times in the print ad. (CX 34; CX 1 G). The ad states, "So why would you want to buy a more expensive ab belt from the competition when the Ab Force is as low as just $10." (CX 34; CX 1 G) (emphasis added).

75. The second point of reference is found 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. (Khubani, Tr. 488).

Response to Finding No. 75:
Complaint Counsel have no specific response.

76. The print ad, viewed as a whole, presents the consumer with a comparative choice message positioning the Ab Force against other EMS ab products that are technologically similar, but which are higher in price.

Response to Finding No. 76:
The print ad does not include the words, "electrical muscle stimluation" or EMS. The net impression of the print ad is that the Ab Force is just as powerful and effective as those ab belts sold on television such as the AbTronic, "So why would you want to buy a more expensive ab belt from the competition when the Ab Force is as low as just $10." (CX 34; CX 1 G) (emphasis added).

77. The language of the print ad does not facially claim, expressly or impliedly, that use of the Ab Force will result in loss of weight, inches or fat; that use of the Ab Force will cause well-developed abdominal muscles; or that use of the Ab Force is a substitute for volitional exercise as alleged in the Complaint.

Response to Finding No. 77:
The net impression of the print ad is that the Ab Force is just as powerful and effective as those ab belts sold on infomercials on television such as the AbTronic, Ab Energizer and Fast Abs ab belts which claimed users would lose weight, inches or fat; develop well-developed abdominal muscles; and that it was a substitute for volitional exercise. (CX 34; JX 7; JX 8; JX 9; CX 96 (Complaint Exhibit 2); CX 98 (Complaint Exhibit 2); (CX 100 (Complaint Exhibits B and D)).

3. Differences between the Test Radio Ad and the Print Ad

78. 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.

Response to Finding No. 78:
The radio and print ads contained very similar reference points. Both ads referred to Electronic Ab Belts. (CX 1 H; CX 34).

79. 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).

Response to Finding No. 79:
While the language about "promising to get our abs into great shape fast without exercise," appears only in the radio ad, the radio, print and televison ads contained very similar reference points. (CX 1H; CX 34; JX 2; JX 3; JX 4; JX 5).

80. Mr. Khubani explained that the differences in the test radio script and the print ad was the result of the drafting process, and that these ads were drafted in that manner to determine "what sounds best." (Khubani, Tr. 489 - 490).

Response to Finding No. 80:
Complaint Counsel have no specific response.

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

Response to Finding No. 81:
Mr. Khubani drafted the Ab Force television advertisements to compare the Ab Force to ab belts such as the AbTronic. He admitted that the AbTronic was the "the one I referred to in the advertisement." (Khubani, Tr. 479 - 480). All the ads referred to Ab belts. Not a single Ab

Force ad referred to any product other than an ab belt or used the words, “electrical muscle stimulation” or EMS. (CX 1H; CX 34; JX 2; JX 3; JX 4; JX 5).

82. Once Mr. Khubani drafted the test radio script and print advertisement, he forwarded them to Shail Prasad, an independent consultant for Telebrands who works on marketing issues. (Khubani, Tr. 481).

Response to Finding No. 82:
Complaint Counsel have no specific response.

83. Mr. Prasad was instructed to make arrangements to have the radio script recorded and to make arrangements to have the finished radio commercial sent out for broadcast. (Khubani, Tr. 481 - 482). He was also instructed to finalize the print ad with a graphics house. (Khubani, Tr. 481 - 482).

Response to Finding No. 83:
Complaint Counsel have no specific response.

4. The Test Television Spots

84. Collette Liantonio is the President of Concepts TV Productions, Inc. (“Concepts”), the company that produced the television commercials for the Ab Force. (JX 1, ¶¶ 23, 38).

Response to Finding No. 84:
Complaint Counsel have no specific response.

85. Ms. Liantonio and Telebrands had had a regular working relationship, and Concepts had produced more than a dozen television commercials together by the time they produced the Ab Force ads. (JX 6, Liantonio Dep. 26).

Response to Finding No. 85:
Complaint Counsel have no specific response.

86. Mr. Khubani gave a copy of the radio script and print ads to Collette Liantonio so she would have a basis to draft a script for television ads. (Khubani, Tr. 482). Ms Liantonio was the producer of the television commercials for the Ab Force. (Khubani, Tr. 482).

Response to Finding No. 86:

Complaint Counsel notes that Collette Liantonio testified that no one at Telebrands told her what the Ab Force was designed to do. (JX 6 (Liantonio, Dep. at 53)). She also testified that she had no product, no literature, and no written information from Telebrands regarding Ab Force before the day that the television commercial was originally recorded. (JX 6 (Liantonio, Dep. at 30, 32-33)). Complaint Counsel has no other response to proposed Finding No. 86.

87. In late December 2001, Telebrands and 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, (Khubani, Tr. 22 - 23).

Response to Finding No. 87:

Complaint Counsel objects to the term, "test," to the extent that this phrase connotes that the advertisements were not televised or shown to consumers. The record is clear that thousands of consumers saw these advertisements and placed orders in response to them. Customers placed 2,392 orders using the telephone number listed in the initial 60-second Ab Force TV commercial (AB-B-60). (JX 1, ¶ 27). Customers placed 2,238 orders using the number listed in the initial 120 second Ab Force TV commercial (AB-B-120). (JX 1, ¶ 28). The *Joint Stipulation* cited by the Respondents does not describe these initial advertisements as a "test." (JX-1, ¶¶ 22- 23).

88. Because Ms. Liantonio was planning a vacation in the Caribbean to follow the Christmas holiday, Mr. Khubani wanted quick turnaround on the production of the television spots. (Khubani, Tr. 482-483; JX 6, Liantonio Dep. 32). Consequently, the first two television ads were shot on December 22, 2001. (Khubani, Tr. 482 – 483; JX 6, Liantonio Dep.38 - 39).

Response to Finding No. 88:

Complaint Counsel have no specific response.

89. Mr. Khubani provided Ms. Liantonio with the radio script and print ad, (Khubani, Tr. 482), but Ms. Liantonio did not see the Ab Force product prior to the shoot. (JX 6, Liantonio Dep. 32 -33). Ms. Liantonio had also not seen any commercials for other EMS ab products before

drafting the script, but was aware of their existence in the marketplace. (JX 6, Liantonio Dep. 30-32). In addition, Ms. Liantonio was not provided with any information about the Ab Force product, nor did Ms. Liantonio see an Ab Force product prior to drafting a script. (JX 6; Liantonio Dep. 30-32).

Response to Finding No. 89:

Complaint Counsel again notes that Collette Liantonio did not testify that Mr. Khubani provided her with a copy of the radio script or print ad. She testified that she had no written information from Telebrands regarding Ab Force before the day that the television commercial was originally recorded. (JX 6 (Liantonio, Dep. at 30, 32-33)). Complaint Counsel has no other response to proposed Finding No. 89.

90. In speaking with Mr. Khubani about the script for the television ads, Ms. Liantonio was told that the Ab Force product was going to be the least expensive of its type on the market, and that Telebrands would compete with others in the marketplace based on price. (JX 6, Liantonio Dep. 54 - 57). Mr. Khubani informed Ms. Liantonio that the script should not contain any claims other than price. (JX 6, Liantonio Dep. 56 – 57; Khubani, Tr. 490 - 491).

Response to Finding No. 90:

Complaint Counsel have no specific response.

91. Prior to the shoot, Ms. Liantonio made production arrangements, including set location and obtaining a crew and spokesperson. (JX 6, Liantonio Dep. 32).

Response to Finding No. 91:

Complaint Counsel have no specific response.

92. In addition, Ms. Liantonio hired a number of models to demonstrate the Ab Force product in the commercials. (JX 6, Liantonio Dep. 62 - 63). Ms. Liantonio hired attractive people with attractive abs, because that was the area of the body much of the shooting would focus on. (JX 6, Liantonio Dep. 62 - 63). Mr. Khubani also gave a copy of the radio script and print ads to Collette Liantonio so she would have a basis to draft a script for television ads. (Khubani, Tr. 482). Ms Liantonio was the producer of the television commercials for the Ab Force. (Khubani, Tr. 482).

Response to Finding No. 92:

Complaint Counsel have no specific response.

93. In addition, models were used to demonstrate the product. In order to ensure that muscle contractions caused by the Ab Force would be visible, models with thin bodies were used. (Khubani, Tr. 518). Ms. Liantonio testified that it was important to see the abs and to make sure that the abs that would be used in the modeling were attractive because the product being advertised was a belt. (JX 6, Liantonio Dep. 62 - 70). When cross-examined by Complaint Counsel as to why she did not use obese people in the advertisements, Ms. Liantonio testified that using obese people would constitute "negative advertising," which was not appropriate in her opinion. (JX 6, Liantonio Dep. 65 - 66).

Response to Finding No. 93:
In the deposition testimony cited by Respondents, (JX 6, Liantonio Dep. 62-70), Ms. Liantonio testified that she used some images of bikini-clad models because this was the image that the viewer was supposed to aspire to. (JX 6 (Liantonio, Dep. at 70)).

94. Also prior to the shoot, Ms. Liantonio drafted a script for the Ab Force television spots. (JX 6, Liantonio Dep. 35–36; RX 34). The opening of the draft script made numerous exercise claims: "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." (RX 34).

Response to Finding No. 94:
Complaint Counsel have no specific response.

95. Ms. Liantonio first showed the draft script to Mr. Khubani the morning of the shoot. (Khubani, Tr. 483 - 485; JX 6, Liantonio Dep. 35 - 37). No one at Telebrands had reviewed the script prior to the morning of the shoot. (JX 6, Liantonio Dep. 37).

Response to Finding No. 95:
Complaint Counsel have no specific response.

96. 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…" (Khubani, Tr. 490). Mr. Khubani testified that when he saw the script he "knew I had to rewrite the script." (Khubani, 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." (Khubani, Tr. 490).

Response to Finding No. 96:

Complaint Counsel have no specific response.

97. Consequently, Mr. Khubani discarded Ms. Liantonio's draft and rewrote the scripts while Ms. Liantonio finished setting up for the shoot. (Khubani, Tr. 484 – 486; 490 – 491; JX 6, Liantonio Dep. 56-57).

Response to Finding No. 97:

Mr. Khubani testified that he redrafted Ms. Liantonio's script; he did not testify that he discarded it. (Khubani Tr. 484 – 486; 490 – 491). Ms. Liantonio testified only that her script "opened with a claim, and he discarded that." (JX-6, Liantonio Dep. 56-57). Indeed, Ms. Liantonio testified that other portions of her draft survived into the television advertisement. (JX 6 (Liantonio, Dep. at 98-99, 104, 113)).

98. The new script completely eliminated Ms. Liantonio's opening. (JX 2; CX 1B).[1]

Response to Finding No. 98:

The new script did not completely eliminate Ms. Liantonio's opening; rather, the new script incorporated and/or paraphrased parts of that opening. Ms. Liantonio opened her draft script with the following statement: "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. The problem is they cost over $100, until now." (Khubani, Tr. 490). The opening for the new script incorporated or paraphrased these statements as follows: "I'm

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[1] [Respondents' footnote to their proposed Finding No. 98 appeared as follows:] The Transcript of the AB-B-60 test commercial was attached to the Complaint as Exhibit B, and was admitted as Exhibit CX-1B. Respondents note, however, that the Transcript is mislabeled as being a transcript of AB-E-60. CX-1B is actually a Transcript of the test commercial (AB-B-60), and not a transcript of the 60-second rollout commercial (AB-E-60) widely disseminated by Telebrands and used by Complaint Counsel's expert, Michael B. Mazis, Ph.D., in his copy test.

sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing! They're the latest fitness craze to sweep the country, and everybody wants one. The problem is, they're expensive, selling for up to $120 each." (JX 2; CX 1B).

As for Respondents' footnote, Complaint Counsel agrees that CX 1B is the transcript of the initial sixty-second Ab Force television commercial—our exhibit list correctly identified that transcript and noted the typographical error.

99. Instead, the new drafts opened with statements similar to those found in the print advertisements, but without any reference to exercise found in the radio advertisement, which was the very first draft of any advertising Mr. Khubani had produced for the Ab Force. (Khubani, Tr. 486 - 489). These scripts, however, contain statements that are different than those found in the radio script or the print ad. (compare JX 2; CX1 B; JX 3; CX 34; and CX 1H).

Response to Finding No. 99:

Complaint Counsel disagrees that the new drafts were "without any reference to exercise." There is no express verbal *statement* referring to "exercise" in the initial Ab Force television advertisements, which do contain *images* of exercise. (JX 2; JX 3). Both the radio ad and the television scripts used for the initial Ab Force television advertisements expressly refer to "fitness." (CX 1 B; CX 1 D; CX 1 H).

Complaint Counsel has no specific response to Respondents' statement that the initial television scripts varied in unidentified respects from the radio script or the print ad.

100. The opening to the test commercials contain the following statements: "I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country, and everybody wants one. The problem is they're expensive, selling for up to $120 each." (Khubani Tr. 491; JX-2; CX1-B; JX-3).

Response to Finding No. 100:

Complaint Counsel again object to the term, "test," to the extent that this phrase may be taken to mean that the advertisements were not televised or shown to many consumers. *See* Response to Finding No. 87. Otherwise, Complaint Counsel have no specific response.

101. Mr. Khubani intended to do 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. (Khubani, Tr. 486 - 489).

Response to Finding No. 101:
The cited transcript pages contain no reference to "other EMS ab products." They contain six references to "ab belts."

102. 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. (Khubani, 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. (Khubani, Tr. 492).

Response to Finding No. 102:
Complaint Counsel have no specific response.

103. Jacob Jacoby, Ph.D., who was qualified in this matter as an expert in consumer behavior and consumer psychology, as well as in consumer comprehension and miscomprehension of advertising, testified regarding the possible "bandwagon effect" of this language. (Jacoby, Tr. 373 - 375).

Response to Finding No. 103:
Complaint Counsel have no specific response.

104. A "bandwagon effect" is a frequently observed phenomenon in advertising used to generate interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby, Tr. 373). Dr. Jacoby testified that as a result of the bandwagon effect, it was not necessary that consumers actually saw any ab belt infomercials in order to create consumer desire for the product, in this case, the Ab Force. (Jacoby, Tr. 374 - 375).

Response to Finding No. 104:

Complaint Counsel have no specific response.

105. Dr. Jacoby testified that the introductory statement contained in the Ab Force ads ("I am sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest craze to sweep the nation, and everybody wants one.")(CX 1F) is consistent with an effort to create a "bandwagon effect."

Response to Finding No. 105:
Complaint Counsel have no specific response.

106. Once the test commercials were shot, Concepts edited the commercials for broadcast. (JX 1, ¶ 38). Ms. Liantonio had principal responsibility for producing and inserting the visual elements for the Ab Force commercials. (JX 1, ¶ 38). She consulted with Mr. Khubani regarding some creative elements. (Khubani, Tr. 39).

Response to Finding No. 106:
The *Joint Stipulation* cited by the Respondents does not state that Ms. Liantonio had principal responsibility for *inserting* the visual elements for the Ab Force commercials. (JX 1, ¶ 38). Nor does it describe initial advertisements for Ab Force as a "test." (JX 1, ¶¶ 22- 23). Complaint Counsel again objects to the term, "test," to the extent that this phrase may be intended to mean that the advertisements were not televised or shown to many consumers. *See* Response to Finding No. 87.

107. Specifically, Mr. Khubani asked Ms. Liantonio to insert some stock visual images, also called "jump-backs" into the advertising as background for the spokesperson. (Khubani, Tr. 541 – 542, 553 - 554). The jump-backs Mr. Khubani wanted inserted were images of the falling numbers and dollar signs to convey falling prices, and images of gears and other mechanisms to give the commercial a "factory" background when the spokesperson spoke about electronics becoming less expensive and Telebrands' deal with the factory. (Khubani, Tr. 553 - 554). Mr. Khubani did not direct that any other images be inserted. (Khubani, Tr. 553).

Response to Finding No. 107:
Complaint Counsel have no specific response.

108. Once production on the test commercials was finalized, Telebrands bought media time for their broadcast.

Response to Finding No. 108:
Complaint Counsel have no specific response.

5. Test Advertising Performance

109. The 60-second and 120-second test television commercials (AB-B-60 and AB-B-120, respectively) were broadcast beginning January 5, 2002. (JX 1, ¶ 24). These ads combined cleared for broadcast 96 times. (JX 1, ¶ 24).

Response to Finding No. 109:
Complaint Counsel have no specific response.

110. 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).

Response to Finding No. 110:
Complaint Counsel have no specific response.

111. 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).

Response to Finding No. 111:
Nearly 5,000 Ab Force orders were placed using the numbers listed in AB-B-60 and AB-B-120. However, consumers may have watched the initial Ab Force commercials (AB-B-60 and AB-B-120) and been influenced by the ads and not placed their orders until after seeing the later commercials (AB-E-60 and AB-E-120) and used the telephone numbers in the later ads.

112. The limited test radio advertisement generated 211 orders in total, which was less than .06 of one percent of total Ab Force orders and was *de minimis*. (Khubani, Tr. 493 – 494; RX 61).

Response to Finding No. 112:
Customers placed 1,340 orders using the telephone numbers in the radio advertisements. (JX 1 ¶ 32). Customers may have heard the first ad and not placed their order until after hearing the second ad.

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

Response to Finding No. 113:
Complaint Counsel notes that consumers may have seen and been influenced by the print advertisements before placing their order in response to another Ab Force ad.

F. TELEBRANDS ROLLOUT OF THE PRODUCT

114. As a result of the testing, Telebrands decided to roll out the product. (Khubani, Tr. 494).

Response to Finding No. 114:
Complaint Counsel have no specific response.

115. Consistent with its typical practice, prior to roll out Telebrands conducted a full intellectual property investigation, arranged production with the manufacturing facility, and consulted with compliance counsel regarding the advertising. (Khubani, Tr. 495).

Response to Finding No. 115:
Complaint Counsel have no specific response.

1. Telebrands Revises Radio and Television Advertising Prior to Rollout

116. As a result of that process, in early January 2002, a number of changes were made to the radio and television advertisements. (Khubani, Tr. 495).

Response to Finding No. 116:
Complaint Counsel have no specific response.

117. Specifically, the television scripts were revised to change the phrase "latest fitness craze" to "latest craze." (Khubani, 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). Mr. Khubani testified that both were intended as points of reference. (Khubani, Tr. 485 - 496).

Response to Finding No. 117:
Complaint Counsel have no specific response.

118. 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 JX5). Mr. Khubani testified that both were references to the fact that Ab Force used the same technology as other EMS ab products on the market. (Khubani, Tr. 497).

Response to Finding No. 118:

The cited transcript page contains no reference to “other EMS ab products.” Rather, it refers to “the product.” The only product referred to in the ads is an ab belt. (JX 2 through JX 5).

119. Finally, a superscript was imposed on the commercial, providing a visual reference to “RELAXING MASSAGE.” (compare JX 2 with JX 4; JX 3 with JX 5).

Response to Finding No. 119:

Ab Force televison commercial producer, Ms. Liantonio acknowledged that, that statement appeared on the screen for approximately a second and a half and the spokesperson in that commercial did not state that Ab Force massages or soothes. (JX 5; JX 6; CX 107 (Liantonio, Dep. at 79-80)). She stated that Mr. Khubani never told her that the Ab Force was intended to be a massager. (JX 6; CX 107 (Liantonio, Dep. at 76)).

120. In addition, 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).

Response to Finding No. 120:

Complaint Counsel have no specific response.

2. Telebrands Prepares User’s Manuals Referencing Massage

121. In addition to making revisions to the advertising, Telebrands prepared two User’s Manuals to accompany the two different models of the Ab Force product. (Khubani, Tr. 499; RX 45; RX 46).

Response to Finding No. 121:

Complaint Counsel have no specific response.

122. The first lines of the User's Manuals state: "The Ab Force is intended to provide a relaxing massage. Ab Force is not intended for medical use, for the treatment of any medical condition, or for any permanent physical changes." (RX 45; RX 46).

Response to Finding No. 122:

Complaint Counsel notes that consumers did not receive the Ab Force User's Manual until after they recieved the Ab Force ab belt and the User's Manual does not affect the message in the Ab Force advertisements. (Khubani, Tr. 551).

123. Additional instructions in the User's Manual state: "The control unit enables a user to turn the unit on and off and to control the intensity of the massage." (RX 45; RX 46).

Response to Finding No. 123:

Complaint Counsel notes that consumers did not receive the Ab Force User's Manual until after they recieved the Ab Force ab belt. (Khubani, Tr. 551).

124. No other benefits, such as weight loss, loss of inches, loss of fat, well-defined abs or substitution for exercise are found in the User's Manuals.

Response to Finding No. 124:

Complaint Counsel notes that consumers did not receive the Ab Force User's Manual until after they recieved the Ab Force ab belt. (Khubani, Tr. 551).

3. Telebrands Creates a Services Agreement Referencing Massage

125. In January 2002, Telebrands and TV Savings entered into a Services Agreement which was finalized and executed on January 22, 2002. (JX 1, ¶ 6; RX 53).

Response to Finding No. 125:
Complaint Counsel have no specific response.

126. The Services Agreement states that the Services Agreement was formed because TV Savings desired Telebrands to perform, and Telebrands desired to perform, certain services related to the marketing and distribution of the Ab Force product, which was referred to throughout the Services Agreement as the "Abforce Massager." (RX 53, p. T000053). Consequently, the Services Agreement established certain obligations of TV Savings and Telebrands with regard to the marketing and distribution of the Ab Force product. (RX 53).

Response to Finding No. 126:
Complaint Counsel have no specific response.

4. Telebrands Creates Internet and E-mail Ads

127. In addition to television, radio and print advertising, Telebrands also created internet and e-mail advertising. (JX 1, ¶ 33).

Response to Finding No. 127:
Complaint Counsel have no specific response.

128. The internet and e-mail advertising generated 2,663 orders in response, totaling less than one percent of all orders placed. (RX 61).

Response to Finding No. 128:
Complaint Counsel notes that consumers may have seen and been influenced by the other Ab Force advertisements before placing their order using the number in the internet and e-mail advertisements.

129. Complaint Counsel has not made the statements and representations in the internet and e-mail advertisements an issue in this matter.

Response to Finding No. 129:

Complaint Counsel noted at pages 3-4 of its Amended Post-Trial Brief that in the Internet and email ads the point of reference was to "those fantastic electronic ab belt infomercials on TV" or to "ab belts sold by other companies on infomercials." See also pages 6-7 of Post-Trial Brief.

5. Performance Of The Rollout Ads

130. The final versions of the 60-second and 120-second television commercials for the Ab Force (AB-B-60 and AB-E-120, respectively) were rolled out to the public beginning on January 19, 2002, and ran until April 7, 2002. (JX 1, ¶ 29).

Response to Finding No. 130:
Complaint Counsel have no specific response.

131. The AB-E-60 and AB-E-120 versions of the television spots ran on cable, satellite and local affiliate stations, and were cleared for broadcast 11,508 times. (JX 1, ¶ 30).

Response to Finding No. 131:
Complaint Counsel have no specific response.

132. The Ab Force spots ran during all media day parts. (Khubani, Tr. 513). However, only 2.6% of the Ab Force time bought was in the same day parts in which infomercials typically ran. (Khubani, Tr. 514). The vast majority of the Ab Force spot airings -- 90% -- occurred at times when infomercials would not typically be broadcast. (Khubani, Tr. 513-515).

Response to Finding No. 132:
Complaint Counsel have no specific response.

133. Consumers placed 74,566 orders for the Ab Force using the telephone number displayed in the 120-second spot (AB-E-120), and 240,440 orders using the telephone number listed in the 60-second spot (AB-E-60). (JX 1, ¶ 31). This constitutes approximately 95% of all orders placed. (RX 61).

Response to Finding No. 133:
Complaint Counsel notes that consumers may have seen and been influenced by the other Ab Force advertisements before placing their order using the number in the second set of television advertisements.

134. Finally, the radio advertisement generated a total of 1,340 orders, 211 for the test spot, and 1,129 for the final radio spot. (Khubani Tr. 494; JX 1, ¶ 32; RX 61).

Response to Finding No. 134:

Complaint Counsel notes that consumers may have seen and been influenced by the radio ads before placing their order using the number in the other Ab Force advertisements.

G. SUMMARY OF FINDINGS REGARDING THE FACTUAL BACKGROUND OF THIS MATTER

135. The Court finds that at the time Respondents entered the EMS ab product market category with the Ab Force product, there were a number of other EMS ab products being sold on the market.

Response to Finding No. 135:

Complaint Counsel have no specific response.

136. In addition to AbTronic, Ab Energizer and Fast Abs, several other EMS ab products were marketed on television, either through commercial spots or on live television shopping networks. These products included the IGIÁ Mini Wireless Massage, the Accusage, the Electrosage, the Electro-Gym, the Cyber-Tone, Slendertone Flex and others.

Response to Finding No. 136:

There is no record evidence that "several" EMS devices were sold on live television shopping networks; Mr. Khubani's testimony on television shopping networks was limited to Slendertone Flex. (Khubani, Tr. 446). Complaint Counsel does not disagree that several EMS devices were advertised via infomercials and/or television commercials.

137. The advertisements for these products touted a variety of benefits. Some product advertisements included weight loss and exercise claims, while others made massage and toning claims.

Response to Finding No. 137:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of

Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

138. Complaint Counsel has not established that Mr. Khubani only had AbTronic, Ab Energizer and Fast Abs in mind when he decided to market the Ab Force or when he created the advertisements for the Ab Force. Indeed, the evidence indicates that Mr. Khubani had a number of EMS ab products in mind when he decided to market the Ab Force and when he drafted the advertising.

Response to Finding No. 138:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

Moreover, the weight of the evidence indicates that Mr. Khubani began to consider marketing an electronic ab belt for sale to consumers after noticing that the AbTronic ab belt was listed in the *JW Greensheet*. (JX 1, ¶ 16; Khubani, Tr. 248-49). When he drafted the advertising, he referred specifically to "ab belts" and referenced the price for the AbTronic ab belt. (Khubani, Tr. 539).

139. Telebrands and Mr. Khubani intended to market this product with a "compare and save" comparative advertising strategy. To that end, Mr. Khubani intended to create a bandwagon effect with his advertisements by referring to other "ab belts" as a "craze" that was "sweeping the nation." Telebrands and Mr. Khubani also intended to use this language as a point of reference for consumers so that they could compare the Ab Force to other EMS ab products on the market at the time. The language of the advertisements themselves indicates that Mr. Khubani intended to convey two ideas. First, that the Ab Force used the same technology found in other EMS ab products on the market, and, second, that the Ab Force was far less expensive than other products on the market. This is a classic example of "compare and save" advertising.

Response to Finding No. 139:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

Complaint Counsel note that the ads contain no reference to "other EMS ab products." Rather, they contain numerous references to other ab belts. Complaint Counsel do not disagree that the "fitness craze" referenced in the Ab Force advertisements was a reference to other electronic ab belts, or that Respondents have adduced testimony concerning a "compare and save" strategy that describes other electronic ab belts.

140. There is also substantial evidence that Mr. Khubani intended to make every effort to avoid making any of the claims asserted in this action. When presented by the producer of the television spots with a draft script containing claims that the Ab Force would result in "flatter tummies" and was a replacement for exercise, Mr. Khubani discarded the script and rewrote it, removing those references.

Response to Finding No. 140:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

141. Moreover, prior to rollout, Mr. Khubani undertook a compliance review of the advertising and determined to make certain changes. These changes further demonstrate Mr. Khubani's intent to avoid making the asserted claims and to follow a "compare and save" strategy.

Response to Finding No. 141:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of

Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

Complaint Counsel does not disagree that Mr. Khubani made changes to the Ab Force advertisements on the advice of counsel. (Khubani, Tr. 277). Obviously, negative as well as positive inferences may be drawn from this fact.

142. The Ab Force spots were broadcast nationally on cable, satellite and broadcast television. These spots were aired throughout all parts of the day, but only a small percentage were aired at times infomercial-length commercials were broadcast.

Response to Finding No. 142:
Complaint Counsel have no specific response.

143. The revised rollout advertising resulted in over 96% of the total orders placed for the ad force. The test television spots and the test radio spots, in combination with the print, internet and e-mail advertising, constituted less than 4% of the total number of orders placed.

Response to Finding No. 143:
Complaint Counsel notes that consumers may have seen and been influenced by the earlier Ab Force advertisements before placing their order using the number in the second set of television advertisements.

III. FINDINGS OF FACT CONCERNING EXPERT TESTIMONY

A. THE PARTIES' EXPERT WITNESSES

144. Two expert witnesses were called by the parties to testify about significant issues in this case. Complaint Counsel called Michael B. Mazis, Ph.D., who provided (1) a facial interpretation of the Ab Force advertising, and (2) opinions based on the results of a consumer survey, also called a copy test, conducted for this proceeding. Respondents called Dr. Jacob Jacoby, Ph.D., who offered his expert opinion on the unreliability and subjectivity of Dr. Mazis' facial analysis, and to identify and describe flaws in the survey methodology and errors in Dr. Mazis' analysis of the results of that survey.

Response to Finding No. 144:
Complaint Counsel have no specific response.

1. Michael B. Mazis, Ph.D.

145. Complaint Counsel called Michael B. Mazis, Ph.D., a professor of marketing at the School of Business at American University. (Mazis Tr. 36; CX 58 at Exh. A thereto).

Response to Finding No. 145:
Complaint Counsel have no specific response.

146. Dr. Mazis' *curriculum vitae*, including his publications and an identification of cases in which he has testified were provided as attachments to his Expert Report (CX58, Exh. A. thereto).

Response to Finding No. 146:
Complaint Counsel have no specific response.

2. Jacob Jacoby, Ph.D.

147. Respondents called Jacob Jacoby, Ph.D., a professor of marketing at New York University. (Jacoby, Tr. 336). Dr. Jacoby holds an endowed chair as Merchants Council Professor of Consumer Behavior at the Stern School of Business at New York University. (Jacoby, Tr. 336).

Response to Finding No. 147:
Complaint Counsel have no specific response.

148. At New York University, Dr. Jacoby teaches the research methodology course to doctoral students in marketing, management, computer information systems. (Jacoby, Tr. 336 – 337). He also teaches consumer behavior at the graduate, MBA and doctoral levels. (Jacoby, Tr. 337).

Response to Finding No. 148:
Complaint Counsel have no specific response.

149. Dr. Jacoby has served as a peer reviewer on the chapter on survey research evidence in the *Reference Manual on Scientific Evidence* published by the Federal Judicial Center. (Jacoby, Tr. 337 - 338). In connection with that work, he was invited by the Federal Judicial Center to provide lectures on survey research evidence to district judges and magistrate judges. (Jacoby, Tr. 338).

Response to Finding No. 149:

Complaint Counsel have no specific response.

150. Dr. Jacoby has been recognized by the highest peer-reviewed journal in the field as the most cited authority in the field for a period of 15 years, and has been recognized as the most cited consumer researcher in the field literature for a period of 20 years. (Jacoby, Tr. 338).

Response to Finding No. 150:
Complaint Counsel have no specific response.

151. In 2002, Dr. Jacoby wrote the chapter on consumer psychology in the International Encyclopedia of the Social and Behavioral Sciences. (Jacoby, Tr. 339).

Response to Finding No. 151:
Complaint Counsel have no specific response.

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

Response to Finding No. 152:
Complaint Counsel have no specific response.

153. Dr. Jacoby has served as president of the Association for Consumer Research and the Society for Consumer Psychology and is a fellow of both institutions. Both are the two leading major scholarly societies in consumer behavior, and have memberships of 1,200 and 700 members, respectively. (Jacoby, Tr. 339).

Response to Finding No. 153:
Complaint Counsel have no specific response.

154. Dr. Jacoby has received awards from the Association for Consumer Research from the Society for Consumer Psychology for research excellence. (Jacoby ,Tr. 340).

Response to Finding No. 154:
Complaint Counsel have no specific response.

155. Dr. Jacoby has previously consulted with the Federal Trade Commission and, in 1974, was asked to develop the definition of misleading advertising for the Food and Drug Administration and to develop an empirical approach for assessing misleading advertising. (Jacoby, Tr. 341).

Response to Finding No. 155:
Complaint Counsel have no specific response.

156. Dr. Jacoby most recently has consulted with the National Football League concerning the use of the trademark "Redskins" and for the Washington Wizards in a trade name dispute brought by the Harlem Wizards. (Jacoby, Tr. 341 - 342).

Response to Finding No.156:
Complaint Counsel have no specific response.

157. As detailed in Dr. Jacoby's *curriculum vitae*, he is a highly published and well-recognized expert in the field of consumer behavior and consumer psychology, as well as advertising comprehension and miscomprehension. (RX 40, Exh. A thereto).

Response to Finding No. 157:
Complaint Counsel have no specific response.

158. Dr. Jacoby was accepted in this matter as an expert in consumer behavior and consumer psychology, as well as consumer comprehension and miscomprehension of advertising. (Jacoby, Tr. 342).

Response to Finding No. 158:
Complaint Counsel have no specific response.

B. THE FACIAL ANALYSIS OFFERED BY DR. MAZIS

159. 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).

Response to Finding No. 159:
Complaint Counsel have no specific response.

160. 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, an "indirect effect." (Mazis, Tr. 66 - 67). Specifically, Dr. Mazis concluded that elements of the Ab Force ad would cause consumers to make an association between the Ab Force product and the ads for AbTronic, Ab Energizer and Fast Abs, thus causing consumers to believe (1) that the Ab Force caused well-developed abs and (2) a loss of inches around the waist. (Mazis, Tr. 66 - 67).

Response to Finding No. 160:
Complaint Counsel have no specific response.

161. The second effect is what Dr. Mazis called a "direct effect." Dr. Mazis concluded that even if consumers had never seen any other ab belt advertisement, elements within the

four corners of the Ab Force 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)

Response to Finding No. 161:
Complaint Counsel have no specific response.

1. Indirect Effects

a. Dr. Mazis offered the opinion that consumers may perceive weight loss and exercise claims because they would likely associate the Ab Force with ads for AbTronic, Ab Energizer and Fast Abs.

162. At trial, Dr. Mazis identified two claims that consumers may perceive from the Ab Force ad "because of association with other ab belts": weight loss and exercise. (Mazis, Tr. 61 - 62).

Response to Finding No. 162:
Complaint Counsel have no specific response.

163. Specifically, Dr. Mazis testified that consumers may perceive that Ab Force is being offered as a substitute for exercise not because that claim is made in the Ab Force ads, but because of consumers' knowledge of the ads for AbTronic, Ab Energizer and Fast Abs: "Now, it doesn't actually say that or even show that in the ads, but because of the association with this ab belt category, people may perceive that." (Mazis, Tr. 61)(emphasis added).

Response to Finding No. 163:
Complaint Counsel have no specific response.

164. Another claim Dr. Mazis testified consumers may perceive as a result of this association is a claim of weight loss. He stated that while this claim is not made on the face of the Ab Force ads, consumers familiar with ads for AbTronic, Ab Energizer and Fast Abs could perceive a weight loss claim based on their familiarity with those other ads: "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." (Mazis, Tr. 61 - 62)(emphasis added).

Response to Finding No. 164:
Complaint Counsel have no specific response.

165. In making his facial analysis, Dr. Mazis identified four "key elements" in the Ab Force ads that he considered as likely to have an impact on consumers. (Mazis, Tr. 59 - 60). Three of these elements he identified were elements that would, in his estimation, cause

consumers to make an association between the Ab Force product and the advertisements for AbTronic, Ab Energizer and Fast Abs and conclude that the Ab Force product caused well-defined abdominals and loss of inches. (Mazis, Tr. 59 - 62).

Response to Finding No. 165:

Respondents have mischaracterized Dr. Mazis' testimony. Dr. Mazis did not identify three elements. The import of his testimony is that all four elements would cause consumers to make the association. These four elements are (1) the linkage of the Ab Force product to the other ab belts by references in Ab Force ads to the other ab belts on TV, (2) the visual images of models with well-developed abs and slim bodies, (3) the physical appearance of the Ab Force product which is similar to the other ab belts, and (4) the similarity of the name "Ab Force" to the names of the other ab belts. (Mazis, Tr. 59-60; CX 58 at 8-9).

166. First, Dr. Mazis noted the "linkage of the Ab Force product to the other ab belts." (Mazis, Tr. 59). Specifically, Dr. Mazis testified that the two Ab Force commercials he reviewed made two references to other ab belt advertising consumers may have seen on television. (Mazis, Tr. 59). He stated that the purpose of this element appeared to him to be a mechanism to cause people to think about their preconceptions about ab belts, what he described as "category beliefs." (Mazis, Tr. 59).

Response to Finding No. 166:

Complaint Counsel have no specific response.

167. Second, Dr. Mazis identified the "physical appearance of the product" as an element impacting consumers' perceptions. (Mazis, Tr. 60). He testified that the Ab Force was similar in appearance to the AbTronic, Ab Energizer and Fast Abs products, and that "if people were familiar with those other ab belts, they would associate the Ab Force as being another type of ab belt, again conjuring up this category, this ab belt category." (Mazis, Tr. 60).

Response to Finding No. 167:

The second element Dr. Mazis identified was the models with the well-developed abs and slim bodies. The "physical appearance" of the Ab Force ab belt was actually the third element that Dr. Mazis identified.

168. Third, Dr. Mazis testified that the name “Ab Force” was an element having an impact on consumers’ perceptions. (Mazis, Tr. 60). He again referenced the advertisements for the AbTronic, Ab Energizer and Fast Abs products, and concluded that the fact they all have “ab” in their name was significant, but did not explain why. (Mazis, Tr. 60). He also testified that the word “force” was significant because it applies force by stimulation, and because the word “force” conveys the idea that it “makes your abs a force.” (Mazis, Tr. 60).

Response to Finding No. 168:

This was the fourth element that Dr. Mazis identified. He testified that the name Ab Force is interesting because it implies a double meaning – it applies force to your abs because of the stimulation and it makes your abs a force, i.e. well-developed. (Mazis, Tr. 60).

b. Dr. Mazis relied on several unproven or false assumptions to reach his opinions that consumers may associate the Ab Force with claims made in the ads for AbTronic, Ab Energizer and Fast Abs

169. As Dr. Jacoby testified at trial, Dr. Mazis’ “indirect effects” facial analysis suffers from two fundamental flaws.

Response to Finding No. 169:

Complaint Counsel have no specific response.

170. First, in identifying “indirect effects” that could shape and influence a consumer’s category beliefs, Dr. Mazis only focused on the AbTronic, Ab Energizer and Fast Abs product infomercials to the exclusion of other advertisements, including advertisements for other similar products. (Jacoby Tr. 347 – 348). Dr. Mazis did not consider other EMS ab products on the market before or at the time the Ab Force was advertised. (Jacoby, Tr. 348). Instead, he assumed that the only television advertisements relevant to consumers’ categorization beliefs were the infomercials for AbTronic, Ab Energizer and Fast Abs. (Jacoby, Tr. 347 - 348).

Response to Finding No. 170:

Complaint Counsel object to this finding to the extent that it implies that Dr. Mazis only reviewed television advertising for AbTronic, AbEnergizer, and Fast Abs. Dr. Mazis stated that

he reviewed the complaints issued by the FTC in those three matters (CX 58, ¶ 9; Mazis, Tr. 124) with exhibits that included retail packaging. Dr. Mazis testified that he reviewed the retail packaging exhibits attached to the complaints, and opined that claims contained on the packages appeared to be similar to claims in the infomercials for those products. (Mazis, Tr. 125).

171. Second, Dr. Mazis' belief that consumers would make an association between the Ab Force commercials and the infomercials for AbTronic, Ab Energizer and Fast Abs—what the Respondents have coined as the "importation theory"—relies on two flawed assumptions: (1) consumers who saw the Ab Force ad also likely saw the ads for AbTronic, Ab Energizer and Fast Abs (CX 58, ¶¶ 11, 15; Mazis, Tr. 123); and (2) because the Ab Force ads contained elements that were similar to elements found in ads for AbTronic, Ab Energizer and Fast Abs, those consumers who saw the Ab Force ads would associate, through "categorization theory," the claims made in the ads for AbTronic, Ab Energizer and Fast Abs with the Ab Force advertising. (CX 58, ¶¶ 11, 17, 19 – 20).

Response to Finding No. 171:

Complaint Counsel objects to the use of the word "belief" to characterize Dr. Mazis's expert opinion. Dr. Mazis was qualified on the record as "an expert in consumer response to advertising, advertising effectiveness, consumer behavior, marketing and consumer research, including the design and implementation of surveys and analyses of surveys." (Mazis, Tr. 41). Complaint counsel further note that respondents have cited no record evidence in support of the assertion in their proposed finding that Dr. Mazis's opinion is flawed. We strenuously object to this proposed finding as a repetitive and improper argument on the merits dressed up as a proposed finding of fact.

172. As Dr. Jacoby testified, Dr. Mazis' assumption that consumers who saw the Ab Force ad also likely saw the ads for AbTronic, Ab Energizer and Fast Abs is mere speculation that was untested in this matter. (Jacoby, Tr. 367). Dr. Jacoby is also correct that Dr. Mazis' opinion that consumers actually developed categorization beliefs is mere untested speculation. (Jacoby, Tr. 347 - 351).

Response to Finding No. 172:

Respondents have totally mischaracterized the testimony of Dr. Jacoby that appears at the first citation, *i.e.*, Jacoby, Tr. 367). Dr. Jacoby did not testify that Dr. Mazis's "assumption" that consumers who saw the Ab Force ad also likely saw the ads for the other three ab belts was "mere speculation that was untested." All he said was there was "no evidence in the record that any of them were exposed to any of these ads." Complaint Counsel further object to the argumentative nature of the second sentence of this proposed finding. There is absolutely no record evidence to sustain the assertion that any of the opinions Dr. Jacoby expressed were correct. We strenuously object to this proposed finding as a improper argument on the merits dressed up as a proposed finding of fact.

c. Dr. Mazis completely ignored what impact advertisements for other EMS ab products would have on consumers

173. At trial, Dr. Mazis was shown portions of infomercial advertisements for the AbTronic, Ab Energizer and Fast Abs products. (Mazis, Tr. 42 – 47; JX 7; JX 8; JX 9). He offered his opinion that the advertising for the Ab Energizer, AbTronic and Fast Abs products conveyed four claims: (1) that use of these products will result in "well-developed abs" or "six-pack abs"; (2) that use of these products "reduces inches off the waist"; (3) that use of these products could cause weight loss; and (4) that these products "are an alternative to exercise." (Mazis, Tr. 47 - 48).

Response to Finding No. 173:

Complaint Counsel have no specific response.

174. Even if Dr. Mazis is correct that the ads for AbTronic, Ab Energizer and Fast Abs contain these claims, his opinion wrongly assumes that consumers seeing the Ab Force ads would only associate these three ads and these four claims with Ab Force, and would not associate the Ab Force with ads for any of the other EMS ab product being sold at the time, and which made none of the claims asserted.

Response to Finding No. 174:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of

Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46 (a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. This argument is properly addressed in Complaint Counsel's Response to Respondents' Post Trial Brief.

1) There were numerous EMS ab products on the market before or at the time the Ab Force was advertised, and many of them made no challenged claims.

175. As Complaint Counsel recognized and as Mr. Khubani testified, there were a significant number of EMS devices on the market prior to and at the time the Ab Force was advertised. Complaint Counsel has acknowledged that there were at least 18 EMS devices on the market at the time, and has acknowledged that 19 others may have been on the market at the time. (RX 80, Interrogatory No. 9 thereto).

Response to Finding No. 175:
Complaint Counsel objects to the phrase "on the market" to the extent that this phrase connotes that these EMS devices were advertised; there is no record evidence that they were advertised. Otherwise, we have no specific response.

176. Mr. Khubani identified numerous EMS ab products that were being marketed before the Ab Force was advertised. (Khubani, Tr. 445-474).

Response to Finding No. 176:
Complaint Counsel have no specific response.

177. Many of the products identified by Mr. Khubani are the same as those identified by Complaint Counsel. (Compare RX 80, Interrogatory No. 9 with Khubani, Tr. 445-474).

Response to Finding No. 177:
All of the products identified at trial by Mr. Khubani had been previously identified by Complaint Counsel and were listed in *Complaint Counsel's Response to Respondents' First Set of Interrogatories*. (Compare RX 80, Interrogatory No. 9 with Khubani, Tr. 445-474).

178. Moreover, several EMS ab products not considered by Dr. Mazis were noted in the *JW Greensheets* as having been advertised on television at the same time as the Ab Force, And at the same time as the AbTronic, Ab Energizer and Fast Abs products. (CX-___;) [sic].

Response to Finding No. 178:
Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

179. Several of these ads were identified by Mr. Khubani as having aired prior to the introduction of the Ab Force, and were presented for viewing at the hearing. (Khubani Tr. 449-460; RX 72; RX 73; RX 74; RX 77).

Response to Finding No. 179:
Complaint Counsel have no specific response.

180. Each of these EMS ab products were shown being used on the abdomen, as well as other parts of the body. (RX 72; RX 73; RX 74; RX 77).

Response to Finding No. 180:
Complaint Counsel have no specific response.

181. Each of these advertisements advocated massage or toning benefits. (RX 72; RX 73; RX 74; RX 77).

Response to Finding No. 181:
Complaint Counsel have no specific response.

182. Unlike the advertisements for the AbTronic, Ab Energizer and Fast Abs products, none of the advertisements shown at the hearing for other EMS ab products (*e.g.*, the IGIÁ line of products) made the claims asserted in this case. (Compare RX 72; RX 73; RX 74; RX 77 and JX 7, JX 8 and JX 9).

Response to Finding No. 182:
Respondents are mistaken. Of the advertisements shown at the hearing, only one product

was an ab belt—Electrogym. (RX 77). At trial, Respondents, played an infomercial for the Electrosage product in which the Electrogym belt was offered as a premium. (RX 72; *see* Khubani, Tr. 452). This infomercial contained a statement suggesting that use of the Electrogym ab belt was an effective alternative to exercise, stating that the ab belt offers "a great workout." (RX 72; Khubani, Tr. 451). Complaint Counsel agrees that IGIÁ's other products did not make claims like those alleged in this case.

2.) Dr. Mazis ignored these other EMS ab products in making his facial analysis.

183. Despite the existence of these other EMS ab belt product advertisements, Dr. Mazis considered none of them. (Mazis, Tr. 123 - 124, 134). Dr. Mazis was not even aware that there were other EMS ab products being marketed prior to or before the marketing of the Ab Force. (Mazis, Tr. 123-124; 134). He was never provided with any other advertisements or products, nor did he review advertisements or retail packaging for any other EMS ab product. (Mazis, Tr. 123, 134).

Response to Finding No. 183:

Complaint Counsel object to the assertion that Dr. Mazis "was not even aware that there were other EMS ab products being marketed prior to or before the marketing of the ab force. Dr. Mazis testified that he was not provided with and did not review any such advertising. (Mazis, Tr. 123-124; 134). Otherwise Complaint Counsel have no specific response.

184. The evidence presented at trial establishes that Dr. Mazis was provided with and considered a limited number of materials in reaching the opinions he offered in this case. Specifically, Dr. Mazis reviewed and considered (1) the Complaint in this matter, and exhibits, (2) transcripts and videotapes of the infomercials for AbTronic, Ab Energizer and Fast Abs, and (3) infomercial ranking reports for the AbTronic, Ab Energizer and Fast Abs products. (Mazis, Tr. 120-121; CX 58, ¶ 9). Dr. Mazis indicated that he reviewed the complaints previously issued by the Commission against the marketers of AbTronic, Ab Energizer and Fast Abs, and it is clear that Complaint Counsel provided information concerning advertising for AbTronic, Ab Energizer and Fast Abs to Dr. Mazis. (Mazis, Tr. 120 – 121).

Response to Finding No. 184:
Complaint Counsel have no specific response.

185. Although Complaint Counsel provided Dr. Mazis with advertisements for the AbTronic, Ab Energizer and Fast Abs products, (CX 58, ¶ 9; (Mazis, Tr. 120 - 121), Complaint Counsel did not provide Dr. Mazis with advertisements for any other EMS ab product on the market. (Mazis, Tr. 123).

Response to Finding No. 185:
Complaint Counsel have no specific response.

186. When asked at trial whether he should have considered other EMS ab products in reaching his opinions, Dr. Mazis testified that while consumers would form a category belief based on seeing EMS ab belts, they would not include in that category other EMS ab products unless they were "relatively similar" in appearance. (Mazis, Tr. 135 - 136). However, Dr. Mazis admitted that this opinion was just "a theory" that he did not test. (Mazis, Tr. 136 - 137).

Response to Finding No. 186:
Complaint Counsel have no specific response.

187. Indeed, Complaint Counsel offered scant evidence on this issue. Kevin Towers, a Commission investigator, was asked to characterize differences he perceived between "ab belts" and the Electrosage, IGIÁ Mini Wireless Massage, Accusage and Electro Gym, (Towers, Tr. 300 - 305). But Mr. Towers admitted he had no expertise in the areas of advertising and marketing, and offered no opinion as to whether consumers would perceive any similarities or dissimilarities between those products. (Towers, Tr. 310).

Response to Finding No. 187:
Complaint Counsel offered ample evidence that ab belts clearly vary in appearance and configuration from other EMS devices. Ab belts are secured about the waist and look like a belt. Other EMS devices identified by the Respondents consist of control box with varying numbers of wires extending from the control box, and at the end of each wire is an electrode that may be individually applied to discrete parts of the body. (*Compare* JX 2 through JX 5, JX 7 through JX 10, RX 75, RX 76, RX 77, RX 79 with RX 72-RX 74, RX; *see also* Towers, Tr. 300-03).

188. Similarly, Dr. Mazis offered no opinion whatsoever on the issue of whether any of the

advertisements for other EMS ab belt products that were admitted into evidence would not be considered by consumers in the same category as "ab belts."

Response to Finding No. 188:

In fact, Dr. Mazis stated that people would probably establish a different category in their minds for products that looked different from the AbTronic, Ab Energizer and Fast Abs or that made different claims. (Mazis, Tr. 136).

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

Response to Finding No. 189:

In fact, Dr. Mazis stated that people would probably establish a different category in their minds for products that looked different from the AbTronic, Ab Energizer and Fast Abs (for example, products that had wires) or that made different claims. (Mazis, Tr. 136).

190. Advertisements for other EMS ab products that Mr. Khubani considered when he decided to market the Ab Force were played in Court during the trial during Respondents' case-in-chief. (Khubani Tr. 449-460; RX-72; RX-73; RX-74; RX-77). Mr. Khubani testified that he considered those EMS ab products to be within the same marketing category as EMS
ab belts because they used the same electrical muscle stimulation technology, were advertised using similar claims and visuals, and were on the market at the same time as other ab belts. (Khubani, Tr. 451-474).

Response to Finding No. 190:

There is no record evidence that Mr. Khubani actually considered these products when he decided to market the Ab Force; the cited testimony merely shows that Mr. Khubani saw other EMS products (Khubani, Tr. 450, 458) or was "aware" of them. (Khubani, Tr. 457, 460, 461, 463). Elsewhere, Mr. Khubani testified quite clearly that he began to consider marketing an

electronic ab belt for sale to consumers after noticing that the AbTronic ab belt was listed in the *JW Greensheet*. (JX 1, ¶ 16; Khubani, Tr. 248-49).

Complaint Counsel objects to the use of the phrase "other ab belts" with reference to RX7 2 through RX 74 as there is no evidence that those products are ab belts.

191. But Dr. Mazis was never called to rebut the idea that these products are so different that they would not be considered part of the category. Without expert testimony that consumers would not consider these EMS ab products in the same category as EMS ab belts, there is no evidence in the record to rebut Mr. Khubani's understanding that these products were all, in the advertising context, part of the same category.

Response to Finding No. 191:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. In fact, Dr. Mazis stated that people would probably establish a different category in their minds for products that looked different from the AbTronic, Ab Energizer and Fast Abs or that made different claims. (Mazis, Tr. 136).

192. By failing to consider other EMS ab belts or EMS ab products, Dr. Mazis limited his facial analysis to a universe consisting entirely of the Ab Force commercials, and the infomercials for AbTronic, Ab Energizer and Fast Abs.

Response to Finding No. 192:

Dr. Mazis' facial analysis focused on the top three advertised and sold ab belts. Mr. Khubani admitted that he referred to the Ab Tronic in the Ab Force advertisement, in his testimony regarding the factory that made both the Ab Force, the AbTronic and the Fast Abs ab belts he

stated, “They were, indeed, making the product for one of the other products, the one I referred to in the advertisement.” (Khubani, Tr. 479 - 480)

193. Because Dr. Mazis’ categorization theory and indirect effects analysis required him to look beyond the four corners of the Ab Force advertising, the fact that he was limited in his review in this manner is sufficient, standing alone, to render his facial analysis not meaningfully probative of any issue in this matter.

Response to Finding No. 193:

Respondents’ proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents’ Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. This argument is properly addressed in Complaint Counsel's Response to Respondents’ Post Trial Brief.

d. Dr. Mazis also assumed, but did not determine, that other factors would have shaped consumer preconceptions about ab belts.

194. In addition to television advertising for AbTronic, Ab Energizer and Fast Abs, Dr. Mazis identified two other elements that would influence consumer preconceptions about EMS ab belts. (Mazis, Tr. 64 – 66). Dr. Mazis describe these influences as “indirect effects.” (Mazis, Tr. 65).

Response to Finding No. 194:

Complaint Counsel have no specific response.

195. First, Dr. Mazis testified that “word-of-mouth” communication was also a factor because seeing ab belt advertisements and purchasing ab belt products are likely to create word-of-mouth communication by purchasers who want to talk about it with others or even demonstrate it for others to see. (Mazis, Tr. 64 - 65). He stated that consumers could hear about the products, see the products in use, and that such information could create category beliefs. (Mazis, Tr. 65). But Dr. Mazis admitted that while “other messages” could be conveyed by word-of-mouth, he was “only focusing on the messages of interest in this case.” (Mazis, Tr. 169).

Response to Finding No. 195:
Complaint Counsel have no specific response.

196. Dr. Jacoby testified that Dr. Mazis had no way of knowing what word-of-mouth, if any, was being generated about AbTronic, Ab Energizer and Fast Abs, or any other EMS ab product. (Jacoby Tr. 347 - 348). As Dr. Jacoby noted, Dr. Mazis could have tested the impact of word-of-mouth communication and other indirect effects on consumer perceptions about ab belts generally and the Ab Force specifically. (Jacoby Tr. 349 – 351). He did not, and instead impermissibly relied on unproven assumptions about the effect of word-of mouth communication. (Jacoby Tr. 349 - 351).

Response to Finding No. 196:
Complaint counsel object to this proposed finding to the extent that it alleges that Dr. Mazis impermissibly relied on unproven assumptions. Dr. Mazis was qualified on the record as "an expert in consumer response to advertising, advertising effectiveness, consumer behavior, marketing and consumer research, including the design and implementation of surveys and analyses of surveys." (Mazis, Tr. 41). Under Commission precedent, his opinions are entitled to consideration as expert opinion.

197. Second, Dr. Mazis testified that "a number of these products were sold at retail," and that consumers seeing the products on store shelves could affect category beliefs held by consumers about ab belts. (Mazis, Tr. 65). Although Dr. Mazis testified he reviewed the retail packages for the AbTronic, Ab Energizer and Fast Abs products, he did not review retail packages for other EMS ab products. (Mazis, Tr. 125 - 126). Moreover, Dr. Mazis admitted that he had no idea what the level of take-away was for consumers who saw retail packaging.

Response to Finding No. 197:
Dr. Mazis also testified that the reason companies put claims on packages is in the belief that consumers read the packages. (Mazis, Tr. 139-40).

198. However, as Dr. Jacoby noted, it was conjecture on Dr. Mazis' part to assume that consumers would discriminate among thousands and thousands of retail packages in stores to review the packaging and develop beliefs about EMS ab products. (Jacoby, Tr. 348). Consumers may not even notice them. (Jacoby, Tr. 348). As Dr. Jacoby testified, while Dr. Mazis is correct that consumers may develop preconceptions about ab belt

products through word-of-mouth communication or retail packaging, his opinion that these elements had shaped consumer perceptions was another matter entirely. (Jacoby, Tr. 349).

Response to Finding No. 198:
Dr. Mazis' opinion is based on his professional training and expertise in the areas of consumer response to advertising, including facial analysis of advertising, advertising effectiveness, consumer behavior, marketing and consumer research, including design and implementation of surveys and analysis of surveys. (Mazis, Tr. 42).

e. Dr. Mazis cannot know whether consumers who saw the Ab Force ad also saw the ads for AbTronic, Ab Energizer and Fast Abs.

1) At the time he offered his facial analysis, Dr. Mazis had no credible, independent knowledge of the number of times the advertisements for AbTronic, Ab Energizer and Fast Abs aired.

199. In his Report, Dr. Mazis stated that "Thirty-minute infomercials were aired for AbTronic, Ab Energizer and Fast Abs. These infomercials were among the most frequently-aired infomercials in the nation." (CX 58, ¶ 15).

Response to Finding No. 199:
Complaint Counsel have no specific response.

200. In support of that statement, Dr. Mazis stated that "an infomercial for the AbTronic…was aired more than 2,000 times (30-minute and two-minute versions) from April 2001 through February 2002." (CX 58, ¶ 15).

Response to Finding No. 200:
Complaint Counsel have no specific response.

201. No two-minute version of an AbTronic ad was ever offered into evidence.

Response to Finding No. 201:
Complaint Counsel offered, and the Court admitted into evidence, the transcript of the AbTronic two-minute commercial. (CX 96 (Complaint Exhibit 4)).

202. No evidence was offered identifying how many times an AbTronic infomercial aired

compared to an AbTronic two-minute commercial.

Response to Finding No. 202:
Complaint Counsel have no specific response.

203. Dr. Mazis also stated that "an infomercial for Ab Energizer was aired more than 1,650 times between October, 2001 and February 2002." (CX 58, ¶ 15).

Response to Finding No. 203:
Complaint Counsel have no specific response.

204. Dr. Mazis also stated that "an infomercial for Fast Abs…appeared more than 1,200 times from November, 2001 through February 22, 2002." (CX 58, ¶ 15).

Response to Finding No. 204:
Complaint Counsel have no specific response.

205. At trial, Dr. Mazis admitted that he did not independently confirm any of these figures, but testified that he had been provided this information either through a review of the Complaint issued by the Commission against the advertisers of AbTronic, Ab Energizer and Fast Abs, or by being told that figure by Complaint Counsel. (Mazis, Tr.120). Dr. Mazis' Report suggests that he relied solely on the Complaints filed by the Commission. (CX 58, ¶ 15, n. 1 – 3).

Response to Finding No. 205:
Complaint Counsel objects to the word "admitted." Dr. Mazis testified that he had access to the underlying reports and that he read them. (Mazis, Tr. 120-22).

206. The Complaint against the advertiser of the AbTronic was rejected as evidence of any matter relevant to this proceeding.

Response to Finding No. 206:
The figures recited in the Complaint are in evidence in this proceeding. (*See* CX 126.)

207. Dr. Mazis testified that he also based his statement that these infomercials "were among the most frequently aired infomercials in the nation" on reports by "some service that rated infomercial frequency." (Mazis, Tr. 119 - 120).

Response to Finding No. 207:
Complaint Counsel have no specific response.

208. Dr. Mazis is not familiar with the name of the service that produced the reports. (Mazis, Tr. 120).

Response to Finding No. 208:

Dr. Mazis recalled that the "reports could have been from the Infomercial Monitoring Service." (Mazis, Tr. 122).

209. Dr. Mazis testified that he was not familiar with the unidentified reports, or what "the underlying methodology was and so on." (Mazis, Tr. 120). He further testified that "they were relied on by the FTC in its complaints against those three companies [the AbTronic, Ab Energizer and Fast Abs advertisers], so I assume that the data were reliable, but that's—that's all the information I have on those—on that service." (Mazis, Tr. 120)

Response to Finding No. 209:

Complaint Counsel have no specific response.

210. Consequently, at the time he made his facial analysis, Dr. Mazis based his opinion on a false or, at the very least, unreliable assumption that the AbTronic, Ab Energizer and Fast Abs infomercials were "among the most frequently aired infomercials in the nation." (Mazis, Tr. 120). Indeed, even through trial, Dr. Mazis had no way of knowing whether that assumption was true.

Response to Finding No. 210:

The cited testimony does not support Finding No. 210 and Respondents pointed to no other record evidence in support. At the time Professor Mazis made his facial analysis, he based his opinion, in part, on market report data collected from third parties by the Federal Trade Commission. Professor Mazis testified that he read these reports and relied on the information contained therein. (Mazis 209-11).

Respondents have adduced no evidence that these market reports are false, and they are incorrect in characterizing these reports as unreliable, for they themselves receive and use these reports in the course of their business. (JX 1, ¶ 18; Khubani, Tr. 248-249, 525-26, 531, 546). For example, Mr. Khubani looks at the *J.W. Greensheet* report weekly to see the top selling

products advertised via television infomercials and spots. (Khubani, Tr. 248, 525).

2) The advertising budgets for the AbTronic, Ab Energizer and Fast Abs products provided Dr. Mazis with no evidence of the number of times the advertisements aired

211. In his Report, Dr. Mazis also supports his claim that the infomercials for the AbTronic, Ab Energizer and Fast Abs "were among the most frequently aired infomercials in the nation" by citing to the advertising budgets for each product. (CX 58, ¶ 15). He testified that this information was provided in his Report to support the view that "the ads for these products were aired many times on TV and—and many consumers would have been exposed to these ads." (Mazis, Tr. 126, 166) (emphasis added).

Response to Finding No. 211:
Complaint Counsel have no specific response.

212. Dr. Mazis stated that the "[m]ore than $18 million was spent to advertise" the thirty-minute and two-minute ads for the AbTronic. (CX 58, ¶ 15). He also stated that "[m]ore than $8 million was spent to broadcast the Ab Energizer infomercial." (CX 58, ¶15). Finally, he stated that "[m]ore than $12 million was spent to air infomercials for Fast Abs." (CX 58, ¶ 15).

Response to Finding No. 212:
Complaint Counsel have no specific response.

213. These figures were based on the Complaints issued against the advertisers of the AbTronic, Ab Energizer and Fast Abs products. (CX-58, ¶ 15, n. 1 – 3).

Response to Finding No. 213:
These figures were based on the report of the Infomercial Monitoring Service, whose figures were recited in the Complaints issued against the advertisers of the AbTronic, Ab Energizer and Fast Abs products. (*See* CX 126.)

214. Dr. Mazis agreed that the total amount spent to air these advertisements was approximately $38 million. (Mazis, Tr. 127 - 128).

Response to Finding No. 214:

Complaint Counsel have no specific response.

215. But Dr. Mazis admitted that he did not know the total value of all infomercial time sold in the United States on a yearly basis. (Mazis, Tr. 128). Nor did he know how many television stations there were in the United States. (Mazis, Tr. 127). Dr. Mazis offered no testimony on how many airings or how many stations the amount spent on AbTronic, Ab Energizer and Fast Abs would include.

Response to Finding No. 215:
Complaint Counsel have no specific response.

216. Consequently, Dr. Mazis also acknowledged that he did not know whether $38 million saturated the airwaves with ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 126 - 127). He admitted that he did not have a comment because he had not "studied that issue in detail." (Mazis, Tr. 126 - 127).

Response to Finding No. 216:
Complaint Counsel have no specific response.

217. Dr. Jacoby, however, had looked into the issue in some detail. He testified that the annual amount of advertising spent in the United States is $150 billion per year. (Jacoby, Tr. 393). As an example of how large that market is, Dr. Jacoby provided the example of Gillette's advertising budget for the Mach 3 razor, which topped $3 billion dollars for that one product alone. (Jacoby, Tr. 393).

Response to Finding No. 217:
Complaint Counsel object to the firsts sentence of Finding 217 as argumentative and conclusory.

218. The annual value of all television time available to air infomercials is approximately $900 million. (Khubani, Tr. 507-508). This is less than what some companies spend to advertise just one product on television. (Jacoby, Tr. 393).

Response to Finding No. 218:
Complaint Counsel have no specific response.

219. Given the enormous amount of advertising dollars spent annually, it is unlikely that the $38 million spent to advertise AbTronic, Ab Energizer and Fast Abs infomercials had any effect of "saturating" the market. (Jacoby, Tr. 393).

Response to Finding No. 219:
Complaint Counsel have no specific response.

3.) There is no reliable basis for Dr. Mazis' assumption that consumers who saw the Ab Force ads would have seen the infomercials for AbTronic, Ab Energizer and Fast Abs.

220. Except for the statements in his Report concerning the number of airings and advertising dollars spent on the ads for the AbTronic, Ab Energizer and Fast Abs, Dr. Mazis had no other information to support his view that the ads for AbTronic, Ab Energizer and Fast Abs "were among the most frequently aired infomercials in the nation." (CX 58, 115).

Response to Finding No. 220:
Complaint Counsel have no specific response.

221. Dr. Mazis was generally familiar with the fact that infomercials and spots may air at different times. Specifically, he testified, as did Mr. Khubani (Khubani Tr. 512), that infomercials are not typically shown in prime time on broadcast stations. (Mazis, Tr. 129). He also stated that infomercials typically would be broadcast in non-peak times during the week, which he defined as before 7:00 p.m. and after 10:00 p.m., and would include the overnight hours of midnight to 6:00 a.m. (Mazis, Tr. 129 - 130). They typically would also be shown at anytime during the weekend. (Mazis, Tr. 129 -130).

Response to Finding No. 221:
Complaint Counsel have no specific response.

222. He also understood that this schedule did not apply to spot advertising. For example, networks such as CNN and MSNBC and CNBC, which would ordinarily not take infomercial advertising, do accept spot advertising. (Mazis, Tr. 131 - 132).

Response to Finding No. 222:
Complaint Counsel have no specific response.

223. But Dr. Mazis was unfamiliar with any specifics concerning the dissemination and broadcasting of any of the advertisements at issue. He testified that he did not know the times of day that the ads for AbTronic, Ab Energizer and Fast Abs were shown. (Mazis, Tr. 128). He also testified that he did not know how frequently, if at all, the infomercials for AbTronic, Ab Energizer and Fast Abs overlapped in terms of time slots with airing of the Ab Force. (Mazis, Tr. 132 - 133).

Response to Finding No. 223:
Complaint Counsel object to the first sentence of Finding 223 as argumentative and conclusory. Dr. Mazis never said he was unfamiliar with any specifics concerning the dissemination and broadcasting of any of the advertisements at issue.

224. Although Dr. Mazis acknowledged, for example, that an airing on a local station at 2:00 a.m. in Dubuque, Iowa and an airing nationally on the Lifetime cable network would each count as one airing, (Mazis, Tr. 128 - 129), he did not know how many times the ads for AbTronic, Ab Energizer and Fast Abs aired locally or nationally. (Mazis, Tr. 129). Dr. Mazis also did not know how many of the ads for AbTronic, Ab Energizer and Fast Abs aired on cable or broadcast. (Mazis, Tr. 129).

Response to Finding No. 224:
Complaint Counsel have no specific response

225. Most importantly, Dr. Mazis testified that he did not know how many consumers would have been exposed to the ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 128, 182 -183). Indeed, he had no opinion about the likelihood that somebody who saw that the Ab Force commercials would also have seen one of the ads for AbTronic, Ab Energizer and Fast Abs, because he had "no information on that." (Mazis, Tr. 172).

Response to Finding No. 225:
Respondents have mischaracterized Dr. Mazis' testimony. Dr. Mazis also testified, "My assumption is that there's a lot of exposure to a lot of these different products." (Mazis, Tr. 172) . . . "There's a lot of movement of people across different infomercials in different time periods, and so people that are interested in exercise products or losing weight or are concerned about their abs, those people would - there's what's called selective attention." (Mazis, Tr. 173).

226. Instead, he relied on his "assumption that there's a lot of exposure to a lot of different products," because these infomercials ran "on weekends, late nights and so on, when there aren't a lot of programming choices out there." (Mazis, Tr. 172 - 173). This assumption, however, ignores his testimony that spot advertising may not necessarily run at the same time or on the same stations to which infomercials are limited. (Mazis, Tr. 131 - 132). Indeed, this assumption is flatly contradicted by. Mr. Khubani's testimony that only 10% of the Ab Force spots aired during day parts when infomercials would typically be show. (Khubani Tr. 513-515).

Response to Finding No. 226:
Respondents have mischaracterized Dr. Mazis' testimony. Dr. Mazis also testified, "My assumption is that there's a lot of exposure to a lot of these different products." (Mazis, Tr. 172) . . . "There's a lot of movement of people across different infomercials in different time periods,

and so people that are interested in exercise products or losing weight or are concerned about their abs, those people would - there's what's called selective attention." (Mazis, Tr. 173).

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

Response to Finding No. 227:

Complaint counsel object to the allegation that there is no evidence demonstrating an overlap in ad viewership for Ab Force ads and ads for the other three ab belts. Respondents' admitted an overlap by stating, "I'm sure you've seen," at the beginning of each of their TV ads. Based on his marketing expertise, Dr. Mazis testified that consumers typically watch TV in multiple time slots; thus it is more than feasible that a person could see an infomercial for, the AbTronic, Fast Abs, or Ab Energizer and also see an Ab Force advertisement on a different channel at a different time. (Mazis, Tr. 184-85). Complaint counsel also object to the assertion that Doctor Mazis did not describe factors that affect consumers' retention and comprehension of advertising. Dr. Mazis testified that, through the process of selective attention, people who have an interest in certain product categories such as those relating to losing weight, or exercise, *e.g.*, the target audience, will pay attention to commercials for such products. Thus, based on his knowledge of consumer behavior and how people watch TV, if there is a propensity for people to watch one ab belt infomercial, there is a propensity for those same people to selectively attend to other such advertising. (Mazis, Tr. 173).

228. Finally, he admitted that he had seen no empirical data about the ability of viewers to

remember what they saw in the infomercials for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 184). He conceded that his opinions "about the take-away from those ads are just based on my facial analysis of those ads." (Mazis, Tr. 184). However, unlike consumers who just "surf in and out" of those infomercials, Dr. Mazis reached his facial analysis after identifying the claims alleged in the Complaint and seeing the infomercials several times. (Mazis, Tr. 141 - 142, 184). As Dr. Jacoby testified, the fact that Dr. Mazis reviewed the Complaint and the allegations therein had the effect of biasing Dr. Mazis' facial analysis. (Jacoby, Tr. 343 - 344).

Response to Finding No. 228:

Complaint counsel object to this finding to the extent it alleges that reading the Complaint before he conducted his facial analysis had the affect of biasing it. Reading the complaint and reviewing the attachments thereto was necessary to become familiar with the underlying evidence. Dr. Mazis has been an expert witness in nine FTC cases over 25 years (Mazis, Tr. 39), and he testified that reading the complaint in such matters is something he would do in any case he gets involved in. (Mazis, Tr. 141). He testified that the first thing he would look at in every case is the complaint. He stated, "I can't imagine an expert getting involved in a case and not understanding what the key issues are. You have to read the complaint." (Mazis, Tr. 142).

229. Despite having no reliable information regarding how frequently any one advertisement at issue had aired, and no information identifying the stations, days or times those ads aired, Dr. Mazis stood by his belief that "many consumers would have been exposed to these ads." (Mazis, Tr. 166). This is not credible testimony supported by reliable evidence.

Response to Finding No. 229:

Professor Mazis testified that he reviewed the IMS report, (Mazis, Tr. 120-22), which states the number of times that Infomercial Monitoring Service detected an airing of each electronic ab belt infomercial at issue. (CX 126). Complaint Counsel object to the rest of the Respondents' proposed finding as argument and not averments of fact.

230. At bottom, Dr. Mazis' assumption that consumers who saw the Ab Force commercial also likely saw the ads for AbTronic, Ab Energizer and Fast Abs is based on no reliable evidence whatsoever, and constitutes little more than speculation or conjecture on his part. (Jacoby, Tr. 348 - 349). Moreover, Dr. Mazis provided no evidence those Ab Force ad viewers who did happen to see the ads for AbTronic, Ab Energizer and Fast Abs would retain or even comprehend that information. (Mazis, Tr. 184).

Response to Finding No. 230:

Respondents' proposed finding is argumentative, conclusory, and repetitive. Complaint Counsel specifically deny the allegations that there is no evidence that viewers of the AB Force ads likely saw the ads for AbTronic, AB Energizer, and Fast Abs or that viewers who did see them would retain or comprehend them. The basic assumption underlying Respondents' argument is that television viewing habits of consumers are rigid and unchangeable. Respondents would have the Court accept the preposterous notion that people whose main television viewing time is, for example, during the prime time hours of 7:00 pm to 10:00 pm never watch TV during non prime time hours such as weekends or late night where infomercials are more likely to appear. Dr. Mazis is an expert on consumer behavior and marketing. He testified that Consumers typically watch TV in multiple time slots; thus it is more than feasible that a person could see an infomercial for, the AbTronic, Fast Abs, or Ab Energizer and also see an Ab Force advertisement on a different channel at a different time. (Mazis, Tr. 184-185) It is reasonable, therefore, to assume, as Dr. Mazis did, that many consumers' television viewing hours are flexible enough to encompass both prime time and late night or weekend hours.

Respondents also argue that Dr. Mazis could not verify that viewers of the infomercials for AbTronic, AB Energizer and Fast Abs comprehended or retained the information in the ads. Dr. Mazis did testify however, based on his experience and knowledge of consumer behavior, that viewers of ab belt infomercials do not necessarily remember specifics of the ads they saw.

Rather, the three ab belt infomercials produced general category beliefs about ab belts that would be triggered by Ab Force ads. (Mazis, Tr. 156-57). These beliefs included weight loss, inch loss, well-developed abs and effective alternatives to exercise.

The most convincing evidence that many viewers of the Ab Force spots were familiar with the infomercials for AbTronic, AB Energizer, and Fast Abs is that Respondents intended to reach consumers familiar with them. The evidence clearly establishes that Respondents intended infomercials about those products to be "reference points" for their "compare and save" Ab Force advertisements. (Khubani, Tr. 487, 490). Mr. Khubani is an experienced and savvy direct sales marketer who knew what he had to do to reach his intended audience. It is reasonable to assume, therefore, that the ads he created reached their intended audience, *e.g.*, persons familiar with the infomercials for the other three ab belts. As Dr. Mazis explained, marketers use media buying services to position their advertising in markets and in media where likely purchasers of the marketer's product will see it. In order to reach the intended buyers, the buying service matches the demographics of the target audience for the marketer's ads with the demographics of audience of the media outlets. (Mazis, Tr. 143-46). Regardless, therefore, of where or when Ab Force ads appeared as compared to media schedules for the AbTronic, AB Energizer, and Fast Abs infomercials, Dr. Mazis was correct in assuming that many viewers of the former were familiar with the latter.

4.) Complaint Counsel has offered no other evidence to establish that consumers who saw the Ab Force ad would likely have seen the ads for AbTronic, Ab Energizer and Fast Abs

i. Information provided by advertisers and shippers

231. Information regarding the advertising dollars and airings concerning the Ab Energizer infomercial was provided by Gary Hewitt and Douglas Gravink, former officers of Energizer Products, Inc., a company they formed for the purpose of managing direct response sales for the Ab Energizer. (JX 6, ¶¶ 12 - 13).

Response to Finding No. 231:
Complaint Counsel have no specific response.

232. Approximately $18,567,254 was spent buying media for Ab Energizer advertising. (JX 6, ¶ 13). Ab Energizer infomercials or spots ran at various times of the day, locally and nationally, from September 2001 through April 2002. (JX 6, ¶ 14). The infomercial was aired over 20,000 times during that period. (JX 6, ¶ 14).

Response to Finding No. 232:
Complaint Counsel have no specific response.

233. Information regarding the advertising dollars and airings concerning the Fast Abs infomercial was provided by John W. Kirby, Jr., who was the CEO of eBrands Commerce Group, LLC at the time that eBrands helped market the Fast Abs product. (JX 6, ¶ 7).

Response to Finding No. 233:
Complaint Counsel have no specific response.

234. Approximately $15 million was spent buying media for Fast Abs advertising. (JX 6, ¶ 9). Fast Abs infomercials or spots ran at various times of the day, locally and nationally, from November 8, 2001 through February 24, 2002. (JX 6, ¶ 10). The infomercial was aired approximately 8,227 times during that period. (JX 6, ¶10).

Response to Finding No. 234:
Complaint Counsel have no specific response.

235. Complaint Counsel has offered no evidence demonstrating the number of times the infomercial for the AbTronic product aired, or the amount of advertising dollars spent on AbTronic. Complaint Counsel has instead produced evidence regarding the approximate number of AbTronic products shipped. (JX 11, ¶ 4 - 5). This evidence was offered by the stipulated testimony of Jon Nokes, an officer of Smart Inventions, Inc. TV Products Fulfillment and Smart Living Inc. (JX 11, ¶ 1). However, none of these companies had any involvement in the direct response marketing of the AbTronic product, nor did they have any involvement in the preparation or airing of the television commercial for the Ab Force. (JX 11, ¶2).

Response to Finding No. 235:
Respondents are mistaken. Complaint Counsel provided a report from the Infomercial

Monitoring Service which showed that the AbTronic was aired over 2,000 times from April, 2001 to February, 2002. (CX 126)

236. The number of AbTronic products shipped provides no evidence of the number of times the AbTronic infomercial aired or the number of consumers who may have seen the AbTronic infomercial.

Response to Finding No. 236:

The number of AbTronic products shipped to direct response customers is some evidence of the prominence of the product and the number of consumers who saw AbTronic infomercials and placed an order for this product. Gross direct response sales for the AbTronic ab belt were approximately 600,000 units or more. (JX 11, ¶ 4).

ii. Jordan Whitney Greensheets

237. Complaint Counsel offered the testimony of Kevin Towers, an investigator with the Federal Trade Commission, to summarize information contained in weekly reports provided by Jordan Whitney Monitoring, Inc. (the "JW Greensheets")(Towers, Tr. 284).

Response to Finding No. 237:

Complaint Counsel have no specific response.

238. The JW Greensheet is a weekly report published by Jordan Whitney, Inc., and is also called a direct-response television marketing report. (Towers Tr. 285).

Response to Finding No. 238:

Complaint Counsel have no specific response.

239. Mr. Towers reviewed the JW Greensheet weekly reports from September 2001 through March 2002. (Towers Tr. 286; CX 62; CX 72 through CX 95).

Response to Finding No. 239:

Complaint Counsel have no specific response.

240. Mr. Towers testified that the JW Greensheets contain three rankings. (Towers, Tr. 287). One ranking contained in each JW Greensheet is a Top 50 ranking of infomercials. The second is a ranking of Top 40 direct response spots. And the third is a Top 20 ranking of

infomercial products. (Towers, Tr. 287; CX 62; CX 72 through CX 95).

Response to Finding No. 240:
Complaint Counsel have no specific response.

241. In each report, printed below the Top 50 ranking of infomercials, is a short description of the means by which Jordan Whitney determines its rankings of infomercials and states the reporting period for the ranking. (Towers, Tr. 287 - 288).

Response to Finding No. 241:
Complaint Counsel have no specific response.

242. That description, in each JW Greensheet, states as follows: "These are the top infomercials based on confidential media budgets and Jordan Whitney's monitoring of national cable and selected broadcast markets for the week ending," followed by a date. (CX 62; CX 72 through CX 95).

Response to Finding No. 242:
Complaint Counsel have no specific response.

243. In each report, printed below the Top 40 ranking of direct response spots, is a short description of the means by which Jordan Whitney determines its rankings of spots and states the reporting period for the ranking. (CX 62; CX 72 through CX 95).

Response to Finding No. 243:
Complaint Counsel have no specific response.

244. That description, in each JW Greensheet, states as follows: "These are the top forty direct response spots which sell hard products directly or indirectly (including 900# lines, excluding music offers) based on confidential media budgets and Jordan Whitney's monitoring of national cable and selected broadcast markets for the week ending," followed by a date. (CX 62; CX 72 through CX 95).

Response to Finding No. 244:
Complaint Counsel have no specific response.

245. In each report, printed below the Top 20 ranking of infomercial products, is a short description of the means by which Jordan Whitney determines its rankings of infomercial products and states the reporting period for the ranking. (CX 62; CX 72 through CX 95).

Response to Finding No. 245:
Complaint Counsel have no specific response.

246. That description, in each JW Greensheet, states, in part, as follows: "Rankings are based

on media expenditures and Jordan Whitney's monitoring of national cable and selected broadcast stations." (CX 62; CX 72 through CX 95).

Response to Finding No. 246:
Complaint Counsel have no specific response.

247. The JW Greensheets also provide summaries of ongoing infomercials, which are described as infomercials that "were observed with some frequency during the preceding 60 days." (CX 62; CX 72 through CX 95).

Response to Finding No. 247:
Commencing with the J.W. Greensheet published January 14, 2002, the ongoing infomercials are described as infomercials that "either have been reviewed by Greensheet or appear among our ranked shows during the past ninety days." (E.g., CX 88, T011306 (emphasis added)). From that point onward, the "ongoing infomercials" are not identified as having been "observed with some frequency" as Respondents claim.

248. Mr. Towers testified that he did not know the confidential media budgets on which the rankings are based for any of the products, because such information is proprietary information. (Towers, Tr. 291).

Response to Finding No. 248:
Complaint Counsel have no specific response.

249. Mr. Towers testified that he did not know what type of information goes into any confidential media budgets that may be considered by Jordan Whitney in setting the rankings. (Towers, Tr. 315 - 316).

Response to Finding No. 249:
Complaint Counsel have no specific response.

250. Complaint Counsel has produced no evidence identifying what type of information goes into any confidential media budgets that may be considered by Jordan Whitney in setting the rankings.

Response to Finding No. 250:
The trial testimony of Mr. Khubani confirmed that direct response advertisers actually give information to Jordan Whitney Inc. in the form of financial data relating to media expenditures.

(Khubani, Tr. 526).

251. Mr. Towers testified that he did not know what is meant by "monitoring" as that term is used by Jordan Whitney in setting the rankings. (Towers, Tr. 316).

Response to Finding No. 251:
Complaint Counsel have no specific response.

252. Complaint Counsel has produced no evidence identifying what is meant by "monitoring" as that term is used by Jordan Whitney in setting the rankings.

Response to Finding No. 252:
The evidence shows that the *J.W. Greensheets* also use the phrases "observed" to describe how the company determines how frequently infomercials appear. (E.g., CX 88, T011309; CX 62; CX 72 through CX 95). Respondents have produced no evidence or testimony to show that the word "monitoring" has any meaning other than that used in common parlance.

253. Mr. Towers testified that he did not know what national cable stations Jordan Whitney monitors in setting the rankings. (Towers, Tr. 317).

Response to Finding No. 253:
Complaint Counsel have no specific response.

254. Complaint Counsel has produced no evidence identifying what national cable stations Jordan Whitney monitors in setting the rankings.

Response to Finding No. 254:
Complaint Counsel have no specific response.

255. Mr. Towers testified that he did not know what selected broadcast markets Jordan Whitney monitors in setting the rankings. (Towers, Tr. 317).

Response to Finding No. 255:
Complaint Counsel have no specific response.

256. Complaint Counsel has produced no evidence identifying what selected broadcast markets Jordan Whitney monitors in setting the rankings.

Response to Finding No. 256:

Complaint Counsel have no specific response.

257. With regard to the JW Greensheet summaries of ongoing infomercials, Mr. Towers testified that he did not know with what “frequency” infomercials aired in order to be identified in the summaries of ongoing infomercials. (Towers, Tr. 321).

Response to Finding No. 257:
Complaint Counsel have no specific response.

258. Complaint Counsel has produced no evidence identifying with what “frequency” infomercials aired in order to be identified in the summaries of ongoing infomercials.

Response to Finding No. 258:
Complaint Counsel have no specific response.

259. Mr. Towers testified that he did not know how frequently any advertisement ranked in the JW Greensheets was aired, (Towers, Tr. 318), or how much more or less frequently any single advertisement in a ranking aired compared to any other single advertisement ranked. (Towers, Tr. 326).

Response to Finding No. 259:
Mr. Towers specifically testified that he did not precisely how many times the three top-ranked electronic ab belts appeared on television in infomercials or television commercials. Otherwise, Complaint Counsel have no specific response.

260. Complaint Counsel has produced no evidence identifying how frequently any advertisement ranked in the Greensheets was aired, or how much more or less frequently any single advertisement in a ranking aired compared to any other single advertisement ranked.

Response to Finding No. 260:
Complaint Counsel has produced extrinsic evidence of how frequently each of the ab belt infomercials ranked in the J.W. Greensheets Top 50 infomercials were televised. Infomercials for AbTronic appeared at least 2,000 times. (CX 126). Infomercials for Fast Abs appeared 8,227 times. (CX 126; JX 6, ¶ 10). Infomercials for AB Energizer appeared over 20,000 times. (CX 126; JX 6, ¶ 14).

261. Complaint Counsel has produced no evidence identifying how much weight Jordan Whitney gave media budgets or how much weight Jordan Whitney gave monitorings in determining rankings.

Response to Finding No. 261:
Complaint Counsel have no specific response.

262. Complaint Counsel produced no evidence demonstrating that the JW Greensheet rankings were reliable. Indeed, the ranking information provided is at variance with other ranking information admitted into evidence. (Compare CX 62, CX 72 through CX 95 with CX 126). They are also, at times, internally inconsistent, ranking an infomercial higher or lower in the Top 50 rankings than the infomercial's product ranking in the Top 20 infomercial products rankings, even though both rankings appear to be based on the same media budget and monitoring information. (see, e.g., Towers, Tr. 321-323; CX 79).

Response to Finding No. 262:
Each of the preceding statements is contradicted by the record in this matter.

First, Complaint Counsel did produce evidence that the J.W. Greensheets are reliable; much of this evidence relates to Respondents' own reliance on this publication. Telebrands has subscribed to the J.W. Greensheet for twelve years, and it costs about $250 a week. (Khubani, Tr. 248-249, 525; JX 1, ¶ 18). Ajit Khubani testified that he reads the J.W. Greensheet weekly to see the top-selling products advertised via television infomercials and spots. (Khubani, Tr. 248, 525). Telebrands has used the information in J.W. Greensheets in dealing with retailers, to encourage them to sell Telebrands products. (Khubani, Tr. 525). Telebrands has also used the J.W. Greensheets in its own decision making; Mr. Khubani began to consider marketing the Ab Force after noticing another electronic ab belt in the J.W. Greensheets. (Khubani, Tr. 248-49; JX 1, ¶ 16). In February 2004, Respondents provided Complaint Counsel with old copies of the J.W. Greensheets from September 2001 to March 2002 that they had in their possession. (Towers, Tr. 284).

Second, the ranking information provided in the J.W. Greensheets is not at variance with other ranking information admitted into evidence. Quantitatively, both Jordan Whitney Inc. and the Infomercial Monitoring Service have reported identical rankings for infomercials during the same time period. For example, in its December 31, 2001/January 7, 2002 double issue, Jordan Whitney Inc. ranked the AB Energizer ab belt at #1 and the Fast Abs ab belt at #2. (CX 87, T011313). This data coincided with the IMS data for the week ending January 4, 2002, which ranked AB Energizer at #1 and Fast Abs at #2. (CX 126). There are numerous other instances which numeric rankings for the electronic ab belt infomercials either coincide or closely correspond to each other. (Compare CX 62, CX 75-92 with CX 126). Qualitatively, the rankings of Jordan Whitney Inc. and the Infomercial Monitoring Service both show that the infomercials for AbTronic, AB Energizer, and Fast Abs were among the most widely televised infomercials during the weeks and months in which they appeared. (Compare CX 62, CX 75-92 with CX 126).

Lastly, the *J.W. Greensheets* rankings of the Top 50 infomercials and the Top 20 infomercial products are not internally inconsistent, even though some products ranked in the Top 50 infomercials occasionally appear at higher positions in the Top 20 infomercial products ranking. The Top 20 ranking expressly excludes 900# and 800# phone line services, business opportunity products and seminars, and lead-generating packages. (E.g., CX 88, T011303). Once these products are excluded, some previously lower-ranked products shift upward and are ranked only very slightly higher as a result. (E.g., CX 88, T011303).

263. The JW Greensheets provide no reliable information as to whether, as Complaint Counsel has argued and Dr. Mazis asserts, the infomercials for the AbTronic, Ab Energizer and Fast Abs were among the most frequently aired infomercials.

Response to Finding No. 263:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact

264. Mr. Khubani testified that the JW Greensheets were unreliable for several reasons. Mr. Khubani stated that the confidential media budgets that were provided by Telebrands to Jordan Whitney were never verified by the publisher and there is no established rule concerning how they must be formulated. (Khubani, Tr. 526-527). In fact, an advertiser can take actions to determine whether the infomercial or commercial that it is running is ranked high or low. (Khubani, Tr. 527-528). The size of the budget reported to Jordan Whitney can be inflated or deflated depending on whether the advertiser chooses to report various costs as part of the budget. (Khubani, Tr. 529-530). And, in fact, there have been times when Telebrands was paying more to run media for one product than another and the product receiving the lower media expenditure was ranked higher in the Greensheets than the product receiving the higher expenditure. (Khubani, Tr. 533-534).

Response to Finding No. 264:

Complaint Counsel have no specific response.

iii. Infomercial Monitoring Service Reports

265. The Court admitted into evidence, over the objection of Respondents, a written response to questions posed by Complaint Counsel concerning the AbTronic, Ab Energizer and Fast Abs infomercials. (CX-126). This document bears the heading "Infomercial Monitoring Service, Inc." ("IMS") (CX 126).

Response to Finding No. 265:

Respondents did not adduce evidence or testimony that the IMS report was "a written response to questions posed by Complaint Counsel," even though they had reserved the right to call the witness from the Infomercial Monitoring Service identified by Complaint Counsel. A proper citation to the Court's evidentiary ruling would not come from the trial transcript since the Court's ruling occurred at the final prehearing conference. Otherwise, Complaint Counsel have no specific response.

266. No witness was called by Complaint Counsel to describe or discuss the information contained in that written response, and the document was never introduced or addressed at trial by any witness.

<u>Response to Finding No. 266:</u>

Respondents discussed the IMS report during their cross-examination of Professor Mazis, who testified that he reviewed the report. (Mazis, Tr. 120-22).

267. The written response purports to identify the number of times the product infomercials aired, in total. (CX-126). The document lists the number of "detections" for each product "as of February 22, 2002." (CX 126).

<u>Response to Finding No. 267:</u>

The written response does not purport to identify the precise number of times that the product infomercials aired, but sets forth the total number of times that IMS detected an airing. (CX 126).

268. The number of "detections" is at great variance with the number of airings for the Ab Energizer and Fast Abs infomercials identified in JX 6, 10, 14. Specifically, the document states 1,693 "detections" for the Ab Energizer infomercial, (CX 126), while Gary Hewitt and Douglas Gravink indicated that the infomercial aired "over 20,000 times." (JX 6, 14). The document also states that there were 1,272 "detections" for the Fast Abs infomercial as of February 22, 2002, (CX 126), while John W. Kirby, Jr. indicated that the infomercial aired 8,227 times. (JX 6, 10).

<u>Response to Finding No. 268:</u>

All of the cited sources agree that thirty-minute infomercials for AB Energizer and Fast Abs each appeared over a thousand times at least and the report provided by the Infomercial Monitoring Service (CX 126) only covered the until February 2002.

269. The document also purports to provide "[w]here [each] product infomercial ranked in terms of frequency for the year 2002." (CX 126).

<u>Response to Finding No. 269:</u>

Complaint Counsel have no specific response.

270. The “rankings” for each product advertisement, however, are different than the rankings for each product reported in the JW Greensheets. (Compare CX 126 and CX 62; CX 72 through CX 95).

Response to Finding No. 270:

Quantitatively, both Jordan Whitney Inc. and the Infomercial Monitoring Service have reported identical rankings for infomercials during the same time period. For example, in its December 31, 2001/January 7, 2002 double issue, Jordan Whitney Inc. ranked the AB Energizer ab belt at #1 and the Fast Abs ab belt at #2. (CX 87, T011313). This data coincided with the IMS data for the week ending January 4, 2002, which ranked AB Energizer at #1 and Fast Abs at #2. (CX 126). There are numerous other instances which numeric rankings for the electronic ab belt infomercials match or closely correspond to each other. (Compare CX 62, CX 75 through 92 with CX 126).

271. The document provides no information describing the methodology used to determine “rankings” or what the ranking number means. (CX 126). The document also provides no information concerning the markets in which the infomercials aired, the stations on which they aired, the times of day they aired, or the number of consumers who may have seen those airings. (CX 126). Complaint Counsel had identified Sam Catanese, President of IMS, as a witness in this proceeding to explain the IMS ranking system, but did call him at trial.

Response to Finding No. 271:

The IMS report states the total number of times that IMS detected an infomercial airing and provides separate numeric rankings, in terms of frequency, for infomercials for each week. (CX 126). Complaint Counsel objects to Respondents’ characterization of the anticipated testimony of Mr. Catanese, which is unsupported by citation to the record

iv. Summary of findings regarding evidence provided by advertisers and shippers, and contained in the JW Greensheets and in the IMS document

272. In summary, the information provided by advertisers and shippers was incomplete in that there has been no evidence produced regarding the number of times the infomercial for the AbTronic product aired or the amount of advertising dollars spent on AbTronic. The information regarding the amount of airing of the AbTronic, Fast Abs and Ab Energizer infomercials contained in the JW Greensheets is found to be of only limited probative value because of the lack of information concerning how the various rankings of infomercials and advertising spots are compiled by Jordan Whitney. Equally unpersuasive are the rankings found in the Infomercial Monitoring Service which differ from the rankings reported in the JW Greensheets. The Infomercial Monitoring Service provides no information concerning the methodology by which the IMS rankings are compiled and Complaint Counsel has failed to call any witness to explain the IMS ranking system.

Response to Finding No. 272:

Respondents failed to cite any testimony or evidence in support of their proposed finding. Complaint Counsel object to this proposed finding, which purports to summarize previous findings and appears to have been interposed for purposes of argument.

To the extent that the Court finds that Finding No. 272 properly recites proposed findings of fact, Complaint Counsel responds that all of the proposed findings are contradicted by the record. The AbTronic infomercial appeared at least 2,000 times and IMS estimates that $18,134,390 million was spent to advertise this electronic ab belt. (CX 126). Complaint Counsel has adduced documentary evidence concerning how Jordan Whitney compiles various rankings of infomercials and advertising spots. (CX 62; CX 75 through 92). The Jordan Whitney and IMS rankings match or closely correspond to each other (CX 87, T011313; compare CX 62, CX 75 through 92 with CX 126). The IMS report states the total number of times that IMS detected an infomercial airing and provides separate numeric rankings, in terms of frequency, for infomercials for each week. (CX 126). Contrary to the assertion stated above, Respondents have failed to show that the market reports are not probative.

f. Dr. Mazis' belief that consumers would make an association between the Ab Force and advertisements for AbTronic, Ab Energizer and Fast Abs is unsupported and should be afforded no weight.

273. In his Report, Dr. Mazis offered the opinion that "the Ab Force advertising exploits consumers' awareness of the advertising for the other EMS ab belts," specifically AbTronic, Ab Energizer and Fast Abs. (CX 58, ¶ 11). He also opined that "the Ab Force is 'free-riding' on the claims made for other EMS ab belts." (CX 58, ¶ 19).

Response to Finding No. 273:

In his report, Mr. Mazis' explained that "there are similar depiction if well-muscled men and trim women with well-defined abdominal muscles in the advertising for the Ab Force and in the advertising of the other three EMS ab belts. Moreover, the brand names for the four products are similar; they refer to "abs" or "ab" (abdominal muscles). The product appearance is also similar for the four EMS ab belts. In addition, there was a significant amount of advertising for the three EMS ab belts, and the infomercials for these EMS ab belts were aired during or shortly before the time period when Ab Force advertisements were broadcast. The Ab Force infomercials also point out the similarity of Ab Force and the other three EMS ab belts (" ... The Ab Force is just as powerful and effective as those expensive ab belts sold by others ...). Thus, the Ab Force advertising exploits consumers' awareness of the advertising for the other EMS ab belts." (CX 58, ¶ 11)

274. At trial, Dr. Mazis elaborated on this opinion, testifying that the advertisements for the AbTronic, Ab Energizer and Fast Abs "would play a role in consumers' perceptions of ab belts, that people over time—these ads that play a part in the fact that people form what's sometimes referred to as a category, an ab belt category, by seeing the ads is one input into forming this so-called ab belt category, or beliefs about ab belts." (Mazis, Tr. 48).

Response to Finding No. 274:

Complaint Counsel have no specific response.

275. Dr. Mazis purportedly based this conclusion on a consumer behavior theory known as categorization theory. (Mazis, Tr. 49). Dr. Mazis described this theory as "the idea that people take objects such as products and put them together based on their similarity." (Mazis, Tr. 49).

Response to Finding No. 275:

Dr. Mazis also testified that this is a "well-developed theory that started in psychology and has bee used a lot in consumer behavior research." (Mazis Tr. 49).

276. Dr. Mazis explained his theory of how categorization worked in this case by showing a chart that demonstrated the number of sources shaping consumers' beliefs about, as he described it, the ab belt category. He concluded that numerous factors shaped consumer beliefs and that, as a result of those influences, consumers held the belief that ab belts caused loss of inches and well-defined abdominals. (Mazis, Tr. 61, 167). According to Dr. Mazis, once consumers saw the Ab Force ads, there was a "transference" of those beliefs over to Ab Force. (Mazis, Tr. 61, 167).

Response to Finding No. 276:

Complaint Counsel have no specific response.

277. But Dr. Mazis made no effort to determine what influences, other than the ads and retail packaging for AbTronic, Ab Energizer and Fast Abs, actually shaped those beliefs. He only focused on the messages that were contained in the ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 169 - 170).

Response to Finding No. 277:

Dr. Mazis focused on the ads and retail packaging for AbTronic, Ab Energizer and Fast Abs but also took word-of-mouth communications into consideration. (Mazis, Tr. 169).

278. He did not know what messages were being conveyed by advertisements or packaging for other EMS ab products. (Mazis, Tr. 167 - 171). He did not know what messages were being conveyed by word-of-mouth communication. (Mazis, Tr. 169 - 170). He did not know what other print or radio advertisements were being disseminated. (Mazis, Tr. 181 - 182). Indeed, Dr. Mazis admitted that when he referred to category beliefs, he was referring only to "ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer and Fast Abs]." (Mazis, Tr. 171 - 172).

Response to Finding No. 278:

Complaint Counsel objects to the use of the word "admitted" as connoting that the procedure

Dr. Mazis followed was unfounded. In performing his facial analysis, Dr. Mazis relied on information in the FTC Complaint (CX 1) and attached exhibits, particularly information that AbTronic, AB Energizer, and Fast Abs were among the most frequently aired infomercials in the nation. (CX 58 at 7; Mazis, Tr. 125-26). As confirmed by rankings in the monitoring reports from Jordan Whitney and Infomercial Monitoring Service, the evidence is conclusive that infomercials for these three products as well as a sixty second spot for AB Energizer were indeed the most frequently aired TV commercials for ab belts by a wide margin. (CX 62, CX 72 through CX 95, CX 126, Towers, Tr. 294, 303-04; JX 6, ¶ 8-11, 13-15, JX 11, ¶ 3-5; Khubani, Tr. 521).

279. In describing his reliance on categorization theory in this case, Dr. Mazis identified an article by Mita Sujan published in the Journal of Consumer Research, and testified that categorization theory is generally accepted in the field of consumer perception. (Mazis, Tr. 49; CX 57).

Response to Finding No. 279:
Complaint Counsel have no specific response.

280. Dr. Jacoby testified that categorization theory, which derives from the field of psychology, theorizes that consumers will form an understanding of categories and will place things into categories, and thus will interpret and infer things about those things. (Jacoby, Tr. 344).

Response to Finding No. 280:
Complaint Counsel have no specific response

281. Dr. Jacoby identified at least two fundamental flaws with Dr. Mazis' opinion that categorization theory applied.

Response to Finding No. 281:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

282. First, Dr. Mazis simply assumes that consumers have formed categories based on exposure to AbTronic, Ab Energizer and Fast Abs infomercials, but never tested that assumption.

Response to Finding No. 282:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel deny that selection criteria for the survey universe was overly broad. *See* Complaint Counsel's response to proposed finding 324.

Complaint Counsel specifically deny the implication of this proposed finding that Dr. Mazis was obligated to test his opinion that consumers formed categories based on exposure to AbTronic, Ab Energizer and Fast Abs infomercials. The implication of this "finding" is that Dr. Mazis should have reinvented the wheel by reconfirming Sujan's work instead of simply demonstrating how the facts in the Ab Force promotion fit the theory that Sujan had already tested and confirmed. Dr. Mazis's assumption that persons who had already formed an ab belt belief category associated the Ab Force with that category when exposed to Ab Force ads did not need to be confirmed. The Ab Force ads are transparent in this regard. Respondents deliberately and expressly invoked that belief category when they opened each of their ads with a direct reference to "those fantastic electronic ab belt infomercials on TV." Respondents made the link from Ab Force to ab belt category beliefs for Dr. Mazis.

283. Dr. Jacoby testified that in order to form categories about certain things, in this case EMS ab products, the consumer must have prior experience with exemplars from that category. (Jacoby Tr. 344 - 345). He testified that Dr. Mazis, in conducting his research, had failed

to confirm that consumers were exposed to or recalled the exemplars (e.g. the ads for AbTronic, Ab Energizer and Fast Abs) that may have led to the formation of category beliefs. (Jacoby Tr. 345).

Response to Finding No. 283:
Complaint Counsel object to this proposed finding to the extent that it suggests that Dr. Mazis was obligated to confirm that consumers were exposed to or recalled the ads for AbTronic, AB Energizer, or Fast Abs through use of extrinsic evidence. *See* Complaint Counsel's response to Proposed Finding 282.

284. Dr. Jacoby has reviewed and is familiar with the Sujan article cited by Dr. Mazis, and testified that Sujan had incorporated research performed in the field of basic cognitive psychology and demonstrated how it could apply in consumer psychology and behavior. (Jacoby, Tr. 345).

Response to Finding No. 284:
Complaint Counsel have no specific response.

285. Dr. Jacoby testified that the Sujan article, while supporting Dr. Mazis' opinion that consumers form category beliefs, does not support the use of assumptions in determining that consumers have formed category beliefs about, in the case of that research, single-lens reflex cameras. (Jacoby Tr. 345; CX 57).

Response to Finding No. 285:
Complaint Counsel have no specific response.

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

Response to Finding No. 286:
Complaint Counsel have no specific response.

287. As Dr. Jacoby testified, although there were many and different ways in which Dr. Mazis could confirm that consumers had a category in mind, he took no such steps. (Jacoby, Tr.

345). For example, Dr. Mazis could have shown surveyed consumers one or more of the ads for AbTronic, Ab Energizer and Fast Abs before showing them and testing them on the Ab Force commercial, or by asking questions to determine whether they had seen such commercials prior to participating in the survey. (RX 40, ¶ 23). Dr. Jacoby testified that Dr. Mazis also could have used questioning after other portions of a survey had been conducted to test consumers' preconceptions. (Jacoby, Tr. 349 - 351).

Response to Finding No. 287:
Complaint Counsel have no specific response.

288. Dr. Jacoby said that a use of such a manipulation check could have been used by showing consumers in one group relevant portions of the ads for AbTronic, Ab Energizer and Fast Abs, and consumers in another group none. (Jacoby, Tr. 350). Post-survey questioning could have then been used to identify participants' knowledge of the ads for AbTronic, Ab Energizer and Fast Abs. (Jacoby, Tr. 350 - 351).

Response to Finding No. 288:
Complaint Counsel have no specific response.

289. Second, Dr. Mazis simply assumed that the reference in the Ab Force ads to other ab belts and other "key elements" were sufficient to trigger consumers' category beliefs. (Mazis, Tr. 60 - 61).

Response to Finding No. 289:
Dr. Mazis cited four elements in the Ab Force commercials that would cause consumers to categorize the Ab Force with the AbTronic, AB Energizer, and Fast Abs. These four elements are: (1) references in Ab Force ads to the other ab belts infomercials on TV; (2) visual images of models with well-developed abs and slim bodies; (3) the physical appearance of the Ab Force product, which is similar to the other ab belts; and (4) the similarity of the name "Ab Force" to the names of the other ab belts. (Mazis, Tr. 59-60). Dr. Mazis testified that the Ab Force ads demonstrate a strategy to get consumers to think about their ab belt category beliefs and link Ab Force to that category. (Mazis, Tr. 59). According to Dr. Mazis, statements such as "I'm sure you've seen those fantastic electronic ab belt infomercials on TV" and "[t]he Ab Force is just as powerful and effective as those expensive ab belts sold by others" rely on viewers' familiarity

with infomercials for other EMS ab belts and exploit the beliefs that consumers have developed from exposure to information about them. (CX 58 at 9).

Additionally, the similarities in the depictions of well-muscled men and trim women with well-defined abdominal muscles within the Ab Force ads as well as the ads for AbTronic, AB Energizer, and Fast Abs ab belts also contribute to categorization. Such visual images, he said, are more lasting in people's memories than verbal messages. (CX 58 at 8; Mazis, Tr. 59). Moreover, Dr. Mazis testified that the similarity in physical appearance between the Ab Force and the other ab belts would cause people familiar with the other ab belts to associate the Ab Force with their ab belt category beliefs. (Mazis, Tr. 60).

Finally, Dr. Mazis opined that the similarities in the names of the four products, inasmuch as all of them refer "ab" or "abs," would also have an impact on consumers and cause them to associate Ab Force with their prior beliefs about ab belts. (Mazis, Tr. 108, 59-60; CX 58 at 8, 10).

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

<u>Response to</u> <u>Finding No. 290:</u>
Respondents' citation for the last sentence of this proposed finding (Jacoby, Tr. 367) does

not

support the allegation set forth. Furthermore, to the extent that it is not the actual conclusion of Dr. Jacoby it is argumentative, conclusory and not supported by record evidence.

291. Instead, whether here [sic] was an impact and what impact a message had must be determined through empirical testing. Dr. Jacoby cited early research in this area by Janish and Fesbach in a 1953 Yale study concerning the impact of fear on consumer behavior. (Jacoby, Tr. 369 - 370). He indicated that in order to determine whether there was an impact on consumers, a manipulation check should be performed to determine whether the communication had the intended effect. (Jacoby, Tr. 370 - 371). This manipulation check may be conducted through a series of post survey questions put to respondents to determine what effect certain elements had on their response to that advertising. (Jacoby, Tr. 370 - 371).

Response to Finding No. 291:

Complaint Counsel object to the first sentence of this proposed finding as argumentative and conclusory as to the issue of whether Dr. Mazis was obligated to perform a manipulation check as part of his facial analysis. To argue that testing should have been done to confirm opinions rendered in the course of a this facial analysis is disingenuous. The standard that the Commission applies to facial analyses of advertising is whether they are "supported by opinions that describe empirical research or analyses based on generally recognized marketing principles or other objective manifestations of professional expertise." *Thompson Medical*, 104 F.T.C. 648, 790, n.11 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) (Emphasis added).

The categorization theory is indisputably a "generally recognized marketing principle[]," and Dr. Mazis clearly demonstrated how consumers familiar with the infomercials for AbTronic, AB Energizer, and Fast Abs would likely interpret the Ab Force ads. (Mazis, Tr. 61-62). Dr. Mazis's assumption that some consumers formed categories of belief based on viewing the infomercials for AbTronic, AB Energizer, and Fast Abs is strongly supported by the evidence that those infomercials were the most frequently aired infomercials during the period in which they appeared. It is reasonable to assume, therefore, that many people who saw them formed a

category of belief about ab belts based upon the core claims contained in them.

292. Dr. Mazis conducted no manipulation check in his survey to determine whether consumers' category beliefs, if they even existed at all, were triggered by the elements cited by Dr. Mazis as having an impact on consumers. (Mazis, Tr. 59).

Response to Finding No. 292:
Respondents' citation for the last sentence of this proposed finding (Mazis, Tr. 59) has no relation to the allegation set forth. Respondents acknowledge that Dr. Mazis did not conduct a manipulation check, but for the reasons set forth in response to Proposed Finding 291 above, deny that such a measure was necessary as part of a facial analysis.

293. Because he failed to test the theory that consumers necessarily formed or retained categorization beliefs about EMS ab products prior to viewing the Ab Force ads, or whether they even saw any of the ads for AbTronic, Ab Energizer and Fast Abs prior to seeing the Ab Force ads, Dr. Mazis' opinion that there was categorization by consumers is merely speculation, not evidence of the association. (Jacoby, Tr. 347 - 351).

Response to Finding No. 293:
Complaint Counsel object to this proposed finding as conclusory, repetitive, and argumentative. Moreover, for the reasons set forth in Complaint Counsel's responses to findings 282 and 291, specifically deny that Dr. Mazis was obligated to confirm his expert opinion set forth in his facial analysis by extrinsic testing.

2. Direct Effects

294. In addition the opinion that indirect effects that would cause consumers to make an association between Ab Force and AbTronic, Ab Energizer and Fast Abs, Dr. Mazis also testified that there were elements that had "direct effects" that could shape category beliefs about ab belts. (Mazis, Tr. 66).

Response to Finding No. 294:
Complaint Counsel have no specific response

295. These “direct effects” would shape consumers’ perceptions regardless of whether they had ever seen an ab belt ad before. (Mazis, Tr. 66). 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).

Response to Finding No. 295:
Complaint Counsel have no specific response.

296. Dr. Mazis offered his view that this “visual imagery” within the four corners of the Ab Force ads conveyed two claims, which he described as the most prominent: (1) that use of the Ab Force will cause well-developed abdominal muscles, and (2) that use will result in loss of inches around the waist. (Mazis, Tr. 61)

Response to Finding No. 296:
Complaint Counsel have no specific response.

297. With regard to the use of trim models in the advertising, Dr. Mazis’ entire opinion on that element is as follows: “The second element that I think that’s important is that the models shown in the ads—I always have the belief that visual images are really more important than the verbal messages, because they really remain in people’s memories. So, there were all these models that had these well-developed abs and slim bodies and you know, these various characteristics.” (Mazis, Tr. 60). There is no evidence that this opinion is based on any reliable foundation or expertise, but rather on the personal impression held by Dr. Mazis.

Response to Finding No. 297:
Dr. Mazis’ opinion is based on his professional training and expertise in the areas of consumer response to advertising, including facial analysis of advertising, advertising effectiveness, consumer behavior, marketing and consumer research, including design and implementation of surveys and analysis of surveys. (Mazis, Tr. 42).

298. Although he did not explain how these images affected perceptions, Dr. Mazis did acknowledge in his testimony that he had agreed that there was a legitimate reason to use people with relatively little fat: so viewers “could see the product vibrating more or something…” (Mazis, 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. (Mazis, Tr. 150). This testimony corroborates Mr. Khubani’s testimony that the only way to visually illustrate the product working was to demonstrate the product on slim models. (Khubani Tr. 518).

Response to Finding No. 298:

The Ab Force television advertisements also depict slim sexy models showing their abs without using or wearing the Ab Force. For example, CX 8 and CX 9 depict images from the Ab Force televison commercial designated as AB-B-120, these images show a model who is dressed in skimpy clothing displaying her lean, trim torso and a man with well-developed abs, respectively, and neither model is wearing the Ab Force ab belt. (CX 8; CX 9; (Khubani, Tr. 543).

299. With respect to the use of the name "Ab Force," Dr. Mazis offered his opinion that the name conjured up an association between Ab Force and AbTronic, Ab Energizer and Fast Abs due to the use of the word "ab" in the name. His analysis of the meaning of the name was as follows: "I think the name is—the brand name is actually quite interesting, that they use Ab Force, meaning – I mean, I guess you could say it's a double meaning. On the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words, it makes your abs noticeable, that they—that they are really well-developed." (Mazis, Tr. 60).

Response to Finding No. 299:

Complaint Counsel have no specific response.

300. Dr. Jacoby, on the other hand, 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. (Jacoby Tr. 405 - 406).

Response to Finding No. 300:

Complaint Counsel have no specific response.

301. Mr. Khubani has testified that the name of the product was selected as a play on the term "Air Force." (Khubani, Tr. 474-478). Whatever the intent, Dr. Mazis has provided the Court with no reliable rationale why consumers would take away the meanings he has attributed to the name Ab Force.

Response to Finding No. 301:

Respondents have mischaracterized Mr. Khubani's testimony. When Mr. Khubani was asked

by Complaint Counsel why he chose the name "Ab Force" he testified, "First of all, it was

designed to work on the abdominal area, and I thought Ab Force was catchy, sort of like Air Force." (Khubani, Tr. 264).

C. THE COPY TEST

1. Description of the Copy Test

302. Dr. Mazis was also called at trial to testify about a copy test, or consumer survey, he had designed for this matter. (Mazis, Tr. 67).

Response to Finding No. 302:
Complaint Counsel have no specific response

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

Response to Finding No. 303:
Complaint Counsel have no specific response

304. In December 2003 and January 2004, U.S. Research, a research contractor, copy tested the Ab Force AB-E-60 one-minute television commercial (the "test ad"), (CX-104), and an edited version of the Ab Force AB-E-120 two-minute commercial (the "control ad"), (CX-105). (Mazis, Tr. 67 – 68, 79 - 83).

Response to Finding No. 304:
Complaint Counsel have no specific response

305. This test used the mall-intercept method in nine geographically dispersed shopping centers. (Mazis, Tr. 68).

Response to Finding No. 305:
Complaint Counsel have no specific response

a. The Screening Questionnaire

306. The copy test employed a screening questionnaire, which is typically used to identify qualified respondents to participate in the actual test. (Mazis, Tr. 68). The screening questionnaire criteria were designed to identify people who would be potential purchasers of the Ab Force product. (Mazis, Tr. 68). Dr. Mazis testified that he designed

the screening questionnaire to capture respondents who would have some propensity to buy the product and to eliminate people who would not be typical consumers of the Ab Force product. (Mazis, Tr. 68).

Response to Finding No. 306:
Complaint Counsel have no specific response

307. The copy test was also designed with certain age and gender quotas to capture respondents who met certain age and gender characteristics of that which would approximate the potential market for the Ab Force. (Mazis, Tr. 71). Dr. Mazis derived these quotas from statistical figures published in the Journal of the American Medical Association identifying the age and gender characteristics of people trying to lose weight. (Mazis, Tr. 71).

Response to Finding No. 307:
Complaint Counsel have no specific response

308. During the screening process, interviewers from U.S. Research approached individuals in the various malls and asked them if they would participate in a survey. (Mazis, Tr. 72). Individuals that agreed were then subjected to 11 questions, lettered from A to K on the screening questionnaire. (Mazis, Tr. 72 – 77; CX-58, Exhibit C thereto).

Response to Finding No. 308:
Complaint Counsel have no specific response

b. The Main Questionnaire

309. Individuals who met the screening criteria, and thus were qualified to be considered in the survey universe, were then taken to a facility for showing the test and control ads. (Mazis, Tr. 90 - 93).

Response to Finding No. 309:
Complaint Counsel have no specific response

310. Study participants were randomly assigned to one of two groups, a test group and a control group. (Mazis, Tr. 90 - 93). Test group subjects were shown the test ad twice and then asked a series of questions from a main questionnaire. Control group subjects were shown the control ad twice and were asked the same questions. (Mazis, Tr. 90 - 93).

Response to Finding No. 310:
Complaint Counsel have no specific response

311. The main questionnaire posed eight substantive questions. (CX-58, Exhibit D thereto).

Response to Finding No. 311:
Complaint Counsel have no specific response

312. Question 2 asked respondents: "What is the brand name of the product in the advertisements you just looked at?" Question 2(a) asked respondents: "What is the specific brand name of the product you just looked at?" (CX-58, Exh. D thereto, Question 2). If the respondent could not identify the name "Ab Force," they were skipped to the end of the questionnaire, asked to provide contact information, and were dismissed from further participation. (CX 58, Exh. D thereto, Questions 2, 2(a) and 9).

Response to Finding No. 312:
Complaint Counsel have no specific response

313. Question 3 of the main questionnaire is an open-ended question that asked: "What did the commercial say show or imply about the Ab Force?" (CX-58, Exh. D thereto, Question 3). Responses were grouped by similarity and were coded by U.S. Research for tabulation in the results. (Mazis, Tr. 95; CX 58, ¶¶ 38 – 39, Exh. D thereto, Question 3).

Response to Finding No. 313:
Complaint Counsel have no specific response

314. Questions 4 through 6 were closed-ended questions that were posed to respondents. (CX-58, Exh. D thereto, Questions 4 through 6). Question 5 of the main questionnaire posed statements in the affirmative, and respondents were asked to agree, disagree or answer that they did not know with regard to each statement. (CX 58, Exh. D thereto, Question 5; Jacoby, Tr. 389).

Response to Finding No. 314:
Complaint Counsel have no specific response

315. Questions 7 and 8 were added by Dr. Mazis at the time the study was scheduled to begin, but which was halted by U.S. Research so that these questions could be added. (RX 10; R 11; RX 19; RX 23; RX 24). Question 7, in part, asked respondents if, "within the past 30 days," they had "[s]een, read or heard a news story about or featuring an abdominal belt device." (CX-58, Exh. D thereto, Question 7).

Response to Finding No. 315:
Complaint Counsel have no specific response

316. Study participants who had seen, read or heard a news story about or featuring an abdominal belt device were asked to state what they recalled from the story. (CX 58, Exh. D thereto, Question 8). If they answered by making negative statements about ab belts, they were removed from the study. (Mazis, Tr. 99 - 100).

Response to Finding No. 316:
Complaint Counsel have no specific response

c. Results of the Study

317. A sample size of approximately 600 people were interviewed, and of those, 389 participants were included in the results. (Mazis, Tr. 147 - 148).

Response to Finding No. 317:
Complaint Counsel have no specific response

318. In response to the closed-ended questions, Question 5 of the Main Questionnaire and its subparts, Dr. Mazis reported the following results:

- 65.4% of the test group respondents believed the ad implied that the Ab Force causes well-defined abdominal muscles, compared to 48.1 % in the control group. (Mazis, Tr. 106; CX-58, ¶ 47).
- 58% of the test group respondents believed the ad implied that the Ab Force causes loss of inches around the waist, compared to 42.4% in the control group. (Mazis, Tr. 106; CX-58, ¶ 47).
- 43% of the test group respondents believed the ad implied that the Ab Force causes loss of weight, compared to 28.1% in the control group. (Mazis, Tr. 107; CX-58, ¶ 47).
- 39.1% of the test group respondents believed the ad implied that the Ab Force is an effective alternative to exercise, compared to 28.6% in the control group. (Mazis, Tr. 106; CX-58, ¶ 47).

Response to Finding No. 318:
Complaint Counsel have no specific response

319. In response to the open-ended question "What did the commercial say, show or imply about the Ab Force?," 22% of the test group participants responded that use of the Ab Force results in well-developed abs, a loss of weight or inches around the waist, or an improved physique. (Mazis, Tr.104 - 105).

Response to Finding No. 319:
Complaint Counsel have no specific response

2. The Copy Test Suffered from Numerous Significant Methodological Flaws that Rendered the Copy Test Unreliable

a. The survey universe was overly broad

320. Dr. Jacoby agreed with Dr. Mazis that it was important to make sure that the study

included only those people who would be potential purchasers of the Ab Force product. (Jacoby Tr. 352). He elaborated on Dr. Mazis' statement, explaining that the perceptions of consumers who would not be prospective purchasers would be irrelevant. (Jacoby, Tr. 352).

Response to Finding No. 320:
Complaint Counsel have no specific response.

321. But Dr. Jacoby differed with Dr. Mazis' opinion that the universe in this case had not been narrowly or over-broadly defined. (Jacoby, Tr. 352). Dr. Jacoby was unconcerned about the first screening criterion -- that participants had purchased a product or used a service to help them lose weight, tone their muscles or massage their bodies within the past 12 months. (Jacoby, Tr. 353 – 354; CX 58, Exhibit C thereto, Question B).

Response to Finding No. 321:
Complaint Counsel have no specific response.

322. Dr. Jacoby disagreed, however, that the second criterion -- that participants had, in the past 12 months, purchased a product by calling a toll-free number that was included in a TV ad, program or infomercial -- was useful in defining the appropriate universe. (Jacoby, Tr. 354; CX-58, Exh. C thereto, Question D). As Dr. Jacoby explained, referencing participants: "You could have purchased any number of things. You could have purchased a real estate course. You could have purchased perfume. You could have purchased flowers, you know, 1-800-FLOWERS…" (Jacoby, Tr. 354).

Response to Finding No. 322:
Complaint Counsel have no specific response.

323. Under this criteria, the survey universe could have included someone who purchased Slim Fast at Safeway and jewelry from QVC. (Jacoby Tr. 355 - 356). Dr. Jacoby explained that an appropriate criterion instead should have excluded those respondents who had not purchased a product to help them lose weight, tone muscles or massage their bodies from a toll-free number that was included in a television ad, program, or infomercial in the past 12 months. (Jacoby Tr. 355).

Response to Finding No. 323:
Complaint Counsel have no specific response.

324. Consequently, there is serious concern that the second criterion led to a universe that was overly broad, because it may have included many people for whom the purchase of something like an ab belt would never have entered their mind and who would never be inclined to purchase one. (Jacoby, Tr. 354 - 355).

Response to Finding No. 324:

Complaint Counsel acknowledge that finding 324 is an accurate summary of Dr. Jacoby's testimony, but object to the conclusory form of the finding. Specifically, Complaint Counsel deny the allegation that Dr. Mazis's screening criteria produced an overly broad universe of survey respondents. Unlike the most situations where products are readily available through retail outlets, potential purchasers of the Ab Force *had* to purchase them by responding to a direct response to a TV, radio, print, or internet ad. Thus, in order to find the appropriate universe in this situation, potential purchasers not only had to have displayed a need for or interest in products or services with benefits that the Ab Force purports to provide, but also had to show a propensity for purchasing products via direct response TV.

A much smaller portion of the population buys goods or services via direct response TV and products sold by direct response TV typically have a limited run before they are replaced by new ones.

It is erroneous to conclude, therefore that people who (1) purchased products or services for weight loss, muscle toning, or massage, and (2) had not purchased such products by direct response TV, but (3) had purchased other products through that venue would not be likely purchasers of an ab belt. They just might not have seen a product that interested them or fit their needs. Hence, it is illogical to assume that persons who demonstrated an interest in weight loss, muscle toning, or massage and who had made purchases via direct response TV of products other than ones in those three categories would not be interested in such products in the future. To leave them out of the universe could have unnecessarily narrowed the universe.

b. The main questionnaire employed leading question.

325. The phrasing of the closed-ended questions raises the likelihood of "yea-saying" by participants. Question 6 of the main questionnaire posed a number of closed-ended questions to survey participants. (CX 58, Exh. D thereto, Question 6). Study respondents were then provided possible answers, in the following order: "YES," "NO," or "DON'T KNOW." (CX 58, Exh. D thereto, Question 6).

Response to Finding No. 325:

Complaint Counsel object to the argumentative and conclusory nature of the first sentence of finding 325 and specifically deny that Question 6 of the main questionnaire raised the likelihood of yea-saying by survey respondents. The questions were not leading because respondents were instructed before the questions were posed that "Some, all, or none of these statements may have been implied by or made in the Ab Force commercial." Furthermore, all three possible answers were provided together for each question:

YES, it is implied by or made in the Ab Force commercial,

NO, it is not implied by or made in the Ab Force commercial, or

You DON'T KNOW or you have NO OPINION.

(CX 58, Exhibit D, Question 6).

In addition, the survey respondents had a card placed before them on which all three possible answers were listed. Hence, all three possible answers to the each question were read and shown to the respondent before the question was asked. (CX 58 at 15, 16; CX 58, Exhibit D;: Mazis, Tr. 95-96). Consequently, survey respondents were free to select from the three possible responses the answer that corresponded to their beliefs without any suggestion that there was a correct answer that the surveyors were seeking. Dr. Jacoby testified that he would have posed the questions in a manner that equally emphasizes affirmative, negative, and neutral responses (Jacoby, Tr. 390). However Dr. Mazis's method of asking the questions gives equal emphasis to all possible responses. The difference between the two methods is *de minimis* and resolves itself

to personal preference between two equally effective methods of avoiding asking leading questions.

326. Dr. Jacoby testified that these closed-ended questions were leading questions because they were framed only in the affirmative (e.g., "Using Ab Force causes users to lose inches around the waist.")(Jacoby Tr. 389). He testified that there was substantial scientific literature on "acquiescence response," also called "yea-saying," that demonstrated a tendency for people to agree rather than disagree with statements posed to them. (Jacoby Tr. 389 - 390).

Response to Finding No. 326:
Complaint Counsel have no specific response.

327. Yea-saying has the effect of making it impossible to determine whether responses were provided due to consumer perceptions or because the questions were leading. (Jacoby, Tr. 391 - 392). Because of study participants' tendency to yea-say, Dr. Jacoby explained that participants in Dr. Mazis' study were likely to have agreed with each statement more often than not as a result of a tendency to yea-say. (Jacoby, Tr. 389 - 392).

Response to Finding No. 327:
Complaint Counsel have no specific response.

328. In order to avoid yea-saying, the questions should have been framed with an emphasis on an affirmative, negative and neutral response equally (e.g., "Would you say that using the Ab Force causes users to lose inches around the waist, does not cause users to lose inches around the waist, did not say that it causes users to lose inches around the waist, or don't know?")(Jacoby, Tr. 390). Dr. Jacoby testified that only by giving an equal emphasis to all of the possible response options could the study avoid yea-saying by study participants. (Jacoby, Tr. 390 - 391).

Response to Finding No. 328:
Complaint Counsel object to the conclusory nature of finding 328 and respond that Question 6 was indeed framed with an equal emphasis on an affirmative, negative and neutral response. *See* Complaint Counsel's response to proposed finding 325.

329. Because Dr. Mazis' study only posited leading, affirmatively-worded questions that would have the tendency to result in impermissible yea-saying the results obtained from this question are unreliable.

Response to Finding No. 329:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel deny that Dr. Mazis's study posited leading questions that had the tendency to lead to yea-saying. *See* Complaint Counsel's response to finding 325.

c. The copy test failed to adequately control for the influence of any preexisting beliefs held by study participants.

330. When asked whether he typically makes any effort to screen for preexisting 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 preexisting beliefs as a possible cause of the results we see. (Mazis Tr. 157).

He also admitted it was possible to screen for preexisting beliefs when using a control group. (Mazis, Tr. 157).

Response to Finding No. 330:

Complaint Counsel have no specific response.

341. [as in original] Dr. Mazis recognized that there are a lot of factors that could lead to consumer preconceptions about ab belts, including television advertising, print advertising, radio advertising, internet advertising, retail packaging, word-of-mouth communication, and news stories. (Mazis, Tr. 153 - 154). Dr. Mazis admitted that a survey participant's response might also be colored by the fact they purchased an ab belt if, in fact, they had purchased one. (Mazis, Tr. 152).

Response to Finding No. 341:

Complaint Counsel object to the first sentence of finding 341 because it misstates Dr. Mazis's testimony. Although Dr. Mazis stated there were "a lot of factors that could affect

consumer presumptions," he never specified what they were other than "prior advertising for ab belts." (Mazis, Tr. 153-54).

342. Dr. Jacoby agreed with Dr. Mazis, stating that it is necessary in copy tests to control for preexisting beliefs because the perception of advertising claims may not be based at all on the content of the advertising, but on the preexisting beliefs of the study participant. (Jacoby, Tr. 376).

Response to Finding No. 342:
Complaint Counsel have no specific response.

343. Dr. Mazis admitted that the recollection of prior advertising, such as for the AbTronic, Ab Energizer and Fast Abs products, could have a material impact on the reactions of people seeing the test ad for the Ab Force. (Mazis, Tr. 152 - 153).

Response to Finding No. 343:
Complaint Counsel have no specific response

344. Although the control ad was purportedly "cleansed" of the key elements Dr. Mazis believed would have an impact on consumers, he admitted that the control ad was not effective in controlling preexisting beliefs, as shown by the "relatively high" numbers of participants in the control group who detected the asserted claims. (Mazis, Tr. 108). Dr. Mazis declared that detecting and controlling for preexisting beliefs was not "relevant" because randomization would ensure that those study participants who held preexisting beliefs would be assigned equally to the test and control groups. (Mazis, Tr. 152-153).

Response to Finding No. 344:
Respondents' proposed finding 344 contains a false statement that Dr. Mazis admitted that his control ad was not effective in controlling for preexisting beliefs. Dr. Mazis never testified to that effect. He did testify that responses for two of the attributes (well-defined abdominal muscles and lose inches around the waist) were "relatively high numbers for a control ad." Dr. Mazis stated that this relatively high response rate shows the strength of prior ab belt beliefs – that there are a lot of respondents that knew something about ab belts and "even when they see the name Ab Force and they see a massage belt or a belt around the waist . . . they infer that the ad was making certain claims, and that's likely based on these prior beliefs that they walked into

the study with." (Mazis, Tr. 108-09).

345. Specifically, Dr. Mazis admitted that he did not ask survey participants if they had ever purchased an ab belt or seen the ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 152). When asked why he did not ask those questions, he stated:

> "It didn't really—I didn't feel it was relevant, and—because there'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."

(Mazis, Tr. 152). Dr. Mazis offered no explanation as to how those participants who had pre-existing beliefs about ab belts would have been sorted evenly by random assignments, but instead offered the conclusory statement that such participants would have been equally divided, thus affecting the results for each group "equally." (Mazis Tr. 152-153).

Response to Finding No. 345:

Complaint Counsel object to the use of the word "admitted" in the first sentence as connoting that Dr. Mazis should have asked the questions of survey participants. Complaint Counsel further object to the use of the word "conclusory" in the final sentence as argumentative and conclusory. Complaint Counsel further state that Dr. Mazis's decision is consistent with prevailing science as to the effect of random assignment and the use of controls. According to the Federal Judicial Center's *Reference Manual on Survey Evidence*:

> By adding an appropriate control group, the survey expert can test directly the influence of the stimulus. In the simplest version of a survey experiment, respondents are assigned randomly to one of two conditions. For example, respondents assigned to the experimental condition view an allegedly deceptive commercial, and respondents assigned to the control condition either view a commercial that does not contain the allegedly deceptive material or do not view any commercial. Respondents in both the experimental and control groups answer the same set of questions. The effect of the allegedly deceptive message is evaluated by comparing the responses made by the experimental group members with those of the control group members. If 40% of the respondents in the experimental group responded with the deceptive message (e.g., the advertised product has fewer calories than its competitor), whereas only 8% of the respondents in the control group gave that response, the difference between 40% and 8% (within the limits of sampling error) can be attributed only to the allegedly deceptive commercial. Without the

control group, it is not possible to determine how much of the 40% is due to respondents' preexisting beliefs or other background noise (*e.g*., respondents who misunderstand the question or misstate their responses). Both preexisting beliefs and other background noise should have produced similar response levels in the experimental and control groups.

> Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2d ed., 2000) at 257-58 (Emphasis added).

The *Reference Manual* further states: "[c]hoosing at random tends to balance the groups with respect to possible confounders" and therefore the groups are "likely to be quite comparable - except for the treatment." David H. Kaye and David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2d ed., 2000), at 93.

Most importantly, Dr. Mazis's methodology is consistent with FTC law as set forth in *Stouffer Foods Corp.*, 118 F.T.C. 746, 807, n.25 (1994):

> A control group is a group of participants who see a stimulus different from the challenged ad – *i.e.*, a 'cleansed' . . . ad that does not convey the hypothesized . . . claim. The control group is then asked the same series of questions as the test group. The control group's . . . answers are subtracted from the . . . results obtained from viewers of the challenged ad to control for purported preexisting belief. (Emphasis added).

346. Dr. Jacoby testified that this approach failed to control at all for pre-existing beliefs held by consumers. (Jacoby, 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 preexisting beliefs into the test and control groups. (Jacoby Tr. 378 - 379).

Response to Finding No. 346:
Complaint Counsel have no specific response.

347. There are significant problems with Dr. Mazis' theory that consumers who held preconceptions would be assigned equally to control and test groups. First, if Dr. Mazis was correct, then random assignment would 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 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).

Response to Finding No. 347:

Respondents proposed finding is argumentative and conclusory. Complaint Counsel further state that although the control group and the test group were slightly unbalanced, the difference is inconsequential. Since the results would have been proportional, the percentages were comparable, and the difference in percentages is a valid measurement. Furthermore, 171 respondents were dropped through the validation process, a process that was beyond the capability of the process of random assignment to control or to account for. (CX 58 at 17-18).

348. 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. (Mazis, Tr. 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. (Jacoby 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. (Jacoby 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. (Jacoby Tr. 378 - 381).

Response to Finding No. 348:

Respondents proposed finding is argumentative and conclusory. Furthermore, respondents have mischaracterized Dr. Jacoby's testimony. Dr. Jacoby did not testify that it was "easily possible" that a larger percentage of test group participants held negative preconceptions about EMS ab products than the control group. Dr. Jacoby's merely gave an example of a disproportionate outcome without speculating as to its probability. (Jacoby, Tr. 379). In fact, Dr. Jacoby's testimony is pure speculation with no evidentiary basis to support it. More importantly such a result is highly improbable if the sample size is large enough, and respondents have not challenged the size of the survey universe. Using a control ad, as Dr. Mazis did to control for

preexisting beliefs is entirely consistent with prevailing law and science and is not "a false assumption." *See* Complaint Counsel's response to proposed finding 345.

349. Efforts could have been taken in this case to control for consumers' preexisting beliefs about ab belts in general and the Ab Force in particular. Dr. Jacoby testified that questions could have been included in the study to detect consumers' preexisting beliefs about ab belts, and to detect whether particular elements had an effect in causing consumers to perceive certain claims in the Ab Force ads. (Jacoby Tr. 348 – 351; RX-40, ¶ 23). Because Dr. Mazis admittedly made no effort to take such steps, whether there was a numerical disproportion between the test and control groups in terms of participants who held preconceptions, and what impact such disproportional distribution had on the results of this study cannot be known. (Jacoby Tr.).[Sic]

Response to Finding No. 349:
Respondents' proposed finding is argumentative, conclusory and repetitious. It was not necessary for Dr. Mazis to take the measures Dr. Jacoby described to control for preexisting beliefs. Dr. Mazis testified that such measures were unnecessary. (Mazis, Tr. 90, 152, 153). Dr. Jacoby opined that they were.. Dr. Mazis is backed up by Commission jurisprudence and the advice of the Federal Judicial Center's *Reference Manual on Scientific Evidence*. *See* Complaint Counsel's response to proposed finding 345.

350. What is known, however, is that Dr. Mazis made an effort to identify from the 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. (Mazis, Tr. 154 - 155).

Response to Finding No. 350:
Complaint Counsel have no specific response.

351. 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?" (Mazis, 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).

Response to Finding No. 351:
Complaint Counsel have no specific response

352. Dr. Mazis' actions in this regard confirm Dr. Jacoby's concerns about the effectiveness of the study in controlling for preconceptions. If Dr. Mazis is correct that participants with preexisting beliefs would have been distributed evenly between the control and test groups, then there would have been no reason to identify and exclude those who held negative preconceptions based on news stories seen, read or heard about in the 30 days prior to the survey.

Response to Finding No. 352:
Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

Dr. Mazis testified that, "If I didn't do that, [remove them] then you would probably be up here asking me questions about why I didn't eliminate them. So, it was just a – it seemed a prudent course of action." (Mazis, Tr. 156). Dr. Mazis also explained, "Now, I could have left them in. There were only 41 of them, and it probably wouldn't have changed the results. The chances are, they would have been equally distributed across the two groups. But it just seemed prudent, if they had – were exposed to this prior publicity, we could just remove them. Its really different with prior advertising. You can't – I mean, if they were exposed to prior advertising, we're not going to remove them from the study. I mean, that's the real world." (Mazis Tr. 155).

353. Dr. Mazis stated that he was merely being "prudent" in excluding participants with preconceptions formed from such news stories, (Mazis, Tr. 155 – 156; 164), but there is evidence in the record that it was important enough to Dr. Mazis that the study was halted and, on the same day, he revised the main questionnaire to include Questions 7 and 8. (RX 10; RX 11; RX 19; RX 23; RX 24).

Response to Finding No. 353:
Complaint Counsel have no specific response.

354. Dr. Mazis admitted that even this control, however, had limitations. Dr. Mazis was shown a press release issued by the Federal Trade Commission on October 1, 2003, approximately eight weeks before the start of the copy testing. (Mazis, Tr. 158 – 160; RX 83). The press release was entitled "Marketer of Electronic Abdominal Exercise Belt Charged with Making False Claims." (RX 83). Dr. Mazis testified he had never seen the press release before the trial. (Mazis, Tr. 159 - 160).

Response to Finding No. 354:
Respondents have mischaracterized Dr. Mazis' testimony. Dr. Mazis never testified that the "control" was removing participants who had seen news stories. This was an extra-precaution that he took. Additionally, Complaint Counsel objects to respondnets characterization that Dr. Mazis made such an admission. Dr. Mazis simply agreed that the news stories that respondents point to that came beyond the 30 day period prior to the survey days would not have been picked up in the screening questions. (Mazis Tr. 160).

355. Dr. Mazis was also shown two published news stories. The first was carried by United Press International, dated October 1, 2003, and entitled "FTC: 'Ab Force Belt' Claims are False." (Mazis, Tr. 160; RX-84). The second was an article published on Consumeraffairs.com, dated October 1, 2003, and entitled "FTC Tightens Noose on Ab Force Belt Promoters." (Mazis, Tr. 161; RX 85). Dr. Mazis testified he had seen neither news story before trial, and had not taken any steps to determine whether there were any news stories that came out in connection with the Complaint issued against Respondents. (Mazis, Tr. 160 - 161).

Response to Finding No. 355:
Dr. Mazis testified that "those people that were exposed to prior publicity, they would have been equally in both groups, the test and control groups." (Mazis Tr. 163).

356. Neither Dr. Mazis' screening questionnaire nor Questions 7 and 8 on the main

questionnaire identified any survey respondents who had seen these or any other similar news stories because they were not published within 30 days of the study. (Mazis, Tr. 160). Consequently, participants who sometime prior to 30 days before the study saw, read or heard these news stories about Ab Force, or other news ab belts in general, would have been included in the survey.

Response to Finding No. 356:

Dr. Mazis testified that "those people that were exposed to prior publicity, they would have been equally in both groups, the test and control groups." (Mazis Tr. 163).

357. If it was prudent for Dr. Mazis to identify and exclude those participants who had preexisting beliefs based on news stories seen, read or heard within 30 days of the study, and Dr. Jacoby testified it was, (Jacoby Tr. 394 - 396), then the same prudence should have been exercised in identifying participants with preexisting beliefs, regardless of the source of those beliefs. (Jacoby, Tr. 394 - 397).

Response to Finding No. 357:

Dr. Mazis noted that the 41 participants who had seen a recent news story about ab belts would probably have been equally distributed between the two groups, but it seemed prudent to exclude from the study because they might have been biased by the recent news story and that the news story was not part of the "real world" that had existed when the Ab Force ads were running. (Mazis, Tr. 155) He noted that exposure to prior advertising for other ab belts was different because those ads were part of the "real world" that existed when the Ab Force ads were running. (Mazis, Tr. 155)

358. Dr. Mazis' admitted failure to adequately control for preexisting beliefs on the part of study participants raises serious doubts as to his claim that the study results show that a significant number of test group participants perceived misleading claims in the Ab Force advertising as opposed to perceiving those claims based on previously held conceptions about ab belts generally or the Ab Force in particular. Consequently, the results of the survey are not reliable.

Response to Finding No. 358:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), 16 C.F.R. § 3.46(a), devoid of record citation. Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel asserts that Dr. Mazis's copy test is probative and reliable evidence that the claims challenged in the Complaint were made in Respondents' advertising.

d. Dr. Mazis engaged in a faulty analysis of the results

1) The net difference between the numbers of test and control group participants who perceived misleading claims is the appropriate measure to be examined.

359. Dr. Jacoby testified that the net difference between the groups, and not the statistical significance of the results, are the appropriate numbers to be examined. He explained that just because two values are statistically significant from each other does not mean that there is a practical significance to the difference. (Jacoby, Tr. 398 – 399; RX 40, ¶ 29).

Response to Finding No. 359:
Complaint Counsel have no specific response.

360. The net difference between the two groups on each response is the appropriate figure to examine in analyzing results. (Jacoby, Tr. 399; RX 40, ¶ 29). For example, the net difference between the test group and control group for the open-ended question was 10% (22% for the test group minus 12% for the control group). (RX 40, ¶ 29).

Response to Finding No. 360:
The actual difference between the two groups is 10.4% (22.3% for the test group minus 11.9% for the control group). CX 58 at 19, Table 1).

2) Dr. Mazis' improper decision to drop 81 study participants substantially affected the results reported

360. [as in original] In Question 2 of the main questionnaire, respondents were asked, "What is the brand name of the product that was advertised in the commercial you just looked at?" (CX 58, Exh. D thereto, Question 2). If the respondent provided a generic product answer, they were then asked Question 2a, which asks, "What is the specific brand name of the product that was just advertised?" (CX 58, Exh. D thereto, Question 2). If the respondent failed to answer "Ab Force," they were skipped to the end of the questionnaire and their responses excluded from the results. (RX 40, ¶ 56; CX 58, ¶ 41).

Response to Finding No. 360:
Complaint Counsel have no specific response.

361. Dr. Mazis said that the failure of 81 participants to fail to recall the name of the product indicated to him that those participants were not paying attention to the ad, which he considered a good reason not to include them in the final result. (Mazis, Tr.147). Consequently he removed from consideration 81 respondents. (Mazis, Tr. 147 – 148).

Response to Finding No. 361:
Complaint Counsel have no specific response

362. Dropping respondents who are inattentive is not consistent with accepted principles of consumer perception analysis. (Jacoby, Tr. 357). As Dr. Jacoby explained, the screening questionnaire is designed to obtain an appropriate universe of participants in the survey. (Jacoby, Tr. 357).

Response to Finding No. 362:
Complaint Counsel object to this finding to the extent that the first sentence is stated in the form of a conclusion. Complaint Counsel further state that the exercise of identifying and dropping inattentive persons from the survey could not practically be accomplished through the screening questionnaire because they had to be exposed to the test or control ad before their attentiveness could be ascertained. Thus, it was not unreasonable and, as Dr. Mazis testified, common practice to remove such people from the survey. (Mazis, Tr. 94, 102). Furthermore, as Complaint Counsel's brief demonstrates, there is precedent for such procedure in FTC and federal court cases. In *Kraft*, respondents to a copy test questionnaire who could not remember the advertised brand name or answered "don't know" when asked to restate the points in the ad were not included in the calculations of percentages. The ALJ rebuffed Kraft's attempt to have the

survey findings suppressed.[2] *Kraft* 114 F.T.C. at 70, n. 2. Federal court decisions in trade mark infringement cases under the Lanham Act have found removing respondents from survey denominators is permissible when valid reasons exist. *Wuv's International, Inc. v. Love's Enterprises, Inc.*, 208 U.S.B.Q. (BNA) 736 (1980) (Where 23 out of 403 survey respondents were excluded from survey results because they were unfamiliar with one of the restaurant chain litigants, the court said "[i]t stands to reason that consumer confusion, if any, indicated on the part of the restaurant-going individuals ignorant of 'Loves" restaurants is irrelevant."); *American Home Products* 871 F. Supp. at 739-761 (D. N.J. 1994). ("It is clear that in a false advertising action, survey results must be filtered via adequate control mechanisms to screen out those participants who took away no message from the ad."); *see also Liggett Group, Inc., v. Brown & Williamson Tobacco Corp.,* (1987 U.S. Dist. LEXIS, * 30 (M.D.NC 1988). (In an action for trademark infringement, the Court stated that the test [for level of confusion] is whether the similitude in the labels would probably deceive a purchaser who exercises ordinary prudence, not the careless buyer who makes no examination.").

363. Study participants who were asked Questions 2 and 2a had already qualified for the study and were an acceptable part of the survey universe. (Jacoby Tr. 357).

Response to Finding No. 363:

Proposed finding 363 is a false statement and does not reflect either what was actually done or what Dr. Jacoby testified to. Dr. Jacoby testified that questions 2 and 2a asked survey respondents what the name of the product was, and, if they didn't say "Ab Force, they were dropped from the study. (Jacoby, Tr. 356-57). This accurately reflects the procedure that was

[2]In his initial decision, the ALJ agreed with Complaint Counsel's expert that the number of such respondent's was not large enough to affect the results of the copy test.

followed. (CX 58, Exhibit D, Q. 2).

364. The fact that participants are inattentive to the brand name of the product does not mean that they are not qualified to form impressions based on viewing the advertising. (Jacoby Tr. 357 - 358). They would not be disqualified from the survey, having passed the screener, nor would they be disqualified from being a potential purchaser of the products at issue. (Jacoby, Tr. 358).

Response to Finding No. 364:

Respondents object to this finding to the extent that it states a conclusion. Although it reflects Dr. Jacoby's opinion, it does not reflect the generally accepted practice in survey methodology. Dr. Mazis testified that excluding inattentive survey respondents from further participation in the study is common practice because such people who cannot remember the brand name of a product featured in a commercial they have just seen twice would probably be unlikely to buy the product. (Mazis, Tr. 94, 102). There is ample precedent for this position. *See* Complaint Counsel's response to proposed finding 362.

365. The 81 dropped respondents were relevant respondents, and dropping them had the effect, in Dr. Jacoby's words, of "stacking the deck" by artificially raising the purported level of deception found by Dr. Mazis. (Jacoby Tr. 366; RX-40, ¶ 56).

Response to Finding No. 365:

Complaint Counsel object to this finding to the extent that it states a conclusion. Complaint Counsel further state that the 81 respondents were appropriately excluded from the survey results. *See* Complaint Counsel's response to proposed finding 362. Therefore, there was no deck stacking and the actual level of deception was not raised, artificially or otherwise.

366. Dr. Jacoby explained that the proper way to treat inattentive respondents who were qualified as part of the relevant universe was to retain them in the denominator of the results, not exclude them. In short, Dr. Jacoby explained that they should be included in the results, (Jacoby Tr. 360), just as Dr. Mazis included respondents who could not be reached to validate their participation after the survey was complete. (CX 58, ¶ 41).

Response to Finding No. 366:

For the reasons set forth in Complaint Counsels' response to proposed finding 362, excluding the inattentive respondents was consistent with generally accepted research practice. Likewise, Dr. Mazis stated, retaining in the survey the questionnaires of persons who could not be reached for validation is consistent with generally accepted practice (CX 58 at 18). Respondents are making an apples and oranges comparison because validation is for the purpose of determining whether the interviews actually took place as much as for whether the respondents were properly qualified. Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2d ed., 2000) at 267. There is no inconsistency in the two procedures.

367. Dr. Jacoby provided the Court with a simple example to explain how exclusion of these purportedly inattentive respondents skewed the results. He addressed a hypothetical in which 100 people were surveyed in a copy test, but 98 of them could not recall the name of the product. (Jacoby, Tr. 360). Of the two that recall the brand name, one extracted a misleading ad claim; the other did not. (Jacoby, Tr. 360). Dr. Jacoby testified that under Dr. Mazis' approach, the 98 participants who did not recall the brand name would have been excluded. As a result, and under Dr. Mazis' approach, because one of the two remaining participants did perceive a misleading claim, 50% of the participants would have detected a misleading claim. (Jacoby, Tr. 360 - 361). Dr. Jacoby explained that the correct and accepted practice is to include those respondents and report that only 1% detected misleading claims. (Jacoby, Tr. 361 - 363).

Response to Finding No. 367:

Dr. Jacoby's example is irrelevant and a little silly. The researchers would not be stuck with a perverse outcome as Dr. Jacoby would have the Court believe. In a situation where there are not enough qualified respondents to comprise an adequate universe, the data would not even be analyzed. In such a situation, researchers would need to qualify more respondents or redesign the survey. In Dr. Mazis' survey, 389 questionnaires were included in the final data tabulations. Dr. Mazis stated that this was consistent with generally accepted procedures in the field. (CX 58

at 18).

368. Dr. Mazis testified that the 81 respondents constituted approximately 15% of the 600 respondents interviewed. (Mazis, Tr. 147 - 148). However, there were 389 respondents who had passed the screener and who were considered part of the relevant universe (with the exception of the 41 respondents dropped for having seen a news story that negatively impacted their view of the Ab Force ads). (CX 58, ¶ 41). As Dr. Jacoby testified, the 81 who were dropped for inattentiveness should have been included in the denominator. (Jacoby, Tr. 360). This would have brought the number of respondents who were considered in the results to 470.

Response to Finding No. 368:

Complaint Counsel disagree with Dr. Jacoby's opinion that the 81 inattentive respondents should have been included in the survey. *See* Complaint Counsel's response to proposed finding

369. Consequently, more than 17% of the total number of respondents who had passed the screener were improperly excluded from the survey.

Response to Finding No. 369:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

370. Dr. Jacoby testified that the mathematical effect of not including these 81 respondents resulted in an exaggeration of the difference between the control and test group percentages reported. (Jacoby, Tr. 366, 392). Because Dr. Mazis improperly excluded these qualified respondents, the overall difference between the control group and the test group would have been substantially lower than actually reported, so that, for example, the results from the open-ended questions would have been substantially lower than the 10.4% difference reported. (Jacoby, Tr. 392).

Response to Finding No. 370:

Complaint Counsel deny that there was an exaggeration of the differences between the test group and the control group and further deny that the percentage differences reported were larger

than they should have been. *See* Complaint Counsel's response to proposed finding 362.

371. Excluding these 81 respondents in violation of accepted survey practices had the effect of substantially inflating the results reported by Dr. Mazis. Consequently, those results are unreliable and cannot support Dr. Mazis' opinion that consumers perceived misleading claims for weight loss, loss of inches, well-developed abs and substitute for exercise from the Ab Force commercials.

Response to Finding No. 371:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel specifically deny that excluding the 81 respondents was in violation of accepted survey practices. Complaint Counsel further deny that the survey results are unreliable. See Complaint Counsel's response to proposed finding 362.

3) The high number of control group respondents who perceived misleading claims demonstrates that the copy test results are unreliable.

372. Dr. Mazis admitted that the results reported for the control group were unusual because the control group had a "relatively high" level of detection of misleading claims for well-developed abs and loss of inches. (Mazis, Tr. 107 - 108).

Response to Finding No. 372:
Complaint Counsel have no specific response.

373. Dr. Mazis offered that these high control group numbers were attributable to the fact that "a lot of respondents…knew something about ab belts" and their responses were attributable to "prior beliefs that they walked into the study with." (Mazis, Tr. 108 - 109).

Response to Finding No. 373:
Complaint Counsel have no specific response.

374. However, there is significant concern that this "relatively high" number may also be the

result of leading questions employed by Dr. Mazis in the study main questionnaire. (Jacoby, Tr. 389 - 392).

Response to Finding No. 374:

The copy test questions were appropriate and asked in ways that minimized bias. (CX 58 at 15, 16, 21; Exhibit H at 12, 15, 17; Mazis, Tr. 95-100). Specifically, the questionnaire proceeded from general, open-ended questions to more narrow close-ended questions, and used a filter question to ensure that responses to follow-up, close-ended questions would not be based upon random guessing. (CX 58 at 15; Mazis, Tr. 95). Such a "funneling" approach" is "the best way to ask questions on a copy test." *Stouffer* 118 F.T.C. at 804. The close-ended questions rotated the order in which the questions were read to respondent, thereby controlling for order bias.[3] (Mazis, Tr. 92; CX 58 at 14). All three possible answers to the each question were read and shown to the respondent before each question was asked. (CX 58 at 15, 16, Exhibit D; Mazis, Tr. 95-96).

In addition, Even the considerable divergence in the responses to the closed ended questions negates the possibility of yea saying due to leading questions. Compared with 48.1% of the control group who perceived a "well-defined abs" claim and 42.4% who received a "lose inches around the waist" claim only 28.6% of the control group perceived an "alternative to exercise" claim, 28.1% perceived the "lose weight" claim, and 19.0% took away a "removes fat deposits around the waist" claim. This divergence suggests that rather than yea saying to leading questions, respondents were discriminating among questions, proving that the questions were unbiased..

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[3]Order bias is also known as "yea saying" to leading questions and the "halo effect." *Stouffer,* 118 F.T.C. at 806.

D. SUMMARY OF FINDINGS REGARDING EXTRINSIC EVIDENCE

1. Facial Analysis

375. Dr. Mazis offered no facial analysis with regard to the test radio advertisement for the Ab Force product.

Response to Finding No. 375:
Complaint Counsel have no specific response.

376. Dr. Mazis offered no facial analysis with regard to the final radio advertisement for the Ab Force product.

Response to Finding No. 376:
Complaint Counsel have no specific response.

377. Dr. Mazis offered no facial analysis with regard to the print advertisement for the Ab Force product.

Response to Finding No. 377:
Complaint Counsel have no specific response.

378. Dr. Mazis offered no facial analysis with regard to the internet advertisement for the Ab Force product.

Response to Finding No. 378:
Complaint Counsel have no specific response.

379. Dr. Mazis' facial analysis extends only to the four television commercials for the Ab Force product.

Response to Finding No. 379:
Complaint Counsel have no specific response.

380. The facial analysis offered by Dr. Mazis is not adequately supported by the evidence in the record for several reasons.

Response to Finding No. 380:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300

(June 12, 2003), it should be disregarded as a proposed finding of fact.

381. First, to the extent that Dr. Mazis offers the opinion that consumers would likely make an association between the Ab Force and between AbTronic, Ab Energizer and Fast Abs, that opinion is not adequately supported by the evidence.

Response to Finding No. 381:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

382. Dr. Mazis' belief that consumers would have formed category beliefs about EMS ab belts is unpersuasive. He was unaware of many details regarding the broadcast of the AbTronic, Ab Energizer and Fast Abs advertisements. For example, he did not know whether those advertisements were broadcast locally or nationally, or at what time of the day they were broadcast. More importantly, he was unaware how many consumers likely saw those advertisements. Instead, his facial analysis rests on the assumption that Complaint Counsel was correct in telling him that these three advertisements were the most frequently aired during the relevant time.

Response to Finding No. 382:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

In addition, Complaint counsel note that Dr. Mazis offered his facial analysis based upon his expert opinion, and at the time he performed his analysis, it was necessarily based upon assumptions that remained to be established in the course of developing an evidentiary record in this matter. Dr. Mazis's assumptions were reasonable at the time and, indeed, they are confirmed by the evidence adduced at trial. The evidence clearly establishes that infomercials for the

AbTronic, AB Energizer, and Fast Abs ab belts dominated the direct response TV market shortly before and during the Ab Force campaign. (CX 62; CX 77 through CX 95; CX 126; JX 6, ¶¶ 10, 11. 13).

The evidence also clearly establishes that Respondents intended infomercials about those products to be "reference points" for their "compare and save" advertising. (Khubani, Tr. 63-75). It is reasonable to assume, therefore, that the ads he created reached their intended audience, *e.g.*, persons familiar with the infomercials for other ab belts.

383. Dr. Mazis also assumed that consumers would retain whatever information was provided through these advertisements and would, as a matter of course, form category beliefs about ab belts. Dr. Jacoby provided persuasive testimony, based on scientific research, that consumers would not necessarily retain or comprehend information conveyed in those commercials.

Response to Finding No. 383:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint counsel also notes that Respondents ads explicitly claimed, "I'm sure you've seen those fantastic electronic ab belt infomercials on TV" or made other references to ab belts sold by infomercials on TV. These explicit references constitute an admission by Respondents that many consumers had seen and remembered those infomercials.

384. Dr. Mazis' opinion that consumers who saw the Ab Force would have had category beliefs about ab belts is also unpersuasive. Even if consumers formed category beliefs about EMS ab belts based on having seen ads for AbTronic, Ab Energizer and Fast Abs, Dr. Mazis offered no persuasive rationale supporting the finding that those consumers

would have seen the Ab Force ad, or, conversely, that consumers who saw the Ab Force ads would have had previously formed category beliefs about ab belts. There is no adequate evidence to support the factual finding that such a nexus exists on the basis of a facial review of the ads at issue. The Court finds that such an association can only be demonstrated through extrinsic evidence.

Response to Finding No. 384:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint counsel also notes that Respondents' ads explicitly claimed, "I'm sure you've seen those fantastic electronic ab belt infomercials on TV" or made other references to ab belts sold by infomercials on TV. These explicit references constitute an admission by Respondents that many consumers had seen and remembered those infomercials. In addition, in their ads Respondents repeatedly referred to the Ab Force as an "ab belt." These repeated references constitute and admission that consumers would have had previously formed category beliefs about ab belts.

385. Second, the Court is not persuaded by Dr. Mazis' opinion that (1) the name "Ab Force" and (2) the use of attractive models in the Ab Force television advertising is sufficient to find that the ads claim that the Ab Force causes loss of inches or well-developed abdominals.

Response to Finding No. 385:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

In addition, As the Complaint alleges, the television ads contain "(1) over a dozen

depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions; and (2) two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles." (JX 2-5; Answer, ¶ 10). Two of them included a close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. (JX 3, JX 5; Answer, ¶ 10). While many ads use attractive people, not all ads use bikini-clad women and well-muscled, bare-chested men. In *Kraft*, the Commission specifically noted that a claim can be communicated by visual images - in that case, the visual image of milk being poured into a glass up to a five-ounce mark to imply that a slice of Kraft singles had as much calcium as five ounces of milk. *Kraft*, 114 F.T.C. at 124.

As to the name "Ab Force, " Mr. Khubani said that it conveys the idea"the product was designed to work primarily on the abdominal area." (Khubani, Tr. 264). In this case, through the use of the name "Ab Force," statements such as "the latest fitness craze" and images of well-sculpted individuals applying the Ab Force belt to their abdominal area, Respondents represented that Ab Force caused loss of fat, inches, or weight; built well-defined abdominal muscles; and was equivalent to traditional exercise. No extrinsic evidence is needed to reach this conclusion.

386. The use of attractive models and spokespersons is common in advertising. One need not be an expert to understand that the use of attractive people in advertising is preferable to the use of unattractive people. In this case, the Court is persuaded that the models used were also shown with bare abdominal areas and slender figures for the purpose of demonstrating the functionality of the Ab Force product, which is intended to cause involuntary muscle contractions.

Response to Finding No. 386:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300

(June 12, 2003), it should be disregarded as a proposed finding of fact.

In addition, clips of two bikini-clad female models who are displaying slim, trim torsos but not wearing an ab belt (CX 7 and CX 8) are in the background of all the Ab Force TV ads (JX 2 through JX 5), and an image of a man with well-developed abs exercising on an exercise bench but not wearing an ab belt (CX 9) is in the background of the two 120-second Ab Force TV commercials. None of these models is wearing the Ab Force. (Khubani, Tr. 543-544). Collette Liantonio testified that Ab Force television commercials contained these stock images of bikini-clad models because "[i]t's a beautiful body," conveying "[b]eauty, the ideal." (JX 6; CX 107 (Liantonio, Dep. at 69)). When asked whether images of bikini-clad models appeared in Ab Force commercials because this was the image that the viewer was supposed to aspire to, Ms. Liantonio responded, "yes." (JX 6; CX 107 (Liantonio, Dep. at 70)). When asked why this image of a male model with well-defined abdominal muscles appeared in Ab Force commercials, Ms. Liantonio responded, "the same reason that the bikini is in there, I guess it's perfect abs." When asked what perfect abs have to do with Ab Force, she responded: "It's the dream, it's the beauty, it's what we all aspire to." (JX 6; CX 107 (Liantonio, Dep. at 72)).

387. The Court is not persuaded by Dr. Mazis' opinion that the name "Ab Force" alone is sufficient to convey claims of loss of inches and substitution for exercise. Dr. Mazis provided no rationale for his opinion that the name "Ab Force" conveys to consumers the belief that the product acts as a force on consumer's abs, making them look great. The Court agrees with Dr. Jacoby that the name could mean many things to different people, and, in the absence of extrinsic evidence, cannot find that the name alone or in conjunction with visual elements conveys the claims asserted.

Response to Finding No. 387:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the

Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. In addition, Complaint counsel note that Mr. Khubani said that the name conveys the idea that "the product was designed to work primarily on the abdominal area." (Khubani, Tr. 264).

388. Third, at the time he made his facial analysis, Dr. Mazis was unaware that there were other EMS ab products being advertised, many with different claims than those being asserted in this case.

Response to Finding No. 388:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

389. Dr. Mazis formed his facial analysis after being retained by the Federal Trade Commission and, more importantly, after reviewing the allegations of the Complaint. This raises doubts that cannot be overlooked as to the objectivity of the facial analysis.

Response to Finding No. 389:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

390. Looking at each of the advertisement as a whole, the Court finds that the advertisements make prominent and express claims of technological similarity to other EMS ab belts, lower price, and, in the case of the rollout television commercials relaxing massage. None of these claims are challenged by Complaint Counsel as deceptive or misleading.

Response to Finding No. 390:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of

Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

391. Viewing the advertisements as a whole, and in the absence of extrinsic evidence to the contrary, the Court is not convinced that consumers viewing those advertisements would likely believe that these specific elements make the alleged implied claims.

Response to Finding No. 391:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

2. The Copy Test

392. Dr. Mazis' copy test purported to evaluate consumer perceptions about the 60-second rollout advertisement (AB-E-60). None of the other televisions commercials for the Ab Force were tested.

Response to Finding No. 392:
All for Ab Force television ads were very similar. Respondents have represented that the majority of Ab Force orders resulted from AB-E-60 and AB-E-120. (JX 1, ¶ 31, Compare with JX 1, ¶¶ 27, 28).

393. Dr. Mazis' copy test did not test consumer perceptions regarding the radio advertisements, print advertisement, or internet advertisement for the Ab Force product. Consequently, the Court finds that no extrinsic evidence was presented at trial concerning the perceptions consumers were likely to have about this advertising.

Response to Finding No. 393:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the

Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

394. The Court finds that the copy test suffers from several serious methodological flaws and therefore does not support Dr. Mazis' opinion that the 60-second rollout ad for the Ab Force contains claims of loss of weight, fat or inches; that the Ab Force causes well-developed abdominals; or that the Ab Force is an alternative to exercise.

Response to Finding No. 394:

Respondents' proposed finding is vague, argumentative, conclusory and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel denies that Dr. Mazis's copy test suffers from serious methodological flaws; to the contrary, it is probative and reliable evidence that the claims challenged in the Complaint were made in Respondents' advertising.

395. The Court shares Dr. Jacoby's concern that the universe criteria selected by Dr. Mazis was overly-broad. Specifically, the criterion that participants must have purchased a product by calling a toll-free number shown in a television program, ad, or infomercial within the year prior to the survey may have captured respondents who would not likely purchase the Ab Force. By potentially broadening the universe to include irrelevant participants through the use of this criterion raises doubts as to the reliability of the results obtained and the opinions based on those results.

Response to Finding No. 395:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel deny

that selection criteria for the survey universe was overly broad. *See* Complaint Counsel's response to proposed finding 324.

396. The Court also shares Dr. Jacoby's concern that the questions used in the main questionnaire were misleading. By providing statements only in the affirmative and then asking participants if they agree with the statement, the risk that responses were the result of yea-saying is significant. Consequently, there is doubt that the results accurately reflect consumers' perceptions, and cannot be seen as reliable.

Response to Finding No. 396:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel deny that the questions in the main questionnaire were "misleading" or, for that matter, leading. See Complaint Counsel's response to proposed finding 325.

397. A serious flaw in the survey is Dr. Mazis' decision not to attempt to control for preexisting beliefs. Despite testifying that consumers may have had preexisting beliefs about EMS ab belts, and that such beliefs may have had a significant impact on the survey responses, Dr. Mazis affirmatively stated that he did not attempt to control for those beliefs. His testimony that such controls are not necessary because respondents with preexisting beliefs would be evenly divided into test and control groups by random assignment is not grounded in any rationale basis. The Court agrees with Dr. Jacoby that additional screening should have been conducted to eliminate as many participants with preexisting beliefs as possible.

Response to Finding No. 397:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel deny

that Dr. Mazis's survey failed to control for preexisting beliefs. *See* Complaint Counsel's response to proposed finding 345.

398. The Court is further troubled by the fact that Dr. Mazis, although having testified that screening for preexisting beliefs was not necessary, actually screened for preexisting beliefs created by news accounts published within 30 days prior to the survey. If Dr. Mazis believed that random assignment would have divided those with preexisting beliefs into the test and control groups, then a question remains as to why he did not take this same approach with those exposed to news accounts within a month of the survey. Equally troubling is the fact that Dr. Mazis limited his screening of preexisting beliefs just to news stories seen, heard or read within that time period. There was evidence that the Commission issued a press release about this very case two months before the copy test was conducted, and that the story was disseminated on the UPI wire as well as elsewhere. Dr. Mazis' limited screening questions (Questions 7 and 8 of the main questionnaire) did not, as he admitted, identify any participants who may have been aware of those stories or this case. Nor would those screening questions have identified anyone who had seen other EMS ab product ads, purchased an ab belt, or otherwise formed preexisting beliefs about ab belts in general or the Ab Force specifically. This failure renders the copy test unreliable.

Response to Finding No. 398:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

399. Finally, the Court shares Dr. Jacoby's puzzlement as to why 81 respondents who were deemed "inattentive" by Dr. Mazis were dropped from the survey. Dr. Mazis did not adequately explain why participants who did not remember the name of the product could not otherwise have formed perceptions of the advertising claims. In fact, when the Court posed this question to Dr. Mazis directly, it went unanswered.

Response to Finding No. 399:

Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the

Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact.

400. The effect of dropping 81 respondents for this reason had the effect of exaggerating the results, in Dr. Jacoby's opinion, significantly. Consequently, the results cannot be deemed a reliable and accurate survey of consumers' perceptions of the advertising claims contained in the 60-second rollout Ab Force television ad.

Response to Finding No. 400:
Respondents' proposed finding is argumentative, conclusory, and, in contravention of Commission Rule 3.46(a), devoid of record citation 16 C.F.R. § 3.46(a). Consistent with the Order Granting respondents' Motion to Strike issued in *Chicago Bridge & Iron Co.*, Docket 9300 (June 12, 2003), it should be disregarded as a proposed finding of fact. Complaint Counsel deny that dropping the 81 inattentive respondents exaggerated the results of the survey or was not done pursuant to sound survey methodology. *See* Complaint Counsel's responses to proposed findings 362 and 364.

CONCLUSIONS OF LAW

I. THE ALLEGED VIOLATION

401. The Complaint in this matter alleges that Respondents engaged in unfair or deceptive acts or practices in the making of false advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52 (Tr. 5).

Response to Finding No. 401:
Complaint Counsel have no specific response.

402. Specifically, the Complaint alleges that shortly before the time period in which the Ab Force commercials appeared, the AbTronic, Ab Energizer and Fast Abs products were offered for sale, sold, and distributed throughout the United States. (CX-1, 11). The complaint alleges that these three products were similar in appearance to the Ab Force, were comprised of components substantially similar to the Ab Force, and were widely advertised through television infomercials. (CX 1, 11). The Complaint also asserts that these three ads made advertising claims of weight, fat and inch loss; that the products

caused well-defined abdominal muscles; and that the devices were equivalent to or more effective than regular exercise. (CX 1, 16-18).

Response to Finding No. 402:
Complaint Counsel have no specific response.

403. The Complaint alleges that the Ab Force ads represented that the Ab Force used the same technology and was just as powerful and effective as other, more expensive EMS devices that were advertised by infomercials shortly before Ab Force appeared. (CX 1, 9-10). Through this advertising, and by reference to AbTronic, Ab Energizer and Fast Abs, the Complaint asserts that respondents represented that the Ab Force could cause loss of weight, fat, or inches; that the Ab Force caused well-defined abdominal muscles; and that the Ab Force was equivalent to or more effective than regular exercise. (CX 1, 21).

Response to Finding No. 403:
The Complaint does not allege that Ab Force was equivalent to or more effective than regular exercise; it alleges more generally that Respondents represented that Ab Force was an effective alternative to regular exercise. (CX1, ¶ 21; see CX 1, ¶ 20). Complaint Counsel object to the proposed conclusion of law to the extent that it purports to identify all of the elements of the Ab Force advertising that are relevant to Respondents' alleged representations.

II. LEGAL STANDARD AND ANALYTICAL FRAMEWORK

404. Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45. Section 12 of the Federal Trade Commission Act declares dissemination of false advertisements regarding certain categories of products to constitute an unfair or deceptive act or practice under Section 5. 15 U.S.C. § 52.

Response to Finding No. 404:
Complaint Counsel have no specific response.

405. Advertising violates Sections 5(a) and 12 of the Federal Trade Commission Act if it is likely to mislead reasonable consumers to the consumers' detriment. In re Novartis Corporation, et al., 127 F.T.C. 580, 678 – 679 (1998); In re Stouffer Foods Corp., 118 F.T.C. 746, 777 (1994). In practice, the Commission's deception analysis is applied as a three-part test: (1) a claim was made; (2) the claim was likely to mislead a reasonable consumer; and (3) the claim was material. Novartis, 127 F.T.C. at 679. There is no

requirement of intent. Id.

Response to Finding No. 405:

Complaint Counsel object to this proposed conclusion to the extent that it conflates the requirements of Section 5 and Section 12 and identifies deception analysis as the sole applicable legal standard.

An advertisement is deceptive under Section 5 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). A "false advertisement" under Section 12 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 (9th 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 *Thompson Medical* , 104 F.T.C. at 818-19), 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).

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).

A. FRAMEWORK FOR DETERMINING IF THE CHALLENGED CLAIMS WERE MADE

406. The threshold question in this matter is what claims may reasonably be ascribed to the advertising for the Ab Force product. Novartis Corporation, 127 F.T.C. 580, 679 (1999), aff'd, 223 F.3d 783 (D.C. Cir. 2000).

Response to Finding No. 406:
Complaint Counsel have no specific response.

407. Although proof of actual deception is not required, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would interpret the message of the advertisement to have made the alleged claims. Id.; In re Kraft, Inc., 114 F.T.C. 40, 120 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 113 S. Ct. 1254 (1993). For analytical purposes, the Commission often distinguishes between express claims and implied claims in evaluating what messages an advertisement can reasonably be interpreted as containing. Kraft, 114 F.T.C. at 120.

Response to Finding No. 407:
Complaint Counsel do not have to establish that all consumers would interpret the message of the advertisement to have made the alleged claims, an advertisement that reasonably can be interpreted in a misleading way is deceptive even though other, non-misleading interpretations are equally possible. *Kraft, Inc.,* 114 F.T.C. at 120 n.8; *Thompson Medical,* 104 F.T.C. at 789 n.7, 818; *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *see also Deception Statement*, 103 F.T.C. at 178 n.21 ("A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate.").

408. Express claims directly state the representation at issue. Id. (citing In re Thompson Medical, 104 F.T.C. 648, 788 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987)). Implied claims are any claims that are not express. Kraft, 114 F.T.C. at 120. They range on a continuum from claims that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." Id. (quoting Thompson Medical, 104 F.T.C. at 789).

Response to Finding No. 408:
Complaint Counsel have no specific response.

1. STANDARDS FOR EMPLOYING A FACIAL ANALYSIS

409. The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself. Kraft, 114 F.T.C. at 121. The Commission has stated that it is often able to conclude that an advertisement contains an implied claim by evaluating the advertisement and the circumstances surrounding it. Id. (citing Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Associates, Inc.,
103 F.T.C. 176 – 177 (1984)("Deception Statement")).

Response to Finding No. 409:
Complaint Counsel have no specific response.

410. But, implied claims may only be found where it may be determined with confidence, after examining all of the constituent elements of the advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad. Stouffer, 118 F.T.C. at 777 (citing Kraft, 970 F.2d at 318); Thompson Medical, 104 F.T.C. at 320.

Response to Finding No. 410:
The representation(s) alleged in the complaint need not be the only "reasonable clear" interpretation(s) of the challenged advertising; an advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Kraft, Inc.,* 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7, 818; *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd,* 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); see also Deception Statement, 103 F.T.C. at 178 n.21 ("A

secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate."). Additionally, implied claims may ne found based on information or surrounding circumstances not apparent on the face of the ad. *Kraft, Inc.,* 114 F.T.C. at 121.

411. of Moreover, the facial interpretation may not be based on a few parsed elements taken out context. Instead, the Commission must consider the overall net impression of the advertisement, taken as a whole. Stouffer, 118 F.T.C. at 777 (citing Kraft, 970 F.2d at 314, 319). The determination must be made based on the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. Stouffer, 118 F.T.C. at 177 (citing Thompson Medical, 104 F.T.C. 648). A facial analysis does not involve the effect of individual words, phrases or visual images. Thompson Medical, 104 F.T.C. at 793. Indeed, individual words, phrases or visual images in and advertisement can effectively counter other words, phrases or visual images also contained in that advertisement. Stouffer, 118 F.T.C. at 789, n. 1.

Response to Finding No. 411:
Complaint Counsel have no specific response.

412. However, if, based on the initial review of the evidence from the advertisement itself, the Commission cannot conclude with confidence that an advertisement cannot reasonably be read to contain a particular implied message, the Commission will not find the ad to have made the claim unless extrinsic evidence allows the Commission to conclude that such a reading of the ad is reasonable. Kraft, 114 F.T.C. at 121 (citing Thompson Medical, 104 F.T.C. at 789; In re Bristol-Myers Co., 102 F.T.C. 21, 319 (1983), aff'd, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985)).

Response to Finding No. 412:
Complaint Counsel have no specific response.

2. STANDARDS FOR CONSIDERING EXTRINSIC EVIDENCE

413. The extrinsic evidence the Commission has demonstrated that it prefers to use is "direct evidence of what consumers actually thought upon reading the advertisement in question." Thompson Medical, 104 F.T.C. at 789. This type of extrinsic evidence may also include consumer surveys, also called copy tests. These surveys are used in lieu of individual testimony because, in most cases, it is "too costly to obtain the statements of enough

individual consumers in another manner (e.g., by way of affidavits) to be reasonably confident that the consumers' views on the record of the proceeding were representative of the entire group to which the ad was addressed." Thompson Medical, 104 F.T.C. at 789 - 790; see also Stouffer, 118 F.T.C. at 779.

Response to Finding No. 413:
Complaint Counsel have no specific response.

414. However, the Commission requires that such consumer surveys be methodologically sound and include reliable results. Thompson Medical, 104 F.T.C. at 790; Kraft, 114 F.T.C. at 121; Cliffdale Associates, 103 F.T.C. at 164-66. In determining whether a consumer survey is methodologically sound, the Commission will look to whether it "draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." Thompson Medical, 104 F.T.C. at 790. The Commission looks to whether such evidence is reasonably reliable and probative of the underlying issues at hand. See, In re Bristol-Myers Co., 85 F.T.C. 688, 743-44 (1975). A survey that is not methodologically sound or which has been incorrectly analyzed should be afforded little weight. See, Kraft, 114 F.T.C. at 121; 970 F.2d at 318.

Response to Finding No. 414:
The Commission has observed that it "does not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably probative." *Stouffer*, 118 F.T.C. at 799.

415. A second type of evidence the Commission will look at is evidence not specifically showing how consumers understood the challenged advertisements, but showing how consumers might ordinarily be expected to perceive or understand representations like those contained in the challenged ads. Thompson Medical, 104 F.T.C. at 790. For example, the Commission might consider evidence respecting the common usage of terms, as well as generally accepted principles drawn from market research showing that consumers generally respond in a certain manner to advertisements that are presented in a particular way. Id.

Response to Finding No. 415:
Complaint Counsel have no specific response.

416. A third type of evidence the Commission will consider if offered is the opinion of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted. Thompson Medical, 104 F.T.C. at 790. However, where the opinions voiced by experts are not adequately supported, the Commission will ordinarily give those opinions little weight. Id. The Commission considers "to be adequately supported [those] opinions that

describe empirical research or analyses based on generally recognized marketing principles or other objective manifestations of professional expertise. Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue." Id., n. 11.

Response to Finding No. 416:
Complaint Counsel have no specific response.

417. In all instances, the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. Kraft, 114 F.T.C. at 122 (citing Deception Statement, 103 F.T.C. at 176). Whether looking from evidence at the ad itself, extrinsic evidence or both, the Commission considers the overall net impression of the advertising in determining what messages may be reasonably ascribed to it. Kraft, 114 F.T.C. at 122; Thompson Medical, 104 F.T.C. at 790.

Response to Finding No. 417:
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. at 120.

B. FRAMEWORK FOR DETERMINING WHETHER CLAIMS ARE LIKELY TO MISLEAD REASONABLE CONSUMERS

419. [so numbered in original] If Complaint Counsel establishes that the asserted claims were made in the challenged advertising, then Complaint Counsel must then prove that the advertising claims are likely to mislead reasonable consumers into believing those claims.

Response to Finding No. 419:
Complaint Counsel have no specific response.

420. The applicable standard concerning the second part of the three-part test set forth in the Novartis case is whether a claim is likely to mislead; proof that particular consumers were actually deceived is not required. Novartis, 127 F.T.C. at 684. The test is whether the consumer's interpretation or reaction is reasonable. Id. A claim is presumed reasonable if it is one that was intended to be conveyed. Id. Finally, a claim would likely mislead a reasonable consumer if at least a "significant minority of consumers" would be deceived by it. Id.

Response to Finding No. 420:

Complaint Counsel have no specific response.

C. FRAMEWORK FOR DETERMINING WHETHER CLAIMS WERE MATERIAL

421. Finally, if Complaint Counsel has established that the claims were in fact made, and that reasonable consumers are likely to be misled by those claims, Complaint Counsel must also prove that the claims were material to the purchasing decision.

Response to Finding No. 421:
Complaint Counsel have no specific response.

422. A "material" misrepresentation is one that involves information important to consumers and that is therefore likely to affect the consumer's choice of, or conduct regarding, a product. Novartis, 127 F.T.C. 685.

Response to Finding No. 422:
Complaint Counsel have no specific response.

423. An advertiser's intent to make the claim generally implies that the advertiser believes that the claim is important to consumers. Novartis, 127 F.T.C. 687. Although the Deception Statement includes intent as a predicate fact giving rise to a presumption of materiality, 103 F.T.C. at 182, in the context of implied claims, extrinsic evidence is required to establish an intent to make the claim. *Novartis*, 127 F.T.C. at 688.

Response to Finding No. 423:
Complaint Counsel notes that 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. Thus, ads that create incorrect consumer beliefs about the **purpose or efficacy** of a product are deceptive. In addition, the Commission presumes materiality with implied claims where there is evidence that the seller intended to make the claim, *Thompson Medical*, 104 F.T.C. at 816-17. Complaint Counsel notes that Respondents ads explicitly claimed, "I'm sure you've seen those fantastic electronic ab belt infomercials on TV" or made other references to ab belts sold by infomercials on TV. These explicit references are evident that Respondents intended to remind consumers of those

infomercials.

Finally, the Commission presumes materiality with "claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. *Thompson Medical*, 604 F.T.C. at 816-17.

424. Consequently, to the extent Complaint Counsel seeks to establish materiality on the basis of Respondents' intent to make the challenged claims, Complaint Counsel is required to provide extrinsic evidence of that intent on the part of the Respondents with respect to the Ab Force advertising. *Id.*

Response to Finding No. 424:

Complaint Counsel notes that 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. Thus, ads that create incorrect consumer beliefs about the **purpose or efficacy** of a product are deceptive. In addition, the Commission presumes materiality with implied claims where there is evidence that the seller intended to make the claim, *Thompson Medical*, 104 F.T.C. at 816-17. Complaint Counsel notes that Respondents ads explicitly claimed, "I'm sure you've seen those fantastic electronic ab belt infomercials on TV" or made other references to ab belts sold by infomercials on TV. These explicit references are evident that Respondents intended to remind consumers of those infomercials.

Finally, the Commission presumes materiality with "claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. *Thompson Medical*, 604 F.T.C. at 816-17.

III. THE CHALLENGED ADVERTISING DID NOT MAKE THE ASSERTED CLAIMS

A. A REVIEW OF THE AB FORCE ADVERTISEMENTS DOES NOT PERMIT THE COURT TO DETERMINE THAT THE IMPLIED CLAIMS ARE EVIDENT ON THE FACT OF THE ADVERTISING

425. Each of the claims asserted in this matter are implied claims.

Response to Finding No. 425:

Complaint Counsel assert that the following claims, from Respondents' radio ads, are explicit claims that the Ab Force will produce well-developed abs and is a substitute for regular exercise. "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 addition, their print ad said, " So why would you want to buy a more expensive ab belt from the competition when the Abforce is as low as just $10?" (CX 1 G). By asserting that the Ab Force is comparable to other ab belts, the print ads explicitly claimed that the Ab Force can perform the same functions that ads for the other ab belts claim are possible for their products.

426. The Court cannot determine with confidence, after examining all of the constituent elements of the Ab Force advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the Ab Force ads.

Response to Finding No. 426:

Respondents' proposed finding is vague, argumentative, conclusory and not supported by the evidence. Moreover, a facial analysis performed by Dr. Mazis, concludes that consumers took away certain core performance claims that were either the result of familiarity with ads for other ab belts or implied by images and words within the four corners of the Ab Force ads. (CX 58 at 4, 9; Mazis, Tr. 61-62).

427. First, to the extent Complaint Counsel alleges that the implied claims arise by association with the ads for AbTronic, Ab Energizer and Fast Abs, those implied claims are not conspicuous, self-evident or reasonably clear on the fact of the Ab Force ads.

Response to Finding No. 427:

As the Commission stated in *Thompson Medical*, it can also consider "circumstances surrounding" the advertisement. 104 F.T.C. at 789. In this case, all the advertisements themselves invite such scrutiny by referring explicitly to the surrounding circumstances by referring to "those fantastic Electronic Ab Belt infomercials on TV." Each of the TV ads then made some comparison of the Ab Force's power and effectiveness 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." (JX 2; CX 1 B at 4-5, Tr. 51-52).

Another stated, "The Ab Force is just as powerful and effective as those ab belts sold by other companies on infomercials." (JX 3; CX 1 D at 4-5; Tr. 54-56). The two most heavily-aired spots 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." (JX 4, JX 5; CX 1F at 3-5; Tr. 55-59).

The advertising for the AbTronic, AB Energizer, and Fast Abs ab belts made express and 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.

Mr. Khubani acknowledges that he was thinking of the AbTronic, Fast Abs and AB Energizer ab belts, among others, when he wrote the statement in the radio ad, "They're amazing...promising to get our abs into great shape fast -- without exercise!" (Khubani, Tr. 273).

428. Indeed, the theory advanced by Complaint Counsel that the Ab Force ads cause an association in consumers minds between the Ab Force and ads for AbTronic, Ab Energizer and Fast Abs requires looking significantly beyond the circumstances surrounding the Ab Force advertising. Consequently, a facial analysis in this case is not appropriate.

Response to Finding No. 428:

As the Commission stated in *Thompson Medical*, it can also consider "circumstances surrounding" the advertisement. 104 F.T.C. at 789. In this case, all the advertisements themselves invite such scrutiny by referring explicitly to the surrounding circumstances by referring to "those fantastic Electronic Ab Belt infomercials on TV." Each of the TV ads then made some comparison of the Ab Force's power and effectiveness 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." (JX 2; CX 1-B at 4-5, Tr. 51-52).

Another stated, "The Ab Force is just as powerful and effective as those ab belts sold by other companies on infomercials." (JX 3; CX 1-D at 4-5; Tr. 54-56). The two most heavily-aired spots 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." (JX 4, JX 5; CX 1 F at 3-5; Tr. 55-59).

429. Second, Complaint Counsel alleges that elements contained within the four corners of the Ab Force ads convey the challenged implied claims. However, the net impression created by the interaction of all elements in the ad, rather than the impact of the few elements identified by Complaint Counsel, does not allow the Court to determine with confidence that the challenged implied claims are conspicuous, self-evident or reasonably clear on the fact of the Ab Force advertising.

Response to Finding No. 429:

Respondents' proposed finding is vague, argumentative, conclusory and not supported by the record. A facial analysis performed by Dr. Mazis, concludes that consumers took away certain core performance claims that were either the result of familiarity with ads for other ab belts or implied by images and words within the four corners of the Ab Force ads. (CX 58 at 4, 9; Mazis, Tr. 61-62).

B. THE EXTRINSIC EVIDENCE PROFFERED AT TRIAL DOES NOT ESTABLISH THAT THE CHALLENGED IMPLIED CLAIMS WERE MADE IN THE AB FORCE ADVERTISING

430. Because the Court could not determine with confidence, from a facial analysis, that the challenged implied claims are conspicuous, self-evident or reasonably clear on the fact of the ads, Complaint Counsel was required to provide extrinsic evidence that the implied claims were made.

Response to Finding No. 430:

Respondents' proposed finding is vague, argumentative, conclusory and not supported by the record evidence.

Complaint counsel asserts, however, that it has provided extrinsic evidence that the claims challenged in the complaint were made. Dr. Mazis testified that four key elements in the Ab Force commercials would have an impact on consumers that would cause them to categorize them with the AbTronic, AB Energizer, and Fast Abs. (Mazis, Tr. 59). These four elements are (1) the linkage of the Ab Force product to the other ab belts by references in Ab Force ads to the other ab belts on TV, (2) the visual images of models with well-developed abs and slim bodies, (3) the physical appearance of the Ab Force product which is similar to the other ab belts, and (4) the similarity of the name "Ab Force" to the names of the other ab belts. (Mazis, Tr. 59-60; CX 58 at 8-9).

431. The court has taken into account the quality and reliability of the extrinsic evidence offered. The expert testimony and copy test evidence offered by Complaint Counsel does not reliably establish that the challenged implied claims were made in the Ab Force advertising.

Response to Finding No. 431:

Respondents' proposed finding is vague, argumentative, conclusory and not supported by the record evidence.

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

Additionally, Dr. Mazis testified that four key elements in the Ab Force commercials would have an impact on consumers that would cause them to categorize them with the AbTronic, AB Energizer, and Fast Abs. (Mazis, Tr. 59). These four elements are (1) the linkage of the Ab Force product to the other ab belts by references in Ab Force ads to the other ab belts on TV, (2) the visual images of models with well-developed abs and slim bodies, (3) the physical appearance of the Ab Force product which is similar to the other ab belts, and (4) the similarity of the name "Ab Force" to the names of the other ab belts. (Mazis, Tr. 59-60; CX 58 at 8-9).

432. Complaint Counsel has therefore failed to prove that the challenged implied claims were made in the Ab Force ads.

Response to Finding No. 432:

Respondents' proposed finding is vague, argumentative, conclusory and not supported by record evidence. Dr. Mazis testified that four key elements in the Ab Force commercials would have an impact on consumers that would cause them to categorize them with the AbTronic, AB Energizer, and Fast Abs. (Mazis, Tr. 59). These four elements are (1) the linkage of the Ab Force product to the other ab belts by references in Ab Force ads to the other ab belts on TV, (2) the visual images of models with well-developed abs and slim bodies, (3) the physical appearance of the Ab Force product which is similar to the other ab belts, and (4) the similarity of the name "Ab Force" to the names of the other ab belts. (Mazis, Tr. 59-60; CX 58 at 8-9).

CONCLUSION

433. Complaint Counsel has failed to prove that Respondents violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.

Response to Finding No. 433:

Respondents' proposed finding is vague, argumentative, conclusory and not supported by record evidence. See Complaint Counsel's Responses to Respondents' Proposed Conclusions of Law, supra.

Respectfully submitted,

____

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Dated: June 15, 2004