

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)
)
TELEBRANDS CORP.,)
a corporation,)
)
TV SAVINGS, LLC,)
a limited liability company, and)
)
AJIT KHUBANI,)
individually and as president of)
Telebrands Corp. and sole member)
of TV Savings, LLC.)

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To: The Honorable Stephen J. McGuire
Chief Administrative Law Judge

**COMPLAINT COUNSEL'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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PROPOSED FINDINGS OF FACT

I. RESPONDENTS, DEVELOPMENT OF THE AB FORCE, AND COMMON ENTERPRISE

A. CORPORATE RESPONDENTS' STRUCTURE

1. Respondent Telebrands Corporation (“Telebrands”) is a New Jersey corporation with its principal place of business at 79 Two Bridges Road, Fairfield, New Jersey 07004. (JX 1, ¶ 2).
2. Respondent TV Savings (“TV Saving”) is a Connecticut limited liability company (JX 1, ¶ 5). TV Savings and Telebrands share the same offices. (Khubani, Tr. 282). TV Savings was organized on January 22, 2002. (JX 1, ¶ 4). TV Savings was set up to handle the Ab Force campaign. (Khubani, Tr. 282).
3. Employees of Telebrands perceived TV Savings as a part of Telebrands. (CX 109 (Shahani, Dep. at 14)).
4. Telebrands sells a variety of consumer products directly to consumers through direct-response channels (telephone numbers and addresses contained in the advertising for the product) and through retail stores. (Khubani, Tr. 245-246; JX 1, ¶ 2).

5. Telebrands advertises through television, print, radio, internet and e-mail. (JX 1, ¶ 10).
6. Direct-response advertising describes a product and gives the consumer a response vehicle to order the product directly from the company, via the telephone, the internet, or a mailing address, versus traditional advertising that sends out a message with no intention of soliciting a direct order from a consumer. (Khubani, Tr. 431-32).
7. The television portion of the direct-response business is known as “direct response TV.” (Khubani, Tr. 246). Direct response television is also known as “DRTV.” (Golden, Tr. 188).
8. Direct response television advertising includes “short form” and “long form” television advertisements. “Short form” advertisements, also known as “commercials” or “spots,” vary in approximate duration from thirty seconds to two minutes. (Khubani, Tr. 432). “Long form” advertisements, also known as “infomercials,” are approximately 28 and a half minutes in length. (Khubani, Tr. 432).
9. Among the different strategies Telebrands uses for developing products is to examine what products its competition is offering on television and develop its own marketing campaign in the same category as the competitor’s product. (Khubani, Tr. 248).
Telebrands sometimes markets a product that is similar in function to a popular product

sold on TV but at a lower price. (Khubani, Tr. 247).

10. Telebrands provided the financing necessary to perform media management services, credit card processing, customer response services, customs clearance, accounting and bookkeeping services and to act as importer of record for TV Savings with respect to the Ab Force, as required under the Services Agreement between Telebrands and TV Savings. (JX 1, ¶14).
11. Respondents have worked together concerning the marketing and distribution of the Ab Force product. (JX 1, ¶ 6).

B. THE AB FORCE BELT

12. The Ab Force product is comprised of (1) a black elasticized belt; (2) a thin, diamond-shaped pad measuring approximately 9 by 5 inches that is purple on one side and silver/gray on the other; (3) a warning and instruction label attached to the silver/gray side of the pad that divides the silver/gray side of the pad into two areas; and (4) a small, battery powered control unit attached to the purple side of the pad. (Answer, ¶ 6).
13. The Ab Force ab belt is an electronic muscle stimulation (“EMS”) device which uses electronic stimulation intended to cause stimulation of the muscles. (JX 1, ¶15).

14. The Ab Force is designed so that some amount of electricity goes into the body.
(Khubani, Tr. 506).
15. Electronic muscle stimulation makes one's muscles contract involuntarily. (Khubani, Tr. 455, 505).

C. INDIVIDUAL RESPONDENT KHUBANI'S ROLE

16. Respondent Khubani ("Mr. Khubani or Khubani") is the president, chief executive officer, chairman of the board, and sole owner of Telebrands (JX 1, ¶ 7) and the sole member of TV Savings (JX 1, ¶ 8; Khubani, Tr. 248).
17. 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).
18. Respondent Khubani has been involved in direct response TV since 1987. (Khubani, Tr. 434).
19. In early 2001, Mr. Khubani began to consider marketing an electronic ab belt for sale to consumers after noticing that an ab belt product, the AbTronic, was listed in the *JW Greensheet*. (JX 1, ¶ 16; Khubani, Tr. 248-49).

20. The *JW Greensheet* is a direct response market industry publication that monitors airings on national broadcast and cable television. (CX 62; CX 72 through CX 95).
21. Mr. Khubani contacted an overseas manufacturer, and with that manufacturer, began to develop the ab belt product to be sold by Telebrands. (JX 1, ¶ 19).
22. The manufacturer of the Telebrands ab belt product informed Mr. Khubani that it was also the manufacturer of the AbTronic ab belt. (Khubani Tr. 264; (JX 1, ¶ 20).
23. The manufacturer informed Mr. Khubani that the Telebrands ab belt product would have the same power output as two other ab belt products, the AbTronic and the Fast Abs belts. Mr. Khubani was aware that he could sell products with the same technology and same or similar power output to consumers for a significantly lower cost than that offered by other ab belt advertisers. (JX 1, ¶ 20).
24. Mr. Khubani was appointed by Telebrands as the “Program Manager” pursuant to the Services Agreement dated January 22, 2002, between Telebrands and TV Savings. He was also TV Savings’ representative under the Services Agreement. As the Program Manager appointed by Telebrands and as TV Savings’ representative under the Services Agreement, Mr. Khubani represented both entities with regard to the responsibilities and duties of each under the Service Agreement. (JX 1, ¶ 13).

25. Mr. Khubani was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign. 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 email advertisements. (JX 1, ¶ 11).
26. Mr. Khubani chose the name “Ab Force.” (Khubani, Tr. 264).
27. Mr. Khubani chose the name Ab Force because it was designed to work primarily on the abdominal area and he thought it was catchy, “sort of like Air Force.” (Khubani Tr. 264).
28. Mr. Khubani set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, ¶ 12).

II. AB FORCE AND ITS MARKETING

A. AB FORCE ADVERTISING

29. In December 2001, Respondents began to disseminate radio and print ads for the AbForce. (JX 1, ¶ 21).
30. Respondents created and broadcast two versions of a 60-second radio advertisement. (JX 1, ¶ 32).

31. The first Ab Force radio ad disseminated by Respondents contained the following statements: “Have you seen those fantastic Electronic Ab Belt infomercials on TV? They’re amazing . . . promising to get our abs into great shape fast—without exercise! They’re the latest fitness craze to sweep the country. But, they’re expensive, selling for up to 120 dollars each! But what if you could get a high quality electronic ab belt for just 10 dollars? That’s right, just 10 dollars! The Ab Force is just as powerful and effective as the expensive ab belts on TV—designed to send just the right amount of electronic stimulation to your abdominal area. . . . Don’t miss out. Get the amazing electronic Ab [F]orce belt—the latest fitness craze for just \$10.” (CX 1-H).

32. The second Ab Force radio ad disseminated by Respondents contained the following statements: “Have you seen those fantastic electronic ab belt infomercials on TV? They’re amazing! They’re the latest craze to sweep the country and everybody wants one! The thing is, they’re expensive, selling for up to 120 dollars each! That’s why we developed the Ab Force that you can buy right now for just 10 dollars. That’s right, just 10 dollars!” (RX 49).

33. Respondents disseminated a single, quarter-page print advertisement that ran from February 14, 2002 to February 22, 2002 in 13 newspapers, and in a newspaper insert from March 10, 2002 to March 17, 2002. (JX 1, ¶ 34).

34. The Ab Force print ads contained the following statements: “I’m sure you’ve seen those

fantastic electronic ab belt infomercials on TV. They're amazing! They're the latest craze to sweep the country and everybody wants one. The thing is they're expensive selling for up to \$120 each. That's why we developed the Abforce that you can buy right now for just \$10. . . . Don't Be Fooled By the Price! The Abforce uses the same powerful technology as those Ab Belts sold by other companies on infomercials. . . . Using sophisticated computer components, the Abforce is capable of directing 10 completely different intensity levels at your abdominal area. . . . So why would you want to buy a more expensive ab belt from the competition when the Abforce is as low as just \$10?" Adjacent to these statements is an image of a well-muscled man wearing an Ab Force belt. Superimposed on this image is a red-and-white, square-shaped "AS SEEN ON TV" logo, and the statement, "Ab Force uses the same powerful technology as those expensive Ab Belts on infomercials." (CX 1-G).

35. Colette Liantonio is president of Concepts TV Productions, Inc., and she participated in the creation or development of promotional materials for the Ab Force by having principal responsibility for producing visual and other elements for television advertisements and for editing television advertisements. (JX 1, ¶ 38). Colette Liantonio consulted with Mr. Khubani regarding some of the creative elements for the production of television advertising. (JX 1, ¶ 39). Colette Liantonio has produced well over a thousand television commercials over the past twenty years. (JX6 (Liantonio, Dep. at 8)).

36. Respondents advertised the Ab Force on television from January 2002 until April 7, 2002. Respondents aired four television commercials for the Ab Force product: (1) a 60-second ad that was shot on December 22, 2001 and given the production code AB-B-60 (JX 2; Corresponds to Exhibit A of the Complaint (CX 1-A), transcript of which is Exhibit B of the Complaint (CX 1-B)); (2) a 120-second ad that was shot on December 22, 2001 and given production code AB-B-120 (JX 3; Corresponds to Exhibit C of the Complaint (CX 1-C), transcript of which is Exhibit D of the Complaint (CX 1-D)); (3) a 60-second ad that was shot in Mid-January 2002 and given the production code AB-E-60 (JX 4; Corresponds to Exhibit E of the Complaint (CX 1-E), transcript of which is Exhibit F of the Complaint CX 1-F)); and (4) a 120-second ad that was shot in Mid-January 2002 and given the production code AB-E-120. (JX 1, ¶ 22).
37. All the Ab Force television ads contained images of well-muscled, bare-chested men and lean, shapely women wearing Ab Force ab belts and experiencing abdominal muscle contractions. (JX 2 through JX 5).
38. The first 60-second television commercial for the Ab Force (production code AB-B-60) contained 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. Well, that’s why we developed the Ab Force that you can buy right now for just \$10. . . . The Ab Force is just as powerful and effective as those expensive ab belts

sold by others - - - designed to send just the right amount of electronic stimulation to your abdominal area! . . .Don't miss out on this opportunity to join the latest fitness craze.” (JX 2; CX 1-B at 4-5, Tr. 51-52).

39. The first 60-second television commercial for the Ab Force (production code AB-B-60) contained the following images, among others: (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; Answer, ¶ 10).

40. The 120-second television commercial for the Ab Force (production code AB-B-120) contained 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. But the problem is, they’re expensive, selling for up to \$120 each. Well, that’s why we developed the Ab Force that you can buy right now for just \$10. But don’t be fooled by the price. The Ab Force is just as powerful and effective as those ab belts sold by other companies on infomercials. Using sophisticated electronic technology, the Ab Force is designed to send just the right amount of electronic stimulation to your abdominal area.” (JX 3; CX 1-D at 4-5; Tr. 54-56).

41. The 120-second television commercial for the Ab Force (production code AB-B-120)

contained the following images, among others: (1) over a dozen depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions; (2) two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles; and (3) one close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. (JX3; Answer, ¶ 10).

42. The 60-second and 120-second Ab Force commercials (AB-B-60 and AB-B-120) were broadcast beginning January 5, 2002 and were cleared for broadcast 96 times. (JX 1, ¶ 24).

43. The second 60-second television commercial for the Ab Force (AB-E-60) contained the following statements: “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re amazing. They’re the latest craze to sweep the country and everybody wants one. But the thing is, they’re expensive, selling for up to \$120 each. Well, that’s why we developed the Ab Force that you can buy right now for just \$20. 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, CX 1-F at 3-5; Tr. 55-57).

44. The second 60-second television commercial for the Ab Force (AB-E-60) contained the following images, among others: (1) over a dozen depictions of well-muscled, bare-

cheded 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 4; Answer).

45. The second 120-second television commercial for the Ab Force (AB-E-120) contained the following statements: "I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest craze to sweep the country, and everybody wants one, but the thing is, they're expensive, selling for up to \$120 each. Well, that's why we developed the Ab Force that you can buy right now for just \$20. That's right, just \$20. But don't be fooled by the price. The Ab Force uses the same powerful technology as those ab belts sold by other companies on infomercials. The Ab Force is a truly high quality product. Using sophisticated computer components, the Ab Force is capable of directing ten completely different intensity levels at your abdominal area." (JX 5; TR. 57-59).

46. The second 120-second television commercial for the Ab Force (production code AB-E-120) contained the following images, among others: (1) over a dozen depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions; (2) two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles; and (3) one close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench. (JX 5).

47. The second versions of the Ab Force 60-second and 120-second television commercials (AB-E-60 and AB-E-120) were broadcast beginning on January 19, 2002, and ran until approximately April 7, 2002. (JX 1, ¶ 29).
48. The AB-E-60 and AB-E-120 versions of the Ab Force commercials ran on cable, satellite, and local affiliate stations, and were cleared for broadcast 11,508 times. (JX 1, ¶ 30).
49. Respondents also disseminated internet advertising and e-mail advertising. (JX 1, ¶ 33).
50. Ab Force Internet advertisements contained the following statements: “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re amazing! They’re the latest craze to sweep the country and everyone wants one. The thing is they’re expensive selling for up to \$120 each. That’s why we developed the AbForce that you can buy right now for just \$20.” (RX 52).
51. One Ab Force email advertisement contained the following statements: “Don’t be Fooled by the Price! The AbForce uses the same powerful technology as those Ab Belts sold by other companies on infomercials. The AbForce is truly a high quality product.” (RX 50).
52. A second Ab Force email advertisement contained the following statements: “They’re Amazing! I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV.

They're amazing! They're the latest craze to sweep the country and everyone wants one. The thing is they're expensive selling for up to \$120 each. That's why we developed the AbForce that you can buy right now for just \$20." Adjacent to these statements is an image of a well-muscled man wearing an Ab Force belt. Above this image, is a square-shaped "AS SEEN ON TV" logo, and across the top of the advertisement is the statement, "The Amazing AbForce For the Unbelievable Price of Just ... \$10.00 (When You Buy Two)" (RX 51).

B. SALES OF THE AB FORCE

53. The Ab Force advertisements promoted the Ab Force for \$10 each or two for \$20, but the actual price paid was sometimes more because of the number of units offered, the product package offered (e.g., a package with applicator gel or additional batteries), or because consumers paid shipping and handling charges. (JX 1, ¶ 35).
54. Consumers placed a total of 330,510 orders for the Ab Force. (JX 1, ¶ 26).
55. Respondents sold approximately 747,000 units of the Ab Force. (JX 1, ¶ 25)
56. Gross sales of the Ab Force, including accessories such as batteries and gels, exceeded \$19 million. (JX 1, ¶ 36).

57. Customers placed 1,340 Ab Force orders using the telephone number listed in the two radio ads. (JX 1, ¶ 32). Customers placed 221 Ab Force orders using the telephone number listed in the first radio ad. (Khubani, Tr. 493).
58. Consumers ordered 6,871 Ab Force units using the telephone number listed in the print advertisement. (JX 1, ¶ 34).
59. 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).
60. Customers placed 2,238 orders using the number listed in the initial 120 second Ab Force TV commercial (AB-B-120). (JX 1, ¶ 28).
61. Customers placed 74,566 orders using the telephone number listed in the AB-E-120 ad and 240,440 orders using the telephone number listed in the AB-E-60 ad. (JX 1, ¶ 31).
62. Customers placed 2,663 orders in response to the Internet and email advertisements. (JX 1, ¶ 33).

III. RESPONDENTS INTENDED THE AB FORCE ADS TO EVOKE THE CORE CLAIMS MADE BY THE ABTRONIC, AB ENERGIZER, AND FAST ABS AB BELTS

A. RESPONDENTS COMPARED THE AB FORCE TO OTHER AB BELTS SOLD BY MEANS OF INFOMERCIALS AND TO THE FITNESS CRAZE THAT THEY REPRESENTED

63. The Ab Force advertisements used a “compare and save” technique. (Khubani, Tr. 486-487).
64. In “compare and save” advertising, there must be a point of reference for comparison; otherwise the consumer doesn’t know “what you're comparing to.” (Khubani, Tr. 487).
65. The comparison in the Ab Force ads was with ab belts, and ab belts that sell for up to \$120. (Khubani, Tr. 539).
66. The AbTronic was the ab belt that sold for up to \$120. (Khubani, Tr. 539).
67. The point of reference chosen by Respondents was the highest price point in the market, \$120, in order to show the biggest savings. (Khubani, Tr. 487).
68. The Ab Force advertisements compared the Ab Force to the AbTronic. (Khubani, Tr. 276).
69. Respondent Khubani wrote the script for the Ab Force radio ads, print ad, and TV ads and the text for the Internet and email advertisements. (JX 1, ¶ 11; Khubani, Tr. 489).

70. In each case, he was attempting to create a “compare and save” advertisement and to establish a point of reference. (Khubani, Tr. 490).
71. The four Ab Force televisions ads, the radio, print, and Internet ads and one of the email ads referred to those “fantastic electronic Ab Belt infomercials on TV.” (JX 2 through JX 5; CX 1 G; CX 1 H; RX 49; RX 51; RX 52).
72. The other Ab Force email ad referred to “Ab belts sold by other companies on infomercials” (RX 50).
73. The AbTronic, the Fast Abs and the Ab Energizer infomercials were among the ab belt infomercials Mr. Khubani was referring to. (Khubani, Tr. 273-274).
74. 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).
75. Mr. Khubani acknowledges that the AbTronic, Fast Abs and AB Energizer ab belts were among the devices he was thinking of when he wrote, “The Ab Force is just as powerful and effective as the expensive ab belts on TV -- designed to send just the right amount of electronic stimulation to your abdominal area” for the Ab Force radio ad. (Khubani Tr.

273-274).

76. When a point of reference is used in “compare and save” advertising, the advertiser tries to give a brief description of that reference. (Khubani, Tr. 487).
77. None of the scripts Mr. Khubani wrote use the word “massage.” (Khubani, Tr. 538). The print, internet, and email ads he wrote do not use the word “massage.” (CX 1 G; RX 50; RX 51; RX 52).
78. None of the Ab Force advertisements used the term electrical muscle stimulation or “EMS.” (JX 2 through JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).
79. The line in the Ab Force radio ad, "They're amazing, promising to get our abs into great shape fast without exercise," right after, "Have you seen those fantastic electronic ab belt infomercials on TV?" was intended as a brief description of the other products that were being referenced and to the claims they were making in their infomercials. (Khubani, Tr. 273, 487 and 538).
80. Although the print ad Mr. Khubani wrote did not contain the actual statement, "They're amazing, promising to get our abs into great shape fast without exercise," Mr. Khubani stated that he felt the print ad has the same message as the radio ad. (Khubani, Tr. 492).

81. Similarly, Mr. Khubani regarded the message in the television ads to be the same message as the radio ad. (Khubani, Tr. 496).
82. The following statements appear in the initial the Ab Force 60-second TV ad (production code AB-B-60): "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." (JX 2; CX 1-B).
83. Mr. Khubani intended these statements to establish a reference point. (Khubani, Tr. 491).
84. Collette Liantonio testified that the reference to a "fitness craze" in the Ab Force commercial scripts was meant to refer to electronic ab belts: "The latest craze was the ab belts." (JX6 (Liantonio, Dep. at 104)).
85. Collette Liantonio testified that she always uses the word "amazing" in television scripts. (JX6 (Liantonio, Dep. at 104)). She also agreed that, in the context of the Ab Force commercial script, the statement, "they're amazing" either reinforces or lends credulity to other electronic ab belt infomercials on television. (JX6 (Liantonio, Dep. at 105)).
86. These statements also represent an attempt to create "hype" or excitement. (Khubani, Tr. 491).

87. Although some minor changes were made in the wording of the second versions of the Ab Force 60-second and 120-second television commercials (AB-E-60 and AB-E-120) as compared to the original Ab Force TV ads, the message was still the same, “compare and save.” (Khubani, Tr. 496). Changing the words "just as powerful and effective" to "uses the same powerful technology as" did not reflect any change in Mr. Khubani’s intent as to the meaning of the ads. (Khubani, Tr. 497).
88. Collette Liantonio has a regular working relationship with Telebrands. (JX 6 (Liantonio, Dep. at 26)). Her firm has produced more than a dozen television commercials for Telebrands. (JX 6 (Liantonio, Dep. at 26)).
89. 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 stated 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)).
90. Ms. Liantonio testified that Mr. Khubani told her that he did not want to make any claims for the Ab Force in the television commercial for that product. (JX 6 (Liantonio, Dep. at 57)). She thought that was unusual. (JX 6 (Liantonio, Dep. at 57)).

91. Ms. Liantonio recalled that someone at Telebrands told her that Ab Force was going to be the least expensive product among similar products, and they would compete on price. (JX 6 (Liantonio, Dep. at 55)). She identified the product category as ab belts. (JX 6 (Liantonio, Dep. at 92)).
92. On November 12, 2001, the *J.W. Greensheet* reported that “the automatic exercise belt is the ‘hot’ product of the moment on DRTV.” (Khubani, Tr. 550; CX 80 at T011120).
93. Mr. Khubani believed the product category that included the Ab Tronic, AB Energizer, and Fast Abs ab belts was “one of the hottest categories to ever hit the industry.” (Khubani, Tr. 255; CX 61).
94. Based on Mr. Khubani’s viewing of the Jordan Whitney report on a weekly basis and his general knowledge of the industry, Mr. Khubani stated that the Ab Force was the 6th product to enter this category on television. (Khubani, Tr. 259-260).
95. Three of the prior products to enter the category were the AB Energizer, the Ab Tronic and Fast Abs. The fourth and fifth were an ab belt by Emson and the Electrosage by IGIA. (Khubani, Tr. 261).
96. Gary Hewitt, who was marketing the AB Energizer, believed that the Ab Force significantly undercut the market for the Ab Energizer. (Khubani, Tr. 521).

97. Mr. Khubani felt safe in saying, in the Ab Force ads, that the Ab Force was "just as powerful and effective as those expensive ab belts sold on infomercials on TV," because 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). He asked the factory how it compared to these ab belts. (Khubani, Tr. 266).

B. RESPONDENTS INTENDED THE AB FORCE ADS TO EVOKE THE CORE CLAIMS MADE BY THE ABTRONIC, AB ENERGIZER, AND FAST ABS AB BELTS THROUGH THE USE OF IMAGES

98. Mr. Khubani edited certain visual aspects of the background of the Ab Force TV commercial designated as AB-B-120. (Khubani, Tr. 541). Nevertheless, he allowed clips of two bikini-clad female models who are displaying slim, trim torsos (CX 7 and CX 8) and an image of a man with well-developed abs exercising on an exercise bench (CX 9) to remain in the background of the Ab Force TV commercial designated as AB-B-120. None of these models is wearing the Ab Force. (Khubani, Tr. 543-544).

99. Mr. Khubani used models in the Ab Force ads with slim physiques showing bare parts of their bodies, such as their abs partly because he felt "this was a product that forced the muscles to involuntarily contract, and the only way you could see what this product was doing and demonstrate what this product does was to show people that were slim enough to show that happening." (Khubani Tr. 518).

100. Mr. Khubani was trying to show that the muscles were involuntarily contracting in the Ab Force television advertisements. (Khubani TR. 518).
101. Collette Liantonio and her employees at Concepts TV made handwritten notes in the course of creating television commercials for Ab Force, and these notes indicate that Ab Force television models were required to wear sportswear and/or have attractive or well-defined abdominal muscles. (CX 4; CX 5; CX 6).
102. For example, a Concepts TV Talent Confirmation Sheet for Ab Force states: “For wardrobe please let us know if need us to get anything. Seeing your abs is important.” (CX 6; JX 6 (Liantonio, Dep. at 65)). And on a Production Job Card for Ab Force, on the line that says, “props,” to the right, the Card reads, “girl with great abs.” (CX 4; JX 6 (Liantonio, Dep. at 64)). Another Talent Confirmation Sheet for Ab Force states: “Please have Abs looking their best!” (CX 5; JX 6 (Liantonio, Dep. at 65)). For “Wardrobe,” this Talent Confirmation Sheet calls for “[a] selection of fitness outfits, a sports bra and bike shorts type look.” (JX 6 (Liantonio, Dep. at 66); CX 5).
103. Collette Liantonio stated that Ab Force television models were required to wear sportswear to showcase an area of the body and allow viewers to see the ab belt. (JX 6 (Liantonio Dep. at 67)). However, Ms. Liantonio acknowledged that Ab Force television commercials also contained stock images of bikini-clad models displaying thin torsos.

(JX 6 (Liantonio, Dep. at 69)). These models were *not* wearing the Ab Force ab belt. (CX7 ; CX 8; JX 2; JX 3; JX 4; JX 5).

104. 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 (Liantonio, Dep. at 69)).
105. 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 (Liantonio, Dep. at 70)).
106. Collette Liantonio also acknowledged that an Ab Force television commercial contained an image of a male model with well-defined abdominal muscles—“a perfect body.” (JX6 (Liantonio, Dep. at 72)). This model was *not* wearing the Ab Force ab belt. (CX9; JX2; JX3; JX4; JX5).
107. At her deposition, Ms. Liantonio was unable to determine whether the male model with well-defined abdominal muscles was using an exercise bench. (JX6 (Liantonio, Dep. at 75)). Review of the AB-B-120 spot indicates that this male model was indeed performing exercise on an exercise apparatus. (JX3; CX9).
108. 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.” (JX 6 (Liantonio, Dep. at 73)). 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 (Liantonio, Dep. at 72)).

109. Collette Liantonio testified that Mr. Khubani never told her that the Ab Force was intended to be a massager. (JX6 (Liantonio, Dep. at 76)).
110. Similarly, the Operations Manager of CCT Marketing, Mark Golden, was never told that Ab Force was a massager. (Golden, Tr. 223).
111. An Ab Force television commercial created in January 2002 contained an on-screen statement referring to massage. (JX5; JX6 (Liantonio, Dep. at 79-80)). That statement appeared on the screen for approximately a second and a half. (JX6 (Liantonio, Dep. at 80)). The spokesperson in that commercial did not state that Ab Force massages or soothes. (JX 5; JX 6 (Liantonio, Dep. at 79)).
112. Collette Liantonio produced a television commercial for a product called the Homedics Back Pleaser. (JX 6 (Liantonio, Dep. at 15)). In that television commercial, models who were depicted using the product indicated, through their gestures or utterances, that they were being soothed or felt more relaxed. (JX 6 (Liantonio, Dep. at 15-16)). They moaned or their faces showed relief. (JX 6 (Liantonio, Dep. at 16)). By comparison, in

the Ab Force television commercials, the models who were depicted using the Ab Force did not indicate, through such gestures or utterances, that they were being soothed or felt more relaxed. (JX 2, JX 3, JX 4, JX 5).

C. RESPONDENTS HAD EVIDENCE THAT CONSUMERS VIEWED THE AB FORCE AS AN ABDOMINAL EXERCISE MACHINE

113. CCT Marketing provides telemarketing services to direct response television advertisers and other clients. (Golden, Tr. 187). CCT Marketing's employees secure "800" numbers for clients, receive phone calls placed to those numbers, and employ a script to sell or take telephone orders from consumers. (Golden, Tr. 187-89).
114. Mark Golden is Operations Manager for CCT Marketing. (Golden, Tr. 186, 188). His duties included activating new clients, scripting for direct response television advertisers, and tracking conversion rates (the percentage of telephone calls that result in telephone orders). (Golden, Tr. 188, 190).
115. CCT Marketing provided telemarketing services for three electronic ab belts—AB Energizer, Ab Force, and Ab Pulse. (Golden, Tr. 191).
116. The first ab belt that CCT Marketing handled was the AB Energizer. (Golden, Tr. 191). AB Energizer was offered for sale in mid-2001. (Golden, Tr. 208). Ab Force was offered for sale later, in early 2002. (Golden, Tr. 207). These two products were marketed at the

same time. (Golden, Tr. 208).

117. CCT Marketing has a procedure for responding to consumer questions; when consumers pose questions to which CCT Marketing employees do not know the answer, they gather that information and “escalate it” so that the question may be answered by CCT Marketing’s client. (Golden, Tr. 194).

118. CCT Marketing’s procedure is as follows: The employee makes a handwritten note and presents that note to their supervisor at the end of their shift. (Golden, Tr. 203). The handwritten note is not forwarded to other employees, instead, it is incorporated in an email to the account executive directly responsible for the client’s accounts. (Golden, Tr. 203). That email is then either forwarded directly to the client or to CCT Marketing management in New Jersey for delivery to the client. (Golden, Tr. 203).

119. CCT Marketing appears to have followed this procedure in the course of providing telemarketing services for the Ab Force: Floor Supervisor Riza Rivera forwarded a series of “questions customers usually ask” about the Ab Force to Account Executive Jiezl Pineda. (Golden, Tr. 211; CX43). Jiezl Pineda was the account executive in charge of all of CCT Marketing’s Telebrands accounts. (Golden, Tr. 211). Ms. Pineda then forwarded this email to Operations Manager Mark Golden (Golden, Tr. 207-08, 211; CX 43). On January 7, 2002, Mark Golden then forwarded this email to Telebrands. (Golden, Tr. 208). Specifically, Mr. Golden forwarded the email to his contact Shail Prasad, an

independent contractor employed by Telebrands who had an email address at telebrands.com. (Golden, Tr. 207-08, 211; CX43, see also JX 1, ¶ 40).

120. According to this email, among the “questions customers usually ask” about the Ab Force was, “How does it differ from other ab electronic exercising machines?” (CX 43).
121. Mark Golden did not recall receiving a reply to this query. (Golden, Tr. 213-15). He did try to research whether CCT Marketing had a reply from Telebrands in its records, but it didn’t exist. (Golden, Tr. 213). He is uncertain that Telebrands replied at all. (Golden, Tr. 213).

IV. LOSS OF WEIGHT, INCHES OF FAT; WELL-DEFINED ABDOMINAL MUSCLES; AND EQUIVALENCE TO REGULAR EXERCISE WERE THE CORE CLAIMS IN ADVERTISEMENTS FOR THE AB ENERGIZER, ABTRONIC AND FAST ABS BELTS

122. The “AbTronic,” “AB Energizer,” and “Fast Abs” were EMS ab belts that were advertised by television infomercials in the United States prior to and during the time period when the Ab Force commercials appeared. (JX 1, ¶ 36).
123. The advertising for the AbTronic, AB Energizer, and Fast Abs ab belts made express and strongly implied claims that consumers using the devices would lose weight, fat, and inches; gain well-developed abdominal muscles; and achieve all of this without the need for strenuous exercise. (JX 7 through JX 10; Mazis Tr. 47-48).

124. The television advertising for the AbTronic, AB Energizer, and Fast Abs ab contained extensive footage of well-sculpted male and female models wearing the belts over their abdominal areas. These images were displayed on the screen while the infomercial hosts repeatedly represented that the devices caused weight, inch, or fat loss; built well-developed abs; and were an effective substitute for exercise. (JX 7 through JX 10).

A. AB ENERGIZER

125. The AB Energizer is an electronic muscle stimulation (“EMS”) device which uses electronic stimulation intended to cause stimulation of the muscles. It was designed so that some amount of electricity goes into the body. (JX 8).

126. The AB Energizer ab belt was being advertised prior to and at the same time as the Ab Force. (Khubani Tr. 253; CX 126).

127. The AB Energizer belt was substantially similar in appearance to the Ab Force, and was comprised of components substantially similar to those used by the Ab Force. (JX 2 through JX 5; JX 8; Mazis Tr. 60).

128. Mr. Khubani had discussions with the marketers of the AB Energizer ab belt in 2001

regarding selling the Cyclone Diet with the Ab Energizer. The Cyclone Diet is a weight loss product that claimed users would ten pounds in two days. (Khubani Tr. 250-252).

129. The AB Energizer infomercial includes: (1) user testimonials, (2) scientific-looking images that purport to illustrate how the AB Energizer functions, (3) commentary by Dr. Michael Skyhar, an orthopedic surgeon, and (4) male and female models with exceptional abdominal definition dressed in bikinis and tight-fitting workout clothes. (JX 8).
130. The AB Energizer infomercial contains statements that the AB Energizer was “absolutely incredible for people who want tighter abs and want to lose inches around the midsection” (JX 8; CX 98 (Exhibit 2) at 29-30) and “with a touch of a button, you can go from flab to rock-hard abs.” (JX 8; CX 98 (Exhibit 2) at 22, 39, 50, 62).
131. The AB Energizer infomercial contains statements that “[I]t works not only your abs, but it also tightens and firms your love handles, your lower back, your thighs and your buns, too... The AB Energizer gives you firm, toned abs without even breaking a sweat.” (JX 8; CX 98 (Exhibit 2) at 38).
132. The AB Energizer infomercial stated, “[S]o, why not get the six-pack abs you’ve been dreaming about? You can do it sooner than you think with the AB Energizer.” (JX 8; CX 98 (Exhibit 2) at 67).

133. The AB Energizer infomercial stated, “[I]t’s safe, fast, and really gets the results you’re after. So, if you don’t want all that pain and hardship while working out in a sweaty gym on those machines, or you can’t afford a gym membership, or you just plain don’t want to stand in those long lines, get the AB Energizer and you’ll be on your way to fitter, tighter abs.” (JX 8; CX 98 (Exhibit 2) at 48).
134. The AB Energizer infomercial stated, “So, if you’ve been looking for a great way to get firm, toned abs, waist, hips and thighs, now’s your chance, because the AB Energizer does the thinking and workout for you. You don’t have to sweat, you don’t have to do sit-ups or use any more ab machines on the floor. It’s as easy as putting on a belt and pushing a button.” (JX 8; CX 98 (Exhibit 2) at 49-50).
135. The AB Energizer infomercial stated that the “secret is AB Energizer’s electronic impulses that stimulate your abs so they contract and relax as if you’re doing a situp. [ON SCREEN: Up to 700 Muscle Contractions 10 Minutes!] Now you can get up to 700 muscle contractions in just 10 minutes and get the tone and definition you’ve always wanted.” (JX 8; CX 98 (Exhibit 2) at 62, 63).
136. One of the testimonialists in the AB Energizer infomercial stated, “I’ve lost 40 pounds. I’ve gone from a waist 37 to a waist 34.” (JX 8; CX 98 (Exhibit 2) at 30-31).
137. The 60- second television spot for the AB Energizer ab belt contains the following

statements: “The secret is AB Energizer’s electronic impulses that stimulate your abs so they contract and relax as if you were doing a sit-up.” ... ON SCREEN: “Up to 700 muscle contractions 10 minutes”... “Now you can get up to 700 muscle contractions in just 10 minutes and get the tone and definition you’ve always wanted.” ... “I’ve gone from a waist 37 to a waist 34.”... ON SCREEN: :Size 37 to 34 ... “If you don’t lose at least two inches off your waist in the first 30 days, return it for a full refund.” (CX 98, (Exhibit 4) at 70).

B. ABTRONIC

138. The AbTronic is an electronic muscle stimulation (“EMS”) device which uses electronic stimulation intended to cause stimulation of the muscles. It was designed so that some amount of electricity goes into the body. (JX 7).
139. The AbTronic ab belt was being advertised prior to and at the same time as the Ab Force. (Khubani Tr. 261; CX 126).
140. The AbTronic ab belt was substantially similar in appearance to the Ab Force, and was comprised of components substantially similar to those used by the Ab Force. (JX 2 through JX 5; JX 7; Mazis TR. 60).
141. The AbTronic infomercials stated that ... “You stay with this for 10 minutes and it’s

comparable to doing 600 sit-ups at a time. And you do that enough times, and you're going to have that six-pack of abs sooner than you think." (JX 7; CX 96 (Exhibit 2) at 19).

142. The AbTronic infomercials stated, "Well, you can lose all the weight in the world that you want, but unless you have good muscle tone underneath, you're not going to have a washboard abdomen . . . So, with systems like the AbTronic where we can stimulate these muscles and you do both things, both the system of losing some weight, losing the inches, and then firming and toning the muscles underneath, that muscle definition will, therefore, show through much better and give you better cosmetic improvement." (JX 7; CX 96 (Exhibit 2) at 10-11).
143. The AbTronic infomercials stated, "AbTronic gives you a choice of six different training modes ... The karate chop and woodpecker modes are the best for ab work because of the steady contractions, comparable to doing 600 sit-ups in 10 minutes. But remember, the AbTronic is doing all the work for you." (JX 7; CX 96 (Exhibit 2) at 33).
144. The AbTronic infomercials stated, "AbTronic works by tiny little electronic impulses that send a signal through the skin to the motor point of the muscle, triggering the muscle to contract. So, there's no more guessing at how to do a proper crunch. AbTronic does it for you the correct way every time." (JX 7; CX 96 (Exhibit 2) at 9).

145. The AbTronic infomercials stated “You can go about your normal business while AbTronic slims, trims and firms your upper abs, your lower abs and/or your love handles with no sweat.” (JX 7; CX 96 (Exhibit 2) at 8).
146. The AbTronic infomercials stated that Abtronic was an “electronic dream machine that will show you immediate improvement without strenuous time-consuming workouts.” JX 7; CX 96 (Exhibit 2) at 13, 27).
147. The AbTronic infomercials stated, “You’ll develop that six-pack you’ve always wanted in the easiest way imaginable.” (JX 7; CX 96 (Exhibit 2) at 13, 27).
148. The Abtronic infomercial included numerous testimonials, stating in essence that consumers who used the ab belt lost several inches on their waist. (CX 96 (Exhibit 2) at 19, 32-33).
149. One of the testimonialists in the AbTronic infomercial stated, “I got into a car accident about three months ago and was unable to go work out at the gym. Since then, I have found the AbTronic System. I’ve used the AbTronic System now for about two and a half months. I’ve lost five inches on my waist and another three inches on my hips.” (JX 7; CX 96 (Exhibit 2) at 6).
150. The Abtronic infomercial stated, “[y]ou’ll see how the AbTronic System gives you the

results of 600 sit-ups in just 10 minutes without any effort” (CX 96 (Exhibit 2) at 3-4; Mazis Tr. 43).

151. The AbTronic infomercial stated: ... “[W]atch as your ab muscles contract as if you’re doing a sit- up ... Ten minutes on the Abtronic is the equivalent of 600 sit-ups. That’s why we guarantee you’ll lose two inches off your midsection in less than a month or your money back. (JX 7; CX 96 (Exhibit 2) at 14, 27, 39).

152. The Abtronic infomercial contains the following images, among others: Images of male and female models with well-defined abdominal muscles and clad in bathing suits; images of physically fit female torso wearing Abtronic belt; and images of well-defined male torso wearing an AbTronic belt with contracting abdominals muscles. (JX 7).

C. FAST ABS

153. The Fast Abs is an electronic muscle stimulation (“EMS”) device which uses electronic stimulation intended to cause stimulation of the muscles. It was designed so that some amount of electricity goes into the body. (JX 9; JX 10).

154. The Fast Abs ab belt was being advertised prior to and at the same time as the Ab Force. (Khubani Tr. 261; CX 126).

155. The Fast Abs ab belt was substantially similar in appearance to the Ab Force, and was comprised of components substantially similar to those used by the Ab Force. (JX 2 through JX 5; JX 9; Mazis Tr. 60).
156. The Fast Abs infomercial features hosts it introduced as “fitness pros” and “health professionals” who repeatedly demonstrate the product and tout its purported benefits. The infomercial also includes: (1) user testimonials; (2) scientific-looking images that purport to illustrate how Fast Abs functions; (3) visual images of flabby torsos transforming into thin, lean and sculpted torsos; and (4) numerous male and female models with exceptional abdominal definition, usually dressed in revealing clothes. (JX 9; Mazis Tr. 46).
157. The Fast Abs ab belt infomercial included the following claims, “With Fast Abs, you can help turn that frumpy midsection into washboard sexy abs in just minutes a day safely and easily.” (CX 100 (Exhibit B) at 42; (Exhibit D) at 43).
158. The Fast Abs ab belt infomercial included the following claims, “Do you want rock-hard abs without sweating in a gym for hours? Do you want to have toned muscles all over your body without lifting heavy weights? Well, now, you can. Introducing Fast Abs—the no-sweat, full body workout.” (JX 9; CX 100 (Exhibit B) at 3-4, 22; Mazis Tr. 45).
159. The Fast Abs infomercial contained the following claims: “The simple, fast, easy,

effective tool to help tool and reshape your body and help get those washboard lean sexy abs is finally here. With Fast Abs, we'll guarantee fast results with no sweat." (JX 9; CX 100 Exhibit B) at 52; (Exhibit D) at 54).

160. The Fast Abs infomercial contained the following claims, "Folks everywhere are sitting back and relaxing while they firm up, slim down, and shed inches quickly." (JX 9; CX 100 (Exhibit B) at 4, 23, 54; (Ex D) at 4, 23-24, 45, 57; Mazis Tr. 45-46).
161. The Fast Abs infomercial contained the following claims, "You'll drop four inches in the first 30 days. We guarantee it." (CX 100 (Exhibit B) at 31, 59; Ex. D at 32, 63) "In fact, just 10 minutes of Fast Abs is like doing 600 sit-ups. [ON SCREEN TEXT: 10 minutes = 600 sit ups] [ON SCREEN IMAGE: woman struggling to perform a sit-up]" (JX 9; CX 100 (Exhibit B) at 11, 52).
162. The Fast Abs infomercial claimed, "I guarantee you'll firm the saggy midriff, tone those flabby love handles and lose that belly that's been embarrassing you for years. Reshape all your problem areas or simply return fast Abs, no questions asked. You deserve to have the body you've always imagined and now you don't have to spend all day at the gym to get it. (JX 9; CX 100 (Exhibit B) at 53).
163. One of the testimonialists in the Fast Abs infomercial claimed, "In the last 14 days, I've lost two and half inches off my waist and two inches off my hips." (JX 9; CX 100

(Exhibit B) at 20, (Exhibit D) at 20).

164. The Fast Abs infomercial claimed, “Tests have proven that this unique isometric action can be 30% more effective than anything you can do on your own with normal exercise.” (JX 9; CX 100 (Exhibit B) at 11, 24, 34-35).

165. The Fast Abs infomercial claimed, “Fast Abs is perfect for everyone who wants to have perfect abs. It was designed to fit the needs of people at all different fitness levels. Doctors have found that it is safe and effective for people because of its unique design and breakthrough technology.” (JX 9; CX 100 (Exhibit B) at 51, (Exhibit D) at 53-54).

V. **ABTRONIC, AB ENERGIZER AND FAST ABS WERE HEAVILY ADVERTISED AND SOLD**

166. Infomercials for the AbTronic, AB Energizer, and Fast Abs ab belts were aired shortly before and during much of the Ab Force campaign. (CX 126; JX 1).

167. According to Respondent Khubani, there are three publications in the direct response television industry, *Response Magazine*, the IMS reports, and the *J.W. Greensheet*. (Khubani, Tr. 525).

168. The *J.W. Greensheet* is a television monitoring report published weekly by Jordan Whitney, Inc. (“Jordan Whitney”) for the infomercial and direct-response television

- industry. (Khubani, Tr. 248).
169. Each *J.W. Greensheet* report contains information relating to the direct response television industry, including information relating to infomercials and advertisements appearing on television shortly before the report's cover date. (Towers, Tr. 284, 288-89; *see also, e.g.,* CX 88).
170. Telebrands has subscribed to the *JW Greensheet* for about 12 years. (JX 1, ¶ 18; Khubani, Tr. 248-249, 525).
171. Each issue of the *J.W. Greensheet* contains a Top 50 ranking of television infomercials, a Top 40 ranking of television spots, and a Top 20 ranking of infomercial products. (Towers, Tr. 286). (Towers, Tr. 290; *see also, e.g.,* CX 88, T011300).
172. The Top 20 ranking of infomercial products excludes 900# and 800# phone line services, business opportunity products and seminars, and lead-generating packages. For that reason, the 'top 20' infomercial products sometimes differ from the "top 20" infomercials. (*E.g.,* CX 88 at T011303).]
173. Jordan Whitney compiles its rankings based on confidential media budgets supplied by direct response marketers as well as its own monitoring of national cable and selected broadcast television markets. (Towers, Tr. 287; *see also, e.g.,* CX 88 at T011299,

T011301).

174. Telebrands itself provides information to Jordan Whitney. (Khubani, Tr. 526).
175. Jordan Whitney's infomercial and spot rankings identify: (1) the name of the advertised product and/or show; (2) its ranking for the current week and the previous week, based on confidential media budgets and monitoring of national cable and selected broadcast television markets; (3) the total number of weeks that the advertised product and/or show has appeared in the rankings; and (4) the distributor or producer of the advertised product. (Towers, Tr. 289; *see also, e.g.*, CX 88 at T011299-302).
176. The *J.W. Greensheet* report costs approximately \$250 per week. (Khubani, Tr. 248).
177. 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).
178. Mr. Khubani also reads the *J.W. Greensheets* to see what advertisements are new or noteworthy, and receives tapes of new and noteworthy advertisements from Jordan Whitney. (Khubani, Tr. 525).
179. Telebrands uses the *J.W. Greensheets* in its own business dealings with retailers, to encourage them to sell Telebrands products. (Khubani, Tr. 531, 546).

180. Jordan Whitney is one of two private firms in the direct response industry that monitors television infomercials and spots. (Khubani, Tr. 249). Infomercial Monitoring Service, Inc. (“IMS”) detects airings of infomercials and spots and ranks them by frequency as well. (CX 126; Khubani, Tr. 248-49). IMS publishes reports on what advertisements are widely shown. (JX6 (Liantonio, Dep. at 24)).
181. Telebrands receives Infomercial Monitoring Service reports. (Khubani, Tr. 536).
182. *Response Magazine*, a publication targeted towards the direct response television industry, reprints Jordan Whitney’s rankings. (Khubani, Tr. 245, 249). *Response Magazine* also reprints IMS reports. (JX 6, ¶ 1 (Liantonio, Dep. at 23-24)).
183. Telebrands receives *Response Magazine*. (Khubani, Tr. 525).
184. The *J.W. Greensheet* rankings of infomercials and spots provide a reliable picture of the most heavily-advertised infomercials and spots in the direct response television industry. (See sources cited *supra*).
185. Collette Liantonio, an experienced producer of TV spots, reads *Response Magazine* to keep track of what her competitors are doing. (JX 6, ¶ 1(Liantonio, Dep. at 8, 23)). She learns about hits in the direct response industry by reading *Response Magazine* or IMS

reports. (JX 6, ¶ 1(Liantonio, Dep. at 24)).

186. AbTronic advertisements first appeared in early 2001. (JX 1, ¶ 16; Khubani, Tr. 248-49).

187. As of February 22, 2002, IMS had detected 2,082 airings of the AbTronic infomercials. (CX 126).

188. The AbTronic ab belt was offered for sale for up to \$120.00. (Khubani, Tr. 539).

189. The AbTronic electronic ab belt appeared 24 times in the Top 50 infomercial rankings published in the *J.W. Greensheet* reports between September 3, 2001 and March 4, 2002. During this time period, Jordan Whitney ranked the AbTronic infomercials as follows:

#10 in the September 3rd/September 10th double issue report (CX 72 at T011047);

#10 in the September 17th report (CX 73 at T011036);

#11 in the September 24th report (CX 74 at T011025);

#2 in the October 1st report (CX 75 at T011014);

#9 in the October 8th report (CX 76 at T011001);

#8 in the October 15th report (CX 77 at T011160);

#12 in the October 22nd report (CX 78 at T011145);

the October 29th report was not available (Towers, Tr. 294);

#12 in the November 5th report (CX 79 at T011129);

#7 in the November 12th report (CX 80 at T011112);
#8 in the November 19th report (CX 62 at T011098);
#6 in the November 26th report (CX 82 at T011084);
#7 in the December 3rd report (CX 83 at T011071);
#7 in the December 10th report (CX 84 at T011060);
#9 in the December 17th report (CX 85 at T011337);
#11 in the December 24th report (CX 86 at T011325);
#7 in the December 31st/January 7th double issue report (CX 87 at T011313);
#3 in the January 14th report (CX 88 at T011299);
#2 in the January 21st report (CX 89 at T011285);
#3 in the January 28th report (CX 90 at T011406);
#7 in the February 4th report (CX 91 at T011393);
#6 in the February 11th report (CX 92 at T011379);
#11 in the February 18th report (CX 93 at T011364);
#6 in the February 25th report (CX 94 at T011349);
#8 in the March 4th report (CX 95 at T011503).

Afterwards, in late April, the AbTronic infomercial dropped out of the Top 50 rankings.

(Towers, Tr. 295). AbTronic appeared in the Top 10 sixteen times before dropping out of the Top 50 rankings. (*See sources cited supra*).

190. Infomercial Monitoring Service, Inc. ranked the AbTronic infomercials in 2002 in terms of frequency as follows:

#8 for the week ending January 4, 2002
#7 for the week ending January 11, 2002
#8 for the week ending January 18, 2002
#8 for the week ending January 25, 2002
#9 for the week ending February 1, 2002
#12 for the week ending February 8, 2002
#12 for the week ending February 15, 2002
#16 for the week ending February 22, 2002

(CX 126).

191. The Infomercial Monitoring Service reported that \$18,134,390 had been spent on the infomercial campaign for the AbTronic electronic ab belt as of February 22, 2002. (CX 126).

192. The AbTronic ab belt was widely advertised through television infomercials, which were among the most frequently-aired infomercials on television during the weeks and months in which they appeared. (*See sources cited supra*).

193. Gross direct response sales for the AbTronic ab belt were approximately 600,000 units. (JX 11, ¶ 4). At least 45,000 units of the AbTronic ab belt were also sold in retail stores. (JX 11, ¶¶ 3 and 5).

194. AB Energizer infomercials or spots ran at various times of the day, locally and nationally, from September 2001 through April 2002. The AB Energizer infomercial was aired over 20,000 times during that period. (JX 6, ¶ 14).
195. Gross direct response sales for AB Energizer were approximately 622,131 units. (JX 6, ¶ 15).
196. Direct response sales include any sales directly to the ultimate consumer through TV, radio, newspaper, periodicals, Internet, or catalogs. (JX 6, ¶ 13).
197. The Ab Energizer was sold for \$60. (Khubani, Tr. 521).
198. The AB Energizer infomercial appeared 19 times in the Top 50 infomercial rankings published in the *J.W. Greensheet* reports between October 15, 2001 and March 4, 2002. During this time period, Jordan Whitney ranked the AB Energizer infomercials as follows:
- #50 in the October 15th report (CX 77 at T011161);
 - #9 in the October 22nd report (CX 78 at T011145);
 - the October 29th report was not available (Towers, Tr. 294);
 - #1 in the November 5th report (CX 79 at T011129);
 - #1 in the November 12th report (CX 80 at T011112);
 - #2 in the November 19th report (CX 62 at T011098);

#2 in the November 26th report (CX 82 at T011084);
#2 in the December 3rd report (CX 83 at T011071);
#2 in the December 10th report (CX 84 at T011060);
#1 in the December 17th report (CX 85 at T011337);
#1 in the December 24th report (CX 86 at T011325);
#1 in the December 31st/January 7th double issue report (CX 87 at T011313);
#2 in the January 14th report (CX 88 at T011299);
#5 in the January 21st report (CX 89 at T011285);
#10 in the January 28th report (CX 90 at T011407);
#15 in the February 4th report (CX 91 at T011393);
#12 in the February 11th report (CX 92 at T011379);
#18 in the February 18th report (CX 93 at T011364);
#33 in the February 25th report (CX 94 at T011350);
#35 in the March 4th report (CX 95 at T011504).

Later in March, the AB Energizer infomercial dropped out of the Top 50 rankings. (Towers, Tr. 296). AB Energizer was ranked #1 or #2 for over two months before it dropped out of the Top 50 rankings.

199. The Ab Energizer TV spot appeared 19 times in the Top 40 Direct Response Spots rankings published in the *J.W. Greensheet* reports between October 15, 2001 and March 4, 2002. During this time period, Jordan Whitney ranked the AB Energizer spots as follows:

#40 in the October 15th report (CX 77 at T011163);
#16 in the October 22nd report (CX 78 at T011147);
the October 29th report was not available (Towers, Tr. 294);
#3 in the November 5th report (CX 79 at T011131);
#3 in the November 12th report (CX 80 at T011114);
#1 in the November 19th report (CX 62 at T011100);
#1 in the November 26th report (CX 82 at T011086);
#5 in the December 3rd report (CX 83 at T011073);
#1 in the December 10th report (CX 84 at T011062);
#1 in the December 17th report (CX 85 at T011339);
#1 in the December 24th report (CX 86 at T011327);
#1 in the December 31st/January 7th double issue report (CX 87 at T011315);
#1 in the January 14th report (CX 88 at T011301);
#1 in the January 21st report (CX 89 at T011287);
#1 in the January 28th report (CX 90 at T011409);
#1 in the February 4th report (CX 91 at T011395);
#3 in the February 11th report (CX 92 at T011381);
#1 in the February 18th report (CX 93 at T011366);
#2 in the February 25th report (CX 94 at T011351);
#2 in the March 4th report (CX 95 at T011505).

200. AB Energizer was widely advertised through “short form” television commercials. (*See*

sources cited *supra*).

201. Infomercial Monitoring Service, Inc. ranked the AB Energizer infomercials in 2002 in terms of frequency as follows:

#1 for the week ending January 4, 2002

#1 for the week ending January 11, 2002

#5 for the week ending January 18, 2002

#9 for the week ending January 25, 2002

#16 for the week ending February 1, 2002

#17 for the week ending February 8, 2002

#23 for the week ending February 15, 2002

#23 for the week ending February 22, 2002

(CX 126).

202. The Infomercial Monitoring Service reported that, of February 22, 2002, \$11,675,166 had been spent on the infomercial campaign for the AB Energizer electronic ab belt and that it had detected 1,693 airings of the infomercial. (CX 126). Over \$18 million was spent on buying media for AB Energizer advertising. (JX 6, ¶ 13]).

203. The AB Energizer ab belt was widely advertised through television infomercials, which were among the most frequently-aired infomercials on television during the weeks and months in which they appeared. (*See* sources cited *supra*).

204. From November 2001 to May 2002, the Fast Abs electronic ab belt was offered for sale, sold, and distributed throughout the United States, usually for the price of \$39.95, excluding shipping and handling charges. (JX 6, ¶ 8]).
205. Fast Abs infomercials or spots ran at various times of the day, locally and nationally, from November 8, 2001 through February 24, 2002. The Fast Abs infomercial was aired 8,227 times during that period. (JX 6, ¶ 10).
206. Gross direct response sales of Fast Abs electronic muscle stimulation devices exceeded one million units. Approximately 650,000 units were sold at retail, including retail stores such as Target, Eckerd's, and Modell's Sporting Goods. (JX 6, ¶ 11).
207. Fast Abs infomercials appeared 15 times in the Top 50 infomercial rankings published in the *J.W. Greensheet* reports between November 19, 2001 and March 4, 2002. During this time period, Jordan Whitney ranked the Fast Abs infomercials as follows:
- #34 in the November 19th report (CX 62 at T011099);
 - #15 in the November 26th report (CX 82 at T011084);
 - #6 in the December 3rd report (CX 83 at T011071);
 - #1 in the December 10th report (CX 84 at T011060);
 - #2 in the December 17th report (CX 85 at T011337);
 - #3 in the December 24th report (CX 86 at T011325);

#2 in the December 31st/January 7th double issue report (CX 87 at T011313);
#2 in the January 14th report (CX 88 at T011299);
#1 in the January 21st report (CX 89 at T011285);
#8 in the January 28th report (CX 90 at T011406);
#1 in the February 4th report (CX 91 at T011393);
#1 in the February 11th report (CX 92 at T011379);
#4 in the February 18th report (CX 93 at T011364);
#5 in the February 25th report (CX 94 at T011349);
#22 in the March 4th report (CX 95 at T011503).

208. The Fast Abs TV spot appeared 15 times in the Top 40 Direct Reponse Spots rankings published in the *J.W. Greensheet* reports between November 19, 2001 and March 4, 2002. During this time period, Jordan Whitney ranked the Fast Abs spots as follows:

#22 in the November 19th report (CX 62 at T011101);
#18 in the November 26th report (CX 82 at T011086);
#11 in the December 3rd report (CX 83 at T011073);
#9 in the December 10th report (CX 84 at T011062);
#34 in the December 17th report (CX 85 at T011340);
#21 in the December 24th report (CX 86 at T011328);
#14 in the December 31st/January 7th double issue report (CX 87 at T011315);
#15 in the January 14th report (CX 88 at T011301);
#11 in the January 21st report (CX 89 at T011287);

#24 in the January 28th report (CX 90 at T011410);
#18 in the February 4th report (CX 91 at T011395);
#18 in the February 11th report (CX 92 at T011381);
#10 in the February 18th report (CX 93 at T011366);
#26 in the February 25th report (CX 94 at T011352);
#29 in the March 4th report (CX 95 at T011506).

209. Fast Abs was widely advertised through “short form” television commercials. (*See* sources cited *supra*).

210. Infomercial Monitoring Service, Inc. ranked the Fast Abs infomercials in 2002 in terms of frequency as follows:

#2 for the week ending January 4, 2002
#12 for the week ending January 11, 2002
#2 for the week ending January 18, 2002
#5 for the week ending January 25, 2002
#3 for the week ending February 1, 2002
#6 for the week ending February 8, 2002
#11 for the week ending February 15, 2002
#36 for the week ending February 22, 2002

(CX 126).

211. The Infomercial Monitoring Service reported that, as of February 22, 2002, \$12,629,2555 had been spent on the infomercial campaign for the Fast Abs electronic ab belt, and it had detected 1,272 airings of the infomercial. (CX 126). Over \$15 million was spent to promote and market Fast Abs, primarily through television infomercials. (JX 6, ¶ 9).
212. The Fast Abs ab belt was widely advertised through television infomercials, which were among the most frequently-aired infomercials on television during the weeks and months in which they appeared. (*See* sources cited *supra*).
213. From late November 2001 through mid-February 2002, the *J.W. Greensheets* consistently ranked AbTronic, AB Energizer, and Fast Abs among the top fifteen infomercials appearing on national cable and selected broadcast television markets. (Towers, Tr. 297-98; *see also* sources cited *supra* ¶¶ 188, 197, and 206). In the January 14th *J.W. Greensheet* report, infomercials for these products occupied the top of the Top 50 rankings—Fast Abs was #1, AB Energizer was #2, and AbTronic was #3. (CX 88 at T011299).
214. AbTronic, AB Energizer, and Fast Abs were the only ab belts that appeared in the *J.W. Greensheet* Top 50 infomercials rankings between early September 2001 and mid-April 2002. (Towers, Tr. 303-04).
215. The Federal Trade Commission issued Complaints against the advertisers of the AB

Energizer, Fast Abs and AbTronic on May 7, 2002. (JX 1, ¶ 46).

216. Television advertisements for Ab Force were highly ranked in the Top 40 television spot rankings published in the *J.W. Greensheet* between February 4, 2002 and March 4, 2002.

During this time period, Jordan Whitney ranked the Ab Force spots as follows:

#2 in the February 4th report (CX 91at T011395);

#2 in the February 11th report (CX 92at T011381);

#3 in the February 18th report (CX 93at T011366);

#4 in the February 25th report (CX 94at T011351);

#3 in the March 4th report (CX 95at T011505).

217. AbTronic, AB Energizer, and Fast Abs were substantially similar in appearance to the Ab Force, and were comprised of components substantially similar to those used by the Ab Force. (JX 2 through JX 5; JX 7 through JX 10; Mazis TR. 60).

218. The Fast Abs and the Abtronic resemble the Ab Force in their button configuration. (Khubani, Tr. 271).

VI. OTHER EMS PRODUCTS

219. Respondents placed on the record promotional materials for eight EMS devices: (1) IGI'A Electrosage (RX 72); (2) Mini Wireless Massage System (RX 73); (3) Accusage

(RX 74); (4) Smart Toner (RX 75); (5) GymFitness (RX 76); (6) ElectroGym (RX 77); (7) Slim Tron (RX 78); and (8) Slendertone Flex (RX 79).

220. Mr. Khubani stated that he saw the Slendertone Flex ab belt advertised on QVC in Fall, 2001. (Khubani, Tr. 447). There is no extrinsic evidence to corroborate or confirm his statement that Slendertone Flex was actually advertised on QVC at that time. The recorded Slendertone Flex television spot produced by the Respondents bears the date of November 10, 2003. (RX 79).

221. There is no evidence that Slendertone Flex was advertised in infomercials before or during the time period in which Ab Force was advertised and sold.

222. Direct response television spots for Slendertone Flex have very recently appeared on television. (Khubani, Tr. 447). Respondent Khubani stated that the presentation for Slendertone Flex on QVC was “very similar” to the recorded Slendertone Flex television spot, which is dated November 10, 2003. (Khubani, Tr. 447; RX 79). The recorded Slendertone Flex television spot opens with the following statement suggesting 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).

223. After advertisements for the Ab Force appeared, Mr. Khubani asked the manufacturer of the Ab Force how that product compared to other ab belts. (Khubani, Tr. 265-67). Mr.

Khubani verified that Ab Force had the same output as the Fast Abs and AbTronic ab belts. (Khubani, Tr. 265; CX18). There is no evidence that Respondents ever verified, or sought to verify, that Ab Force had the same output as the Slendertone Flex ab belt.

224. The Smart Toner product is an electronic ab belt. (RX75).
225. The Gymfitness product is an electronic ab belt. (RX76; Towers, Tr. 301).
226. The Slim Tron product is an electronic ab belt. (RX78).
227. Promotional materials for these products contain statements relating to inch, weight, and fat loss; well-developed abs; and/or an effective alternative to exercise. (*See sources cited infra*).
228. The television spot for the Smart Toner ab belt states that the product is “the fast, easy, sexy way to have the slim, sexy body you’ve always wanted.” (RX75).
229. The television spot for the Smart Toner ab belt states, “in fact, we’ll guarantee you’ll lose two inches from your waist in just two weeks, or your money back.” (RX75).
230. The Smart Toner commercial further states, “with sit-ups, you struggle to pull up most of your body weight. It takes forever. But Smart Toner uses electromagnetic impulses to

massage and contract your muscles 100 times per minute. It does all the work for you.”
(RX75).

231. Product testimonials in the Smart Toner ab belt commercial assert the loss of 15 pounds, “a big reduction in body fat,” and “over two inches lost in the waistline.” (RX75).

232. A product presenter in the television infomercial for the GymFitness ab belt states, “GymFitness really works my muscles whether I’ve made it to the gym or not.” (RX76).

233. A product presenter in the television infomercial for the GymFitness ab belt also states, “whenever I show people how to do crunches, I explain to them that in order for it to work effectively the abdominal muscles have to contract properly. Half of the time they come back to me and I have to explain the right technique all over again. If they use Gym Fitness on a day they can’t work out at the Gym, they don’t have to worry about technique. All they have to do is put on the belt, turn the unit on and they can feel the muscles contracting. Even better they can see the results. There’s no doubt in my mind Gym Fitness works.” (RX76).

234. Additionally, a product presenter in the television infomercial for the GymFitness ab belt states: “Sure, you can go to the beach and see men and women with beautifully conditioned bodies, with the six-pack abs and the sculpted muscles that make other people turn their heads and notice. But how many people can go through that kind of

rigorous training? Most of us can't spend hours a day working out. Well, Gym Fitness lets us keep our muscles healthy and well-conditioned even when we can't get to the gym. Simply use it for 10 minutes two or three times a day. You'll feel the difference." (RX76).

235. The Gymfitness infomercial further states: "Gym Fitness doesn't have any wires to attach. All the electronics are self-contained in one compact unit and that unit is attached to the belt. You just wrap it around the stomach, press the button and that's it. There's no way you can go wrong. In fact, you'll immediately feel it working. You'll feel those muscles contracting just as though you were doing a strenuous muscle workout. But you're not working at all. Gym Fitness is doing all the work for you." (RX 76).
236. The Gymfitness infomercial also contains this statement: "I've had people ask me why I like Gym Fitness so much. They think because I'm a personal trainer, I'm going to want them to use traditional methods of exercise and body conditioning. But the purpose of training is isn't to only make people sweat or make them feel pain. It's also about getting results. We want to condition their muscles, get them into shape and encourage a healthy lifestyle. If there's an easy way to accomplish that, what's wrong with it?" (RX 76).
237. The Gymfitness ab belt infomercial also contains this statement: "It was like a personal trainer putting me through some heavy duty routines." (RX76).

238. The television spot for the Slim Tron ab belt contains the following statement: “If you don’t lose at least three inches off your waist, send it back for a full refund.” (RX78).
239. Although Ab Force promotional materials refer to those “fantastic Electronic Ab Belt infomercials on TV,” several of the products advertised in the television advertisements turned over by the Respondents are not electronic ab belts. (*See* sources cited *infra*).
240. The IGI’A Electrosage product is not an electronic ab belt. (RX72; Towers, 302-03).
241. The Mini Wireless Massage System product is not an electronic ab belt. (RX73; Towers, Tr. 299-300). Moreover, the television commercial for the Mini Wireless Massage System expressly compares the product to “massagers [that] are big and bulky, and similar devices sell in catalogs for \$579.” (RX 73; Khubani, Tr. 459).
242. The Accusage product is not an electronic ab belt. (RX74; Towers, Tr. 300).
243. Ab Force promotional materials expressly refer to “those fantastic Electronic Ab Belt infomercials on TV,” not short-form television spots or commercials. (*E.g.*, JX2, JX3, JX4, JX5).
244. Most of the television advertisements for other products placed on the record by the Respondents were not infomercials. (*See* sources cited *infra*).

245. The Mini Wireless Massage System product advertisement turned over by the Respondents was a short spot, not an infomercial. (RX73). There is no evidence that this product was the subject of an infomercial before or during the time period in which Ab Force was advertised and sold.
246. The Smart Toner product advertisement turned over by the Respondents was a short spot, not an infomercial. (RX75). There is no evidence that this product was the subject of an infomercial before or during the time period in which Ab Force was advertised and sold.
247. The Electrogym product advertisement turned over by the Respondents was a short spot, not an infomercial. (RX77). There is no evidence that the Electrogym product was the subject of an infomercial before or during the time period in which Ab Force was advertised and sold.
248. The Electrogym product briefly appeared in an infomercial for the IGI'A Electrosage. (RX72). In this infomercial, the Electrogym ab belt was offered as a "free gift" in connection with the sale of the IGI'A Electrosage. (RX72; Khubani, Tr. 451). This infomercial also contains a statement suggesting that use of the Electrogym may be an effective alternative to exercise; it states that the Electrogym ab belt offers "a great workout." (RX72; Khubani, Tr. 451).

249. The Slim Tron product advertisement turned over by the Respondents was a short spot, not an infomercial. (RX78). There is no evidence that this product was the subject of an infomercial before or during the time period in which Ab Force was advertised and sold.
250. The Slendertone Flex product advertisement turned over by the Respondents was a short spot, not an infomercial. (RX79).
251. Slendertone Flex is an electronic ab belt. (RX79).
252. Direct response television spots for Slendertone Flex have very recently appeared on television. (Khubani, Tr. 447). Respondent Ajit Khubani stated that the presentation for Slendertone Flex on QVC was “very similar” to the recorded Slendertone Flex television spot, which is dated November 10, 2003. (Khubani, Tr. 447; RX79). The recorded Slendertone Flex television spot opens with the following statement suggesting 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; RX79).
253. At the hearing in this matter, Ajit Khubani professed to recall numerous other EMS devices that may have been offered for sale, besides the Ab Force, AbTronic, AB Energizer, and Fast Abs electronic ab belts. (*E.g.*, Khubani, Tr. 449, 455, 463).
254. Of all these other products, one was widely advertised on television: From September

2001 through February 2002, the short spot for the IGI'A Electrosage appeared approximately 22 times in Jordan Whitney's Top 40 commercial spots ranking, with an average ranking of four. (Towers, Tr. 303).

255. However, the IGI'A Electrosage is not an ab belt (see *supra*; RX72; Towers, 302-03) and the *infomercial* for the Electrosage was not widely televised—it never appeared in Jordan Whitney's Top 50 infomercials ranking from September 2001 through February 2002. (Towers, Tr. 303).

256. There is no evidence that any other EMS devices that Ajit 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).

257. The television spot for the Mini Wireless Massage System did not appear in the Top 40 commercial spot rankings published by Jordan Whitney, Inc. from September 2001 through February 2002. (CX62; CX72-CX95).

258. The five-minute television advertisement for the Accusage product appeared once in the Top 40 commercial spot rankings published by Jordan Whitney, Inc., on December 24, 2001, ranked at number 31. (CX86; see generally CX62; CX72-CX95).

259. The television spot for the ElectroGym appeared approximately eight times in the Top 40

commercial spot rankings published by Jordan Whitney, Inc. from September 2001 through February 2002, with an an average ranking of 28. (Towers, Tr. 302).

260. Additionally, several other television advertisements placed on the record by the Respondents were not widely televised before or during the time period in which Ab Force was advertised and sold. (*See* sources cited *infra*).
261. The television spot for the Smart Toner ab belt did not appear in the Top 40 commercial spot rankings published by Jordan Whitney, Inc. from September 2001 through February 2002. (Towers, Tr. 301; *see also* CX62; CX72-95).
262. The television spot for the Slimtron ab belt appeared approximately three times in the top 40 commercial spot rankings published by Jordan Whitney, Inc. with an average ranking of 30 from September 2001 through February 2002. (Towers, Tr. 302; *see also* CX62; CX72-95).
263. The infomercial for the Gymfitness ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings published by Jordan Whitney, Inc. from September 2001 through February 2002. (Towers, Tr. 301; *see also* CX62; CX72-95).
264. Television advertising for the Slendertone Flex ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings published by Jordan

Whitney, Inc. from September 2001 through February 2002. (Towers, Tr. 301, 303-04; *see also* CX62; CX72-95).

VII. EXTRINSIC EVIDENCE

A. THE AB PULSE CAMPAIGN

265. Like Ab Force, Ab Pulse was an ab belt marketed by Telebrands. (Golden, Tr. 191, 218).
Ab Pulse was a similar product to Ab Force. (Golden, Tr. 218; CX2).
266. Mark Golden received a digital copy of the television commercial for Ab Pulse from Shail Prasad. (Golden, Tr. 218).
267. The Ab Pulse television commercial affirmatively stated that Ab Pulse was unlike electronic ab belts sold through infomercials by: (1) verbally describing the product as “the most innovative massaging ab belt to hit the market” (Tr. 219; CX2); (2) verbally cautioning viewers, “don’t confuse the AbPulse with an electronic ab belt that you’ve seen on infomercials,” (Tr. 219; CX2); and (3) visually cautioning viewers with a graphic of a red cross superimposed on an ab belt displayed alongside the on-screen legend, “infomercial ab belts.” (CX2).
268. Ab Force television commercials did not state that Ab Force was unlike electronic ab

belts sold through infomercials; none of the aforementioned verbal statements or depictions from the Ab Pulse television commercial were present in any Ab Force television commercial. (JX2, JX3, JX4, JX5). Rather, the Ab Force television commercials used electronic ab belts sold through infomercials as a point of reference as part of a “compare and save” message. (*See* sources cited *supra*).

269. Based on sales results, the Ab Pulse was a failure. (Khubani, Tr. 281). Ab Pulse was offered for about a month, and it did not receive high call volume. (Golden, Tr. 222). However, the Ab Force enjoyed gross sales of \$19 million. (JX 1, ¶ 36).

B. DR. MICHAEL MAZIS

270. Complaint Counsel offered the expert opinion of Michael Mazis, Ph.D., as extrinsic evidence of the claims conveyed by the Ab Force ads. (Mazis, Tr. 35 *et seq.*; Cx 58).

271. Dr. Mazis is Professor of Marketing at the Kogod School of Business, American University. He has been a faculty member at American University for over 20 years, serving 10 years as chair of the Department of Marketing. For over a decade, he has taught undergraduate and graduate courses in marketing research and consumer behavior. These courses focus on consumer perceptions and attitudes and on research methodology, questionnaire design, and data analysis. In addition, he has taught courses in principles of marketing, marketing management, and Internet marketing. (CX 58 at 2: Mazis, Tr. 37).

272. Dr. Mazis received a B.S. degree in Economics from the University of Pennsylvania, Wharton School, an M.B.A. degree from New York University, and a Ph.D. degree in Business Administration from Pennsylvania State University. (CX 58 at 2; Mazis, Tr. 37, 38).
273. From 1976 to 1979, Dr. Mazis served as an in-house marketing expert at the Food and Drug Administration (“FDA”) and at the FTC, where he evaluated consumer perception of companies’ advertising and other promotional materials, designed and conducted consumer research surveys, and evaluated surveys submitted by companies seeking to substantiate advertising claims. (CX 58 at 3).
274. Dr. Mazis also served as a consultant on advertising issues and consumer behavior for the FTC, FDA, Consumer Product Safety Commission, Department of Justice, U. S. Mint, Bureau of Alcohol, Tobacco, and Firearms, and the State of California. (CX 58 at 3).
275. Dr. Mazis also worked as a marketing research analyst for the Warner-Lambert Pharmaceutical Company. In this position, he designed marketing research surveys and focus group studies. (CX 58 at 3).
276. Dr. Mazis is a member of the American Marketing Association and a member and former director of the Association for Consumer Research. He was editor of the *Journal of Public Policy & Marketing* from 1992 to 1995, and Associate Editor of *The Journal of*

Consumer Affairs from 1998 to 2001. (CX 58 at 3; Mazis, Tr. 38).

277. Dr. Mazis testified that he has conducted hundreds of surveys and research studies. (Mazis, Tr. 38). Dr. Mazis has published over 60 articles in academic journals and conference proceedings. His research has been published in the *Journal of Marketing*, *Journal of Consumer Research*, *Journal of Marketing Research*, *Journal of Public Policy & Marketing*, *The Journal of Consumer Affairs*, *Journal of Personality and Social Psychology*, *Journal of Experimental Social Psychology*, and *Journal of the American Medical Association*. (CX 58 at 3; Mazis, Tr. 38).
278. Dr. Mazis was principal investigator on a three-year grant from the National Institute on Alcohol Abuse and Alcoholism to study consumer perception of alcohol warning labels. In addition, he has spoken on designing consumer perception surveys at conferences sponsored by the American Marketing Association, American Bar Association, and Better Business Bureaus (National Advertising Division). (CX 58 at 3-4).
279. Including depositions and trials, Dr. Mazis has testified as an expert witness on consumer perceptions between 35 and 40 times including nine times for the Federal Trade Commission over the past 25 years. (Mazis, Tr. 38-39, 40). He has also testified for the FDA, the Department of Justice, and the State of California. (Mazis, Tr. 39). Private sector companies for which he has testified include MCI, Abbott Labs, Johnson & Johnson, Super Telecommunications, and Clorox. (Mazis, Tr. 39-40).

280. Dr. Mazis, is qualified to testify as an expert witness in consumer response to advertising, including a facial analysis of advertising, advertising effectiveness, consumer behavior, marketing research, including the design and implementation of surveys and analysis of surveys. (Mazis, Tr. 41).

1. Facial Analysis of the Ab Force Ads

281. 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).

282. In performing his facial analysis, Dr. Mazis previously considered the FTC complaint (CX 1) and attached exhibits (including video tapes and transcripts of 60-second and 120-second advertisements for Ab Force, other video tapes of Ab Force advertisements (JX 2 - 5), and transcripts of 60-second and 120-second advertisements for Ab Force (CX 1-B, 1-D & 1-F). In addition, Dr. Mazis considered the FTC complaints, video tapes of advertisements (JX 7- JX 10), transcripts of advertisements, and media placement information for the AbTronic, AB Energizer, and Fast Abs EMS ab belts. (CX 58 at 4; Mazis Tr. 42, 120, 123, 124, 134, 141).

a. Indirect Effects of the Ab Force Ads Resulting from Viewers' Ab Belt Category of Beliefs

283. Dr. Mazis relied on information that AbTronic, AB Energizer, and Fast Abs were among the most frequently aired infomercials in the nation; that an infomercial for AbTronic was aired more than 2,000 times (30-minute and two-minute versions) from April 2001 through February 22, 2002 and that more than \$18 million was spent to televise those infomercials. (CX 58 at 7; Mazis, Tr. 125-26).
284. In addition, he stated that he relied on information that an infomercial for AB Energizer was aired more than 1,650 times between October 2001 and February 22, 2002 with more than \$8 million spent to broadcast the AB Energizer infomercial. (CX 58 at 7).
285. Finally, he stated that he relied on information that an infomercial for Fast Abs appeared more than 1,200 times from November 2001 through February 22, 2002, and more than \$12 million was spent to air infomercials for Fast Abs. (CX 58 at 7).
286. Dr. Mazis relied on the allegations of the FTC complaints against the marketers of AbTronic, AB Energizer, and Fast Abs for this information. (Mazis, Tr. 120).
287. Dr. Mazis testified that he also reviewed reports that rated infomercial frequency (Mazis, Tr. 119-20) and that the reports seemed consistent with the information as to frequency contained in the FTC's complaints against AbTronic, AB Energizer, and Fast Abs.

(Mazis, Tr. 121).

288. Dr. Mazis could not recall specifically the names of the reports that he saw, but they could have been from Infomercial Marketing Service. (Mazis, Tr. 122).
289. Dr. Mazis viewed the tapes of infomercials for AbTronic, AB Energizer, and Fast Abs (Mazis Tr. 42), and he read their corresponding transcripts. (Mazis, Tr. 123).
290. On the basis of his review, Dr. Mazis concluded that advertisements for AbTronic, AB Energizer, and Fast Abs included numerous representations about how using the products causes consumers to obtain well-defined abdominal muscles and to lose inches around the waist. He stated that these representations are made through statements (“six pack abs,” “washboard abs,” and “rock-hard abs”), before-and-after photographs, computer animations, consumer testimonials, professional testimonials (such as, from a medical doctor and a fitness expert), and models with extraordinary abdominal definition and trim waists. (CX 58 at 17; Mazis, Tr. 47).
291. Dr. Mazis also concluded that advertisements for AbTronic, AB Energizer, and Fast Abs included representations that product performance is equivalent to or superior to abdominal exercises, such as sit-ups and crunches, and representations (including the use of consumer testimonials) that use of the products leads to weight loss. (CX 58 at 8; Mazis, Tr. 47-48).

292. As a result of exposures to the AbTronic, AB Energizer, and Fast Abs infomercials over time, as well as other influences, Dr. Mazis opined that consumers formed an “ab belt category of beliefs,” *e.g.*, beliefs they formed about ab belts. (Mazis, Tr. 48).
293. These beliefs would cause consumers to associate ab belts with well-developed abs, losing inches around the waist, losing weight, and effective alternatives to exercise. (Mazis, Tr. 48; CX 58 at 7).
294. Their ab belt category beliefs would affect those consumers’ perceptions of Ab Force advertising. (Mazis, Tr. 64).
295. Dr. Mazis testified that other elements, in addition to impressions gained by viewing the infomercials for AbTronic, AB Energizer, and Fast Abs, contribute to the formation of the ab belt category beliefs. One such element is word-of-mouth communication generated by viewers of the infomercials or by people who have purchased an ab belt and communicated their impressions to others who did not see the ads. (Mazis, Tr. 64 - 65, 169-70).
296. The other means by which non-viewers of the ads for other ab belt infomercials get information that leads to ab belt category beliefs is by seeing the packaging for them on display in retail outlets. (Mazis, Tr. 65). According to Dr. Mazis, people could be

exposed to claims that appear on the retail packaging for ab belt products that appear on the shelves of retail outlets and they could use such information to form their own category beliefs. (Mazis, Tr. 139-40, 170-71).

297. According to Dr. Mazis, people exposed to the ab belt infomercials do not necessarily remember the specifics of the ads they saw. Rather, the ab belt infomercials produced general category beliefs about ab belts that would be triggered by the Ab Force ads. (Mazis, Tr. 156-57).

298. Dr. Mazis's opinion is grounded in the psychological/consumer behavior theory of "categorization." He testified that according to the categorization theory, people take objects such as products and group them together in categories based on their similarity. (Mazis, Tr. 49, 156-57).

299. The categorization theory is well-recognized in the field of consumer behavior, and a leading proponent of the theory, Mita Suján published a well-known peer-reviewed article on the subject in the *Journal of Consumer Research* 15 years ago. (Mazis, Tr. 49).

300. According to Professor Suján, "[The] basic premise [of the categorization approach] is that people naturally divide the world of objects around them into categories enabling an efficient understanding and processing of the environment. . . . [i]f a new stimulus can be categorized as an example of a previously defined category, then the effect associated

with the category can be quickly retrieved and applied to the stimulus.” (CX 57 at 31).

301. The categorization theory is generally accepted by consumer perception scientists. (Mazis, Tr. 49). Respondents’ marketing expert, Dr. Jacoby testified that he was familiar with the theory and with Dr. Sujan’s article. (Jacoby, 344-45).
302. 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).
303. 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).
304. According to Dr. Mazis, statements such as “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV” and “The Ab Force is just as powerful and effective as those expensive ab belts sold by others. . . .” rely on the fact that many viewers have seen infomercials for other EMS ab belts. Thus, according to Dr. Mazis,

Respondents exploit the beliefs consumers have developed from exposure to information about other ab belts. (CX 58 at 9).

305. Dr. Mazis also notes that the depictions of well-muscled men and trim women with well-defined abdominal muscles in advertisements for Ab Force are similar the depictions shown in ads for AbTronic, AB Energizer, and Fast Abs ab belts. (CX 58 at 8). He testified that visual images such as these are more important than verbal messages because they remain in people's memories. (Mazis, Tr. 59).

306. Dr. Mazis testified that the physical appearance of the Ab Force is very similar to the appearance of the other ab belts, and people familiar with the other ab belts would associate the Ab Force with the ab belt category of beliefs. (Mazis, Tr. 60).

307. Finally, Dr. Mazis opined that the similarities in the names of Ab Force, AbTronic, AB Energizer, and Fast Abs, 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).

308. Dr. Mazis refers to the effects generated on consumers because of previous exposure to ab belts through either the infomercials for AbTronic, AB Energizer, and Fast Abs, word-of-mouth about ab belts, and retail packaging for ab belts as "indirect effects." (Mazis, Tr. 66).

309. As a result of these indirect effects, Dr. Mazis opines that the Ab Force TV spots contain implied claims that using Ab Force will result in well-developed abs and loss of inches around the waist. (Mazis, Tr. 61; CX 58 at 9-10). He stated that these are the most prominent of the ab belt category belief claims that consumers likely perceive because they are reinforced with visual images. (Mazis, Tr. 61; CX 58 at 9-10).
310. Dr. Mazis also opined that consumers also may perceive claims that use of Ab Force results in weight loss and that the Ab Force is an effective substitute for regular exercise. Although not reinforced by visual images, he believes they may receive these claims because they associate them with the ab belt category. (Mazis, Tr. 61).
311. Dr. Mazis opined that advertising for other EMS devices that did not resemble ab belts or that made different claims might cause consumers to form a different category of beliefs for them. (Mazis, Tr. 135-36).
312. Dr. Mazis stated that the fact that Ab Force ads may have appeared on different channels or in different time periods than the infomercials for AbTronic, AB Energizer and Fast Abs would not alter his opinion as to how the Ab Force triggers ab belt category beliefs. (Mazis, Tr. 133).
313. Dr. Mazis explained that 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).

b. Direct Effects within the Four Corners of the Ab Force Ads

314. In addition to the indirect effects that influence consumer perceptions of the Ab Force ads, Dr. Mazis testified that there are direct effects or "within the four corners of the ad" effects that cause consumers to make similar inferences about Ab Force and take away similar implied claims. (Mazis, Tr. 66-67).
315. These direct effects are not dependent upon prior exposure to information about ab belts or having a category of beliefs about them. Dr. Mazis identified these direct effects as the appearance of very trim, very fit models and the depiction of the Ab Force belt itself shown visibly pulsating the abdominal muscles of the models. (Mazis, Tr. 66-67, 180).
316. Another influence that is within the four corners of the Ab Force ads is the "Ab Force" name. Dr. Mazis testified that the name could have a double effect on consumers: "On the one hand, it applies force to your abs because of this [electronic] stimulation, and you can also say it makes your abs a force. In other words it makes your abs noticeable, that they are - - really well developed." (Mazis, Tr. 60).

2. The Mazis Copy Test

317. In addition to his facial analysis, Dr. Mazis designed a copy test of an Ab Force TV spot. (Mazis, Tr. 67).
318. A copy test is an in-person survey in which people are shown an advertisement, and asked a number of questions in terms of their perceptions of the advertisement, which is sometimes referred to as the “take-away” from the advertisement. (Mazis, Tr. 67).
319. The purpose of the copy test was to assess whether a 60-second advertisement for Ab Force communicates to consumers that using Ab Force results in well-developed abdominal muscles; causes users to lose inches around the waist; causes users to lose weight; is an effective alternative to exercise; and removes fat deposits. (CX 58 at 10).
320. 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).
321. Dr. Mazis designed the study, and the contractor for the study, U.S. Research, collected

the data. (Mazis, Tr. 67). U.S. Research is reliable to execute such copy tests. (Mazis, Tr. 67).

a. The universe for the copy test was properly defined

322. The goal of Dr. Mazis's study was to define a universe of consumers who might be interested in buying the Ab Force ab belt. (Mazis, Tr. 68). It is good practice to create a universe of people who are likely to buy the product whose claims are at issue. (Jacoby, Tr. 407-08).

323. The copy test was conducted in nine shopping malls located in Albuquerque, NM, Austin, TX, Colorado Springs, CO, Orlando, FL, Poughkeepsie, NY, St. Louis, MO., Schenectady, NY, Seattle, WA, and Toledo, OH. (Mazis Tr. 67-68; CX 58 at 11).

324. The choice of the mall locations assured geographic diversity throughout the country and facilitated achieving an approximately equal number of interviews in the four Census regions. (Mazis, Tr. 71).

325. Copy-test interviews were conducted in December, 2003 and January, 2004. (CX 58 at 11).

326. Interviewers from U.S. Research approached shoppers in the selected malls and asked

them if they would answer a few brief questions. (Mazis, Tr. 72).

327. Interviewers used a screening questionnaire (“screener”) (CX 58, Exhibit C) designed by Dr. Mazis to determine whether potential respondents were qualified to participate in the study. (Mazis Tr. 68; CX 58 at 12).
328. Age and sex quotas for copy-test survey respondents are set fourth on the first page of the screener. Dr. Mazis established these criteria based upon the results of a 1996 survey of consumers who were trying to lose weight. The results were published in the October 13, 1999 issue of the *Journal of the American Medical Association*. (Mazis, Tr. 71-72; CX 58 at 11).
329. The survey called for a survey universe of 60 percent females, 40 percent males with 20 percent 18-29 years of age, 45 percent 30-49 years of age, and 35 percent 50 years and older. (Mazis, Tr. 71-72; CX 58 at 11).
330. The screener asked both “inclusion” questions and “exclusion” questions. (Mazis, Tr.73-76; CX 58 at 12).
331. Questions in the screener were designed to bring into the study people who might have some propensity to buy the product and eliminate people who wouldn’t be typical consumers. (Mazis, Tr. 68).

332. The questionnaire properly screened out people who worked for an advertising agency, a public relations firm, or a marketing research firm (CX 58, Exhibit 3, Q. G) because they would have specialized knowledge of research technique. (Mazis, Tr.75).
333. Likewise, the questionnaire properly screened out people who worked for a store or company that sells exercise, fitness, weight loss products or programs, or products to massage the body (CX 58, Exhibit 3, Q. F) because such people would have specialized knowledge about fitness, exercise, exercise, weight loss, or massage and, consequently would not be typical consumers who would have a propensity to purchase the Ab Force. (Mazis, Tr. 75).
334. In order to qualify for the study, potential survey respondents had to have purchased in the past 12 months a product or used a service to help them lose weight, tone muscles, or massage the body. (CX 58 at 12; Mazis, Tr. 73-74). Dr. Mazis reasoned that consumers who had bought products or used a service to lose weight, tone their muscles, or massage their body were in a class of likely purchasers of the Ab Force ab belt. (Mazis, Tr. 73).
335. Dr. Jacoby opined that this particular question was appropriate. (Jacoby, Tr. 353-54).
336. In addition, potential respondents, in the past 12 months, had to have purchased a product by calling a toll-free number that was included in a TV ad, program, or infomercial. (CX

58 at 12; Mazis, Tr. 72-76). Consumers who never bought products by calling toll free numbers in response to TV ads, programs or infomercials would be unlikely purchasers of the Ab Force. (Mazis, Tr. 75).

337. Dr. Jacoby opined that this question was relevant. (Jacoby, Tr. 356).

338. Dr. Mazis' universe was composed of people who had demonstrated an interest in products for weight loss, toning muscles, or massage and who had also demonstrated a propensity for responding to direct response TV advertising. (Mazis, Tr. 72-76).

339. Dr. Mazis did not screen for prior purchasers of ab belts. He explained that there are a variety of ways people's prior beliefs could be influenced, and random distribution would assure that such people would be evenly distributed across the test group and the control group. (Mazis, Tr.152).

340. For the same reason, Dr. Mazis did not screen for persons who had been exposed to advertising for ab belts (Mazis, Tr. 154). He testified that he did not consider it to be helpful to ask about recall of prior advertising since there were a number of reasons that the respondents could have been influenced, and, since the sample size was large enough, the two groups would be approximately equal with respect to their exposure to prior ab belt advertising. (Mazis, Tr. 154).

341. The screening questionnaire also included “masking” questions regarding working for companies that sell personal computers or prescription drugs (CX 58, Exhibit 3, Q. F) that served to disguise the true intent of the study and prevent people from assuming that the study was for a fitness or massage product. (Mazis, Tr.74).

b. The Control Advertisement and the questions were appropriate

342. Survey respondents who qualified to participate in the study were randomly assigned to either a test group or a control group. (CX 58 at 13). The test group (consisting of 182 survey respondents) watched a version of the Ab Force ad (CX 104) that Respondents aired most often (Mazis, Tr. 79; CX 58 at 13). The control group (consisting of 220 survey respondents) saw an advertisement created by Dr. Mazis (CX 105) that was a “cleansed” (60-second) version of one of the 120-second commercials for Ab Force. (Mazis, Tr. 83; CX 58 at 12-13).

343. Control groups are frequently used in consumer protection surveys. (CX 58 at 13).

344. The use of a control ad in copy testing is similar to the use of a placebo in medical studies. (Mazis, Tr. 83, 84).

345. A “cleansed” ad may have allegedly misleading elements removed and/or a statement correcting the alleged deception. (CX 58 at 13).

346. Dr. Mazis cleansed the control ad of two types of allegedly misleading elements. First, the mention of ads for other electronic abdominal belts advertised on TV was removed (“I’m sure that you’ve seen those fantastic electronic ab belt infomercials on TV...”). Second, all but one brief depiction of well-muscled men and trim women with clearly identifiable abdominal muscles were removed. (Mazis Tr. 83-84; CX 58 at 13).
347. In addition, Dr. Mazis added the following statement at the end of the commercial: “Ab Force for a relaxing massage.” This statement appeared on the screen and was read by an announcer. (Mazis Tr. 83-84; CX 58 at 13).
348. Survey respondents who qualified for the study were escorted to the interviewing facility maintained by the research organization and were administered one of the two versions of the “main” questionnaire. (Mazis, Tr. 77-78). Dr. Mazis designed the main questionnaire. (Mazis, Tr. 77).
349. Approximately, one half of the survey respondents were administered questionnaire version Version 1A and the other half Version 1B. Each version contained exactly the same questions, but the order was changed to control for bias resulting from question ordering. (Mazis, Tr. 92; CX 58 at 14).
350. In addition, each version of the questionnaire was color coded blue or green to

correspond to either the “blue dot” test ad or the “green dot” control ad. Respondents were initially asked to identify the color of the dot on the tape cassette they were about to view. (Mazis, Tr. 91-92). This was done to assure that respondents viewed the correct commercial. (Mazis, Tr. 91; CX 58 at 14).

351. Survey respondents were assigned to the test group or the control group at random. (Mazis, Tr. 90).
352. Randomization serves to equal out factors that are not otherwise controlled for such as age or income (Mazis, Tr. 90), or prior exposure to ab belt ads (Mazis, Tr. 152, 153, 154). Dr. Mazis testified that researchers cannot possibly control for all of the factors that affect consumers’ perceptions, but that random assignment between the test group and the control group effectively addresses that problem. (Mazis, Tr. 153).
353. Each survey respondent saw the test ad or the control ad twice before the questionnaire was administered. (CX 58 at 14; Mazis, Tr. 92).
354. Survey respondents were asked to identify the brand name of the product that was advertised in the commercial they had just looked at. (Question 2/2a). Survey respondents who identified the product as “Ab Force” were asked the ensuing questions. (CX 58 at 14).

355. Survey respondents who were unable to identify the sponsor were not asked any of the subsequent questions and were eliminated from the study. (Mazis, Tr. 93; CX 58 at14-15).
356. These survey respondents had just finished viewing a sixty-second TV commercial twice where the word Ab Force had been used fourteen times over the two viewings. (Mazis, Tr. 146).
357. 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).
358. Eliminating such people from further participation in the survey at that point was proper because inattentive survey respondents were unlikely to give meaningful responses to the ensuing questions. (Mazis Tr. 94).
359. Consumers so inattentive that they could not remember the name of the product immediately after viewing the commercial twice might not be able to remember the telephone number needed to purchase the product. (Jacoby, Tr. 407).

c. The questions were unbiased and appropriate

360. The remaining respondents were then asked an open-ended question (Question 4): “What did the commercial say, show, or imply about Ab Force?” (CX 58 at 15).
361. Dr. Mazis defined open-ended questions as questions in which there are no defined answer categories. “People just give the answers in their own words, and the interviewer defines the response verbatim.” (Mazis, Tr. 95).
362. The next question (Question 4) is a “filter” question designed to reduce guessing to subsequent questions. (CX 58 at 15).
363. Question 4 asked respondents whether the commercial said, showed, or implied that Ab Force improves users’ appearance, fitness, or health. Respondents were shown a card with only three possible answers: “yes it does,” “no, it doesn’t,” or “don’t know or no opinion,” and asked to provide one of those three answers (CX 58 at 15).
364. Only respondents who answered this question in the affirmative were asked the ensuing close-ended questions. (CX 58 at 15; Mazis, Tr. 95).
365. The purpose of the filtering question was to eliminate respondents who might be prone to guess in answering subsequent closed-ended questions. (Mazis, Tr. 95; CX 58 at 15).
Dr. Mazis testified that if respondents did not see a fitness, health, or appearance claim in the commercial, their answers to the more specific questions might not be very reliable.

(Mazis, Tr. 95).

366. Question 5 began with respondents being informed that they would be read a list of statements, of which, some, all, or none may have been implied by or made in Ab Force commercial. (Mazis, Tr. 95-96).

367. This instruction was followed by a series of eight statements with the order rotated throughout the questionnaires so that there was no order bias. (CX 58 at 15; Mazis, Tr. 96).

368. Five of the eight statements were at issue in the case:

“Using Ab Force causes users to lose inches around the waist.”

“Using Ab Force results in well-defined abdominal muscles.”

“Using Ab Force removes fat deposits.”

“Using Ab Force is an effective alternative to regular exercise.”

“Using Ab Force causes users to lose weight.”

(CX 15-16, Mazis Tr. 97-98).

369. The three other statements (regarding stomach ulcers, nausea, and blood pressure) were included to mask the intent of the study. (CX 58 at 15).

370. Dr. Mazis explained that these were included to assure that respondents were paying

attention and not just saying yes to every question. (Mazis, Tr. 97).

371. After each statement was read to respondents, they had the opportunity to select one of three possible answers: “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.” (Mazis, Tr. 96; CX 58, Exhibit D). Respondents were shown a card with the three possible answers: “yes, it does,” “no, it doesn’t,” or “don’t know or no opinion.” (CX 58 at 16).
372. None of the test group and only 4.3% of the control group answered yes to the statement about stomach ulcers. (CX 58, Exhibit H at 12).
373. To the statement about relieving nausea, only 1.1% of the test ad respondents and 1.9% of the control ad respondents answered “Yes.”. (CX 58, Exhibit H at 15).
374. Only 5.0% of the test group and 2.9% of the control group said yes to the statement that Ab Force lowers blood pressure. (CX 58, Exhibit H at 17).
375. Positive responses to the statement that Ab Force removes fat deposits were 22.9% for the test ad and 19.0% test for the control ad compared to 65.4% and 48.1% for the statement that Ab Force results in well-defined abdominal muscles. (CX 58 at 21).

376. Question 6 asks “Does or doesn’t the Ab Force commercial say, show, or imply that the Ab Force gives users a massage?” Dr. Mazis explained that this question was included in anticipation of Respondents’ claim that their ads conveyed a massage claim. (Mazis, Tr. 98).
377. This massage question was asked before Question 4 (the appearance, fitness, health question) in half of the questionnaires to control for order bias. (Mazis, Tr. 98-99).
378. Question 7 asks whether, in the last 30 days, respondents had seen, read, or heard a news story or stories featuring an abdominal device. (Mazis Tr. 100).
379. Dr. Mazis added Question 7 just before the study was about to go into the field. (Mazis, Tr. 99). He testified that the addition was prompted by recent news accounts on TV illustrating an FTC action regarding companies making weight loss claims with depictions of ab belts. His concern was that these news accounts might bias people’s views about ab belts. (Mazis, Tr. 99).
380. Those who answered affirmatively were asked “As best you can remember, what did the news story or stories say about abdominal belt ab belts?” (CX 58 at 16).
381. Forty-one (41) persons gave responses indicating that the news stories said that the ab belts were ineffective, didn’t cause weight loss, were dangerous, or were a false

advertising scam. (CX 58 at 18; Mazis, Tr. 100).

382. Dr. Mazis removed these survey respondents out of prudence due to their recent exposure to the news stories. (Mazis, Tr. 154-56).

d. Results

383. At the completion of the survey, completed questionnaires from the nine shopping malls were sent to U.S. Research where they were reviewed to confirm that they were filled out properly and for possible mistakes in the way the interview was administered. (Mazis, Tr. At 101).

384. The names and telephone numbers of all survey respondents who provided them were then sent to Park Research, an interviewing service not affiliated with U.S. Research, to conduct telephone validation. (CX 58 at 17).

385. The purpose of validation is to confirm that the survey respondents did, in fact, participate in the interview and that they met the criteria for being included in the study. (Mazis, Tr. 101; CX 58 at 17).

386. As a result of the validation process, 171 survey respondents were eliminated from the data base. (CX 58 at 18). Most of the people were removed because they said that they hadn't purchased a product from an 800 number. (Mazis, Tr. 101).

387. After validation, Dr. Mazis removed the questionnaires of the 41 persons who, in response to Question 7, indicated either that ab belts were ineffective, didn't cause weight loss, were dangerous, or were a false advertising scam. (CX 58 at 18; Mazis, Tr. 100, 154-156).
388. He also did not include the 81 partially completed questionnaires of survey respondents who were inattentive and unable to identify Ab Force as the sponsor of the advertisement. (Mazis, Tr. 102; CX 58 at 18).
389. Consistent with generally accepted procedures in the field, 389 questionnaires were included in the data tabulations. (CX 58 at 18).
390. Under Dr. Mazis's supervision, U.S. Research developed a coding framework for the open-ended question: "What did the commercial say, show, or imply about Ab Force?" (CX 58 at 17; CX 58, Exhibit F; Mazis, Tr. 104).
391. Two independent coders, who were unaware of the study's purpose coded the responses to the open-ended question. (Mazis, Tr. 17).
392. The responses to this open-ended question reveal that 22.3% of survey respondents in the test ad group indicated that the advertisement communicated that using Ab Force results

in well-developed abdominal muscles, in loss of weight or inches around the waist, or in an improved physique. (CX 58 at 19; Mazis, Tr. 104-05)

393. 11.9% of the survey respondents in the control group responded similarly. (CX 58 at 19; Mazis, Tr.105).

394. The net take-away (test ad response minus control ad response) was +10.4%. (CX 58 at 19; Mazis, Tr. 104-05).

395. Dr. Mazis testified that these results are statistically significant at the .01 level, which means that the probability is less than one in 100 that the observed difference (22.3% vs. 11.9%) is due to chance. (Mazis, Tr. 105; CX 58 at 19).

396. To the statement that using Ab Force results in well-defined abdominal muscles, 65.4% of test group and 48.1% of the control group responded affirmatively. (Mazis, Tr.106).

397. The net difference between the test group and the control group was for the well-defined abs statement was 17.3%. (Mazis, Tr. 106).

398. That result is statistically significant at the .001 level. (Mazis, Tr. 106).

399. To the statement that using Ab Force causes users to lose inches around the waist, 58.1%

of the test group and 42.4% of the control group responded affirmatively. (Mazis, Tr. 106).

400. The net difference between the test group and the control group for the lose inches around the waist statement was 15.7 %. (Mazis, Tr. 106).

401. That result was statistically significant at the .01 level. (Mazis, Tr. 106).

402. For the statement that using Ab Force causes users to lose weight, 43 % of the test group and 28.1% of the control group responded affirmatively. (Mazis, Tr. 107).

403. The net difference between the test group and the control group for the lose weight statement was 14.9%. (Mazis, Tr. 107).

404. That net difference was statistically significant at the .01 level. (Mazis, Tr. 107).

405. For the statement that using Ab Force was an effective alternative to exercise, 39.1% of the test group and 28.6% of the control group responded positively. (Mazis, Tr. 107).

406. The net difference between the test group and the control group for the alternative to exercise statement was 10.5%. (Mazis, Tr. 107).

407. That difference was statistically significant at the .05 level. (Mazis, Tr. 107).

408. For the statement that using Ab Force removes fat deposits, the net difference between the test group and the control group of 3.9% was not statistically significant. (Mazis, Tr. 107).

409. The following chart from Dr. Mazis's expert report summarizes the affirmative responses to each of the five key closed-ended statements posed in Question 5:

Using Ab Force . . .	TEST AD	CONTROL AD	DIFFERENCE
Results in well-defined abdominal muscles	117 (65.4%)	101 (48.1%)	+17.3%***
Causes users to lose inches around the waist	104 (58.1%)	89 (42.4%)	+15.7%**
Causes users to lose weight	77 (43.0%)	59 (28.1%)	+14.9%**
Is an effective alternative to exercise	70 (39.1%)	60 (28.6%)	+10.5%*
Removes fat deposits	41 (22.9%)	40 (19.0%)	+03.9%

*** $p < .001$ ** $p < .01$ * $p < .05$

(CX 58 at 21).

410. Dr. Mazis testified that the level of affirmative responses for the control ad were relatively high, particularly for the well-defined abdominal muscles response (48.1%) and the inches around the waist response (42.4%). (Mazis, Tr. 107-08; CX 58 at 20).

411. He attributed the high level of response to survey respondents' prior knowledge of ab

belts and the presence in the control ad of the name “Ab Force” and the visual image of an ab belt around the waist. (Mazis, Tr. 108; CX 58 at 20).

412. Dr. Mazis said that the likely high level of prior knowledge would have affected both the control group and the test group equally as a result of random assignment between the two groups and that is why you subtract the control group results from the test group results. (Mazis, Tr. 153).

VIII. THE AB FORCE DOES NOT CAUSE LOSS OF WEIGHT, INCHES OR FAT; WELL-DEFINED ABDOMINAL MUSCLES; AND IS NOT AN EFFECTIVE ALTERNATIVE TO REGULAR EXERCISE

413. The Ab Force does not cause loss of weight, inches or fat. (JX 6, ¶ 16)

414. The Ab Force does not cause well-defined abdominal muscles. (JX 6, ¶ 17)

415. Use of the Ab Force is not an effective alternative to regular exercise. (JX 6, ¶ 18)

416. Respondents did not possess and rely upon substantiation for the alleged claims that (a) Ab Force causes loss of weight, inches or fat, (b) Ab Force causes well-defined abdominal muscles, and (c) use of the Ab Force is an effective alternative to regular exercise. (JX 6, ¶ 19)

IX. RESPONDENT KHUBANI'S HISTORY OF VIOLATING THE FTC ACT AND OF MARKETING MEDICAL DEVICES WITH FALSE CLAIMS

417. In 1990, the Commission obtained a consent judgment enjoining Khubani and a corporation he controlled from violating the Mail or Telephone Order Merchandise Rule ("Mail Order Rule") and requiring them to pay a penalty of \$35,000 for alleged violations. *United States v. Azad Int'l, Inc.*, No. 90 CIV 2412-(PLN) (S.D.N.Y. Apr. 12, 1990).
418. In 1996, the Commission obtained a consent judgment enjoining Khubani and Respondent Telebrands from violating the Mail or Telephone Order Merchandise Rule ("Mail Order Rule") and requiring them to pay a penalty of \$95,000 for alleged violations. *United States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 18, 1996).
419. In 1996, the Commission also obtained an administrative order prohibiting Khubani and Telebrands from violating Section 5 of the FTC Act in connection with the marketing of antennas and hearing aids. *In re Telebrands Corp.*, 122 F.T.C. 512 (1996).
420. In 1999, the Commission modified the existing 1996 consent judgment with Khubani and Telebrands and obtained penalties of \$800,000 for alleged violations of the Mail Order Rule. Modified Consent Decree, *United States v. Telebrands Corp.*, Civ. No. 96-827-R (W.D. Va. Sept. 1, 1999).

PROPOSED CONCLUSIONS OF LAW

I. JURISDICTION

- 1 The Commission has jurisdiction over the subject matter of this proceeding pursuant to Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. § § 45 and 52.

- 2 The Commission has jurisdiction over, “persons, partnerships, and corporations,” pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45. The Commission, therefore, has jurisdiction over all Respondents.

- 3 An advertisement is deceptive under Section 5 of the Federal Trade Commission Act if it contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984), *appeal dismissed sub nom., Koven v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984); *see also* Letter from James C. Miller, III, Chairman, Federal Trade Commission to Hon. John T. Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983) (“*Deception Statement*”), *reprinted in* 103 F.T.C. 174, 175.

- 4 A representation is considered material if it “involves information that is important to consumers and hence, likely to affect their choice of conduct regarding a product.” *Cliffdale Associates*, 103 FTC at 165. The Commission presumes materiality with three types of claims: (1) express claims; (2) implied claims where there is evidence that the

seller intended to make the claim; and (3) claims that significantly involve health, safety, or other area with which reasonable consumers would be concerned. *Thompson Medical*, 104 F.T.C. at 816-17.

5 Section 12 of the FTC Act prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, or cosmetics. 15 U.S.C. § 52. A “false advertisement” is any advertisement that is “misleading in a material respect.” 15 U.S.C. § 55; *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994).

6 The Ab Force ab belt, an electronic muscle stimulation (“EMS”) device which uses electronic stimulation intended to cause stimulation of the muscles, is a device within the meaning of Section 12 of the FTC Act, 15 U.S.C. § 55(d) (defining “device” as including “an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . (3) intended to affect the structure or any function of the body of man”).

7 Corporate respondents acting in concert to further a common enterprise each should be liable for the acts and practices of the others in furtherance of the enterprise. *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973) and *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir.), *cert. denied*, 377 U.S. 992 (1964) (treating all defendants as single economic entity where there was common control); dealings between defendants were not at arms length); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (common enterprise found where individuals were

transacting an integrated business through a maze of interrelated companies); sharing office space and offices, Zale Corp. and Corrigan-Republic, Inc. v. FTC, 473 F.2d 1317, 1320 (5th Cir. 1973). *Accord Martin v. Deiriggi*, 985 F.2d 129 (4th Cir. 1992); *Barber v. Kimbrells, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 268-69 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970).

8 At all times relevant to the Complaint, Respondents have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force device.

9 At all times relevant to the Complaint, Respondents engaged in a nationwide advertising campaign to offer for sale and sell the Ab Force.

10 At all relevant times herein, Respondents were engaged in and affected commerce, as “commerce” is defined Section 4 of the FTC Act as amended, 15 U.S.C. § 44.

II. INDIVIDUAL LIABILITY

11 To obtain a Cease and Desist order against an individual, Complaint Counsel must only prove violations of the FTC Act by the corporation and that the individual either directly participated in the acts at issue or had some measure of control over those acts. *FTC v. Standard Education Society*, 302 US 112 (1937); *National Housewares, Inc.*, 90 F.T.C. 572, 598 (1977).

12 At all relevant times herein, individually or in concert with his officers and employees, Respondent Khubani had authority to control the policies, acts, or practices of Respondents Telebrands and TV Savings.

13 At all relevant times herein, Respondent Khubani directly participated in the acts and practices described in the Complaint.

III. BURDEN OF PROOF

14 The parties burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act (“APA”), and case law. Pursuant to Commission Rule 3.43(a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” 16 C.F.R. § 3.43(a).

15 The preponderance of the evidence standard typically governs in FTC enforcement actions. *In re Adventist Health System/West*, 117 F.T.C. 224, 297 (1994) (“Each element of the case must be established by preponderance of the evidence:); *FTC v. Abbott Laboratories*, 853 F. Supp. 526, 535 (D.D.C. 1994) (government must show “by a preponderance of the evidence that [defendant’s] action was the result of collusion with competitors”). See also *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-91 (1983)

(preponderance of the evidence standard applies to enforcement of antitrust laws); *Steadman v. SEC*, 450 U.S. 91, 95, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

- 16 A respondent’s intent is relevant in determining the meaning of ads. “While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made.” *Novartis Corp.*, 127 F.T.C. 580, 683 (1999), *aff’d.*, 223 F.3d 783 (D.C. Cir. 2000).
- 17 Respondents intentionally referred to, and compared the Ab Force to, the AbTronic, AB Energizer and Fast Abs, ab belts featured in those “those fantastic Electronic Ab Belt infomercials on TV.”
- 18 Respondents intended the Ab Force ads to evoke the core claims made by the AbTronic, AB Energizer, and Fast Abs ab belts.
- 19 In addition, ads that take advantage of preexisting consumer beliefs are deceptive. The Commission has recognized that companies “may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs.” *See Stouffer Foods Corp.*, 118 F.T.C. 746, 810 n.31 (1994); *see also Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (“That the belief is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive”).

IV. ADVERTISING CLAIMS

20 A facial analysis of the radio advertisement disseminated by Respondents for the Ab Force reveals that it makes implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of statements such as, “Have you seen those fantastic Electronic Ab Belt infomercials on TV? They’re amazing . . . promising to get our abs into great shape fast—without exercise! They’re the latest fitness craze to sweep the country. But, they’re expensive, selling for up to 120 dollars each! But what if you could get a high quality electronic ab belt for just 10 dollars? That’s right, just 10 dollars! The Ab Force is just as powerful and effective as the expensive ab belts on TV—designed to send just the right amount of electronic stimulation to your abdominal area.”

21 A facial analysis of the television advertising disseminated by Respondents for the Ab Force reveals that it makes implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of statements such as, “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 Ab Force is just as powerful and effective as those expensive ab belts sold by others -- designed to send

just the right amount of electronic stimulation to your abdominal area! . . . Don't miss out on this opportunity to join the latest fitness craze.”

- 22 A facial analysis of the television advertising disseminated by Respondents for the Ab Force reveals that it makes implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of images of well-muscled, bare-chested men and lean, shapely women wearing Ab Force ab belts and experiencing abdominal muscle contractions.
- 23 A facial analysis of the print advertisement disseminated by Respondents for the Ab Force reveals that it makes implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of statements such as, “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re amazing! They’re the latest craze to sweep the country and everybody wants one. The thing is they’re expensive selling for up to \$120 each. . . .The Abforce uses the same powerful technology as those Ab Belts sold by other companies on infomercials. . . . And through the use of an image of a well-muscled man wearing an Ab Force belt. Superimposed on this image is a red-and-white, square-shaped “AS SEEN ON TV” logo, and the statement, “Ab Force uses the same powerful technology as those expensive Ab belts on infomercials.”

- 24 A facial analysis of the email advertisement identified by Respondents as RX 50 and disseminated by Respondents for the Ab Force reveals that it makes implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of statements such as, “Don’t be Fooled by the Price! The AbForce uses the same powerful technology as those Ab Belts sold by other companies on infomercials.” and The AbForce is truly a high quality product.” (RX 50).
- 25 A facial analysis of the email advertisement identified by Respondents as RX 51 and disseminated by Respondents for the Ab Force reveals that it makes implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of statements such as, “They’re Amazing! I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re amazing! They’re the latest craze to sweep the country and everyone wants one. The thing is they’re expensive selling for up to \$120 each. That’s why we developed the AbForce that you can buy right now for just \$20.” And through the use of an image of a well-muscled man wearing an Ab Force belt. Above this image, is a square-shaped “AS SEEN ON TV” logo, and across the top of the advertisement is the statement, “The Amazing AbForce For the Unbelievable Price of Just ... \$10.00 (When You Buy Two).”
- 26 A facial analysis of the Internet advertisement disseminated by Respondents for the Ab

Force reveals that they make implied claims that consumers using the Ab Force would lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise through the use of statements such as, “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re amazing! They’re the latest craze to sweep the country and everyone wants one. The thing is they’re expensive selling for up to \$120 each. That’s why we developed the AbForce that you can buy right now for just \$20.”

27 When the Commission turns to extrinsic evidence to determine the meaning of an ad, the evidence can consist of “expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.” *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176 n.8 (11984); *Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). “The Commission can also consider opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted, if such opinions are adequately supported.” *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) at 122.

28 The Commission and this Court are not limited only to looking at a survey of prior purchasers asking why they purchased the product. To do so would thwart the statutory goals of Section 5 of the FTC Act. See, *FTC v. Figgie Int’l Inc.*, 994 F. 2d 595. 605 (9th Cir. 1993), quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn.

1985); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F. 2d 1312, 1316 (8th Cir. 1991);
FTC v. Wilcox, 926 F. Supp. 1091, 1105 (S.D. Fla. 1995).

- 29 Allegations in the FTC's Complaint in this matter with regard to the frequency of the airings of infomercials for AbTronic, AB Energizer, and Fast Abs are sustained by the record evidence in this matter.
- 30 Dr. Mazis's experience and background qualify him as an expert in marketing research and consumer behavior. He is well-qualified to render an opinion on the effect of the Ab Force TV spots on consumer behavior.
- 31 Dr. Mazis's opinion of the direct effects of the Ab Force TV spots supports the notion that even without the influence of the indirect effects, consumers can perceive implied claims that the Ab Force causes well-developed abdominal muscles and loss of inches around the waist.
- 32 Dr. Mazis's facial analysis of the likely consumer perceptions of the Ab Force TV spots is probative and reliable as to the issue of whether the claims challenged in the complaint were made.
- 33 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.

34 The Ab Force advertisements sufficiently referred to advertisements for the AbTronic, AB Energizer, and Fast Abs to cause consumers to place the Ab Force in the same category as those devices as weight loss and muscle building devices, and to therefore, take away the same express and strongly implied claim as contained in the infomercials for those products.

35 The conclusion that the challenged advertisements convey claims that the Ab Force causes loss of weight and inches, builds well-defined abdominal muscles, and is an effective alternative to exercise, based on a facial analysis of the ads and supported by the testimony of Dr. Mazis, is confirmed by the results of the copy test introduced by Complaint Counsel.

36 To constitute reliable and probative evidence, copy tests must be methodologically sound, *e.g.*, they should “draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly.” *Thompson Medical*, 104 F.T.C. at 790; *Stouffer Foods Corp.* 118 F.T.C. at 807. Perfection is not the prevailing standard for determining whether a copy test may be given any weight. *Stouffer*, 118 F.T.C. at 807. A study may harbor one or more sources of potential error or bias and still be probative. *Stouffer*, 118 F.T.C. at 807.

37 Copy test results provide extrinsic evidence of what messages are conveyed to consumers by tested advertisements. *Thompson Medical*, 104 F.T.C. at 790-791.

38 Dr. Mazis's copy test was conducted to assess whether consumers perceived the challenged claims, not to confirm the source of those perceptions.

39 Dr. Mazis's copy test is probative and reliable as to whether consumers perceived the challenged claims.

40 Dr. Mazis properly excluded the 81 inattentive respondents who could not remember the name of the product after viewing the Ab Force ad twice from further participation in the survey.

41 "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. *Stouffer Foods Corp.*, 118 F.T.C. 746, 807, n.25 (1994).

42 "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.

43 Dr. Mazis's explanation as to the purpose and effect of a control group is also consistent with advice in 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 (“[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.”).

44 “In addition, if respondents who viewed the allegedly deceptive commercial respond differently than respondents who viewed the control commercial, the difference cannot be the result of a leading question, because both groups answered the same question. The ability to evaluate the effect of the wording of a particular question makes the control group design particularly useful in assessing responses to closed-ended questions, which may encourage guessing or particular responses.” Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2d ed., 2000) at 58.

45 Accordingly, Dr. Jacoby’s assertion that purportedly leading questions could prejudicially skew Dr. Mazis’s survey results is unfounded. Since both the control group and the test group in Dr. Mazis’s study were asked the same questions, the effect of leading questions would have been neutralized.

46 Whether the control group’s affirmative responses to closed-ended questions were the result of prior knowledge of ab belts, as Dr. Mazis opines, or biased, leading questions, as Dr. Jacoby argues, or a combination of both, the process of random assignment,

combined with the use of a control ad, balanced out the effects and resulted in reliable and significant net take-away levels ranging from 10.5% to 17.3%.

47 There is no absolute minimum percentage of copy test respondents who must report taking a specific message before that claim is deemed communicated. The Commission’s opinion in *Thompson Medical* does provide, however, a level of close-ended responses deemed sufficient to show that a claim was communicated by an ad. There, the Commission relied on percentages, after the control question responses had been deducted, of 16% to 18% of the respondents answering that they took the claim, to conclude that the tested ad “did, in fact, cause average viewers to believe the [claim].” (104 F.T.C. at 805.). Other FTC cases contain dictum that suggest that the Commission would be justified in considering levels of 10% net take-away sufficient, *e.g.*, *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir.), 414 U.S. 1112 (1973) (Where Firestone’s own consumer survey revealed that 15.3% perceived “Safe Tire” to mean every tire was ‘absolutely safe’ or ‘absolutely free from defects,’ the court stated that it was “hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public.”) and *Stouffer Foods*, 118 F.T.C. at 805 (Where the Commission noted that one of Stouffer’s own experts “testified that often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful.”)

48 Moreover, several decisions in Lanham Act decisions support the proposition that a net

difference between 10% and 15% is sufficient to support an allegation of trade mark infringement. *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (10%); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 817 (8th Cir. 1969) (11%); *James Borough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 279 n.23 (7th Cir. 1976) (referring to prior case showing 11%); *Jockey Int'l, Inc. v. Burkard*, 185 U.S.P.Q. (BNA) 201, 205 (S.D. Cal. 1975) (11.4%); *McDonough Power Equip. Inc. v. Weed Eater, Inc.*, 208 U.S.P.Q. (BNA) 676, 683-85 (Trademark Trial & App. Bd. 1981) (11%); *Goya Foods, Inc., v. Condal Distributors, Inc.*, 732 F. Supp. 453, 456-57 (S.D.N.Y. 1990) (9%); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*, 365 F. Supp. 707, 716 (S.D.N.Y. 1973), *modified and aff'd*, 523 F.2d 1331 (2^d Cir. 1975) (8.5%); *compare Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455 n.15 (4th Cir. 1996) (“We may infer from case law that survey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent.”) (emphasis added.).

49 The results of Dr. Mazis’s copy test indicate that a sufficient number of consumers acting reasonably under the circumstances take away the challenged claims of well-developed abdominal muscles, loss of inches around the waist, loss of weight, and substitute for exercise from the Ab Force TV spots.

50 The claims challenged in the Complaint are material.

51 Materiality of the claims challenged in the Complaint is evidenced by Respondents

intentional use of visual images of models with well-sculpted torsos to represent the perfect body; the fact that the Ab Pulse, Respondents' product that was differentiated in advertising from the ab belts in "those fantastic Electronic Ab Belt infomercials on TV" did not sell well; and Respondent's intentional use of words such as "fitness" and "exercise" in some of their advertising, among other things. In addition, claims about weight loss, fat loss, fitness, and exercise are material because they all involve health concerns.

52 Any other criticisms by Dr. Jacoby are insufficient to negate the probative value of Dr. Mazis's testimony.

53 The claims that the use of the Ab Force causes consumers to lose weight, fat, and inches; gain well-developed abdominal muscles; and that it is a substitute for regular exercise are false.

54 At the time Respondents made these representations, they did not possess and rely upon a reasonable basis that substantiated such representations.

55 The acts and practices of Respondents as found herein were all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices and false advertisements in or affecting commerce in violation of Sections 5 and 12 of the FTC Act.

56 The Commission has the authority to impose a bond as fencing-in relief if presented with facts showing that such relief is necessary to prevent future violations. The Commission has broad discretion to fashion remedies to “close all roads to the prohibited goal, so that [the Commission’s] order may not be by-passed with impunity.” *FTC v. Rubberoid Co.*, 343 U.S. 470, 473 (1957).

57 Requiring Respondent Khubani to post a bond prior to marketing a food, drug or device as defined by the FTC Act is reasonably related to the conduct and appropriate to prevent future violations. *See, e.g., United States v. Vlahos*, 884 F.Supp. 261, 266 (N.D. Ill. 1995), *aff’d*, 95 F.3d 1154 (7th Cir. 1 996); *FTC v. Slim America*, 77 F. Supp. 1263, 1276-77 (S.D. Fla. 1999).¹

58 The requirements in the proposed Ab Force Order are appropriate in terms of claim and product coverage given both the serious and deliberate nature of respondents’ violations. *See, e.g., Stouffer Foods Corp.*, 118 F.T.C. at 811-15; *Thompson Medical*, 104 F.T.C. at 833. The offense is serious because the deceptive claim was disseminated in numerous ads, in multiple media. Respondents paid over \$4 million to disseminate the challenged ads. The duration, number of executions, and multi-million dollar cost of the campaign all constitute significant evidence of the seriousness of the violations. *See Thompson*

¹ Although the Commission has not reviewed the inclusion of a bond in a litigated Part III matter, it has accepted orders with a bond in several part III matters. *See, e.g., William E. Shell, MD*, docket no. C-3749 (June 16, 1997); *Original Marketing, Inc.*, C-3596 (August 9, 1995); *Taleigh Corp.*, C-3587 (June 16, 1995).

Medical, 104 F.T.C. at 834-36.

- 59 The “fencing-in” relief in Part III of the proposed Order, which extends the prohibitions of the order beyond EMS devices to “any food, drug, dietary supplement, device, or any other product, service, or program,” is appropriate given the seriousness of the violations, the ease with which the unlawful conduct can be transferred to other products, and the fact that Respondent Khubani, who controls the other two Respondents, has a long history of violations of the FTC Act, including an action involving hearing aids, another device under Section 12, aids. *See Thompson Medical Co.*, 104 F.T.C. at 833.
- 60 The accompanying order is necessary and appropriate under applicable legal precedent and the facts of this case.

WHEREFORE, Complaint Counsel respectfully urge the Administrative Law Judge to adopt the Proposed Findings of Fact, Conclusions of Law, and proposed Order.

Respectfully submitted,

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Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
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Dated: June 2, 2004

PROPOSED ORDER

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
2. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
3. “EMS device” shall mean any appliance or machine, or any accessories thereof, used to stimulate the muscles of the human body with electricity.
4. “Food,” “drug,” “device,” and “cosmetic” shall mean as “food,” “drug,” “device,” and “cosmetic” are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. Unless otherwise specified, “respondents” shall mean Telebrands (a corporation), TV Savings (a limited liability company), their successors and assigns and their officers; Ajit Khubani, individually and as president of Telebrands and sole member of TV Savings; and each of the above’s agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Ab Force EMS device or any substantially similar device in or affecting commerce, shall not represent, in any manner, including through the use of pictures, demonstrations, testimonials or endorsements, expressly or by implication, that:

- A. any such device causes or promotes loss of weight, inches, or fat;
- B. any such device causes or promotes well-defined abdominal muscles, including through the use of terms such as “rock hard abs,” “washboard abs,” “chiseled abs,” “cut abs,” “well-developed abs,” and/or any other terms with substantially similar meaning;
- C. use of any such device for any period of time is an effective alternative to regular exercise, including but not limited to sit-ups, crunches, or any substantially similar exercises;

- D. any such device makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any EMS device, shall not make any misrepresentation, in any manner, including through the use of pictures, demonstrations, testimonials or endorsements, expressly or by implication, that:

- A. any such device causes or promotes loss of weight, inches, or fat;
- B. any such device causes or promotes well-defined abdominal muscles, including through the use of terms such as “rock hard abs,” “washboard abs,” “chiseled abs,” “cut abs,” “well-developed abs,” and/or any other terms with substantially similar meaning;
- C. use of any such device for any period of time is an effective alternative to regular exercise, including but not limited to sit-ups, crunches, or any substantially similar exercises;
- D. any such device makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ab Force, any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program, shall not make any representation, in any manner, expressly or by implication, about weight, inch, or fat loss, muscle definition, or the health benefits, safety, or efficacy of any such product, service, or program, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

Nothing in this Order shall prohibit respondents from making any representation for any device that is specifically permitted in labeling for that device under any premarket approval application or premarket notification approved or cleared by the Food and Drug Administration.

V.

IT IS FURTHER ORDERED that respondent Khubani, directly or through any corporation, subsidiary, division, or other entity, shall not engage in or assist others in engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device, as that term is defined in Section 15(d) of the FTC Act, 15 U.S.C. § 52, unless, prior to engaging in that activity, respondent Khubani first obtains a performance bond (“the bond”) in the principal sum of \$1,000,000. The terms and conditions of the bond requirement are as follows:

- A. The bond shall be conditioned upon compliance with Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and Parts I through III of this Order. The bond shall be deemed continuous and remain in full force and effect as long as defendant is engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device. Respondent Khubani shall maintain the bond for a period of three years after he provides notice to the Commission that he has ceased engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device. The bond shall cite this Order as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Sections 5(a) and 12 of the FTC Act, or Parts I through III of this Order.
- B. The bond shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each state in which respondent Khubani, or any entity directly or indirectly under his control, is doing business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. The bond shall be in favor of the Federal Trade Commission for the benefit of any consumer injured as a result of any activities that required obtaining the bond.
- C. The bond required pursuant to this Paragraph is in addition to, and not in lieu of, any other bonds required by federal, state or local law.
- D. At least 10 days before commencing any activity that requires obtaining the bond, respondent Khubani shall provide notice to the Commission describing in reasonable detail the activities and include in the notice a copy of the bond obtained.
- E. Respondent Khubani, directly or through any business entity, shall not disclose the existence of the bond to any consumer, or other purchaser or prospective purchaser in connection with advertising, promoting, marketing, offering for sale, or sale of any product, service, or program. *Provided, however*, that this provision

does not apply to the handling of consumer complaints and cancellation and refund requests so long as respondent Khubani, directly or through any business entity, also discloses, at the same time, that the bond is “required by Order of the Federal Trade Commission to resolve an action charging that Ajit Khubani engaged in deceptive practices as alleged in *The Matter of Telebrands Corp., et al.*, File No. _____.” The disclosure shall be stated or set forth in a clear and prominent manner. If in print, the disclosure shall be separated from all other text, in 100 percent black ink against a light background, in print at least as large as the main text of the sales material or document, and enclosed in a box containing only the required disclosure.

VI.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent Khubani shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. all advertisements and promotional materials containing the representation;
- B. all materials that were relied upon in disseminating the representation; and
- C. all tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent Khubani shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in

the corporation or limited liability company that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Khubani, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and phone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent Khubani shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This Order's application to any respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the order has terminated under this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

THEREFORE, the Federal Trade Commission this _____ day of _____, 2003, has issued this complaint against respondents.

By the Commission.

Donald S. Clark
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2004, I caused *Complaint Counsel's Post-Trial Brief; Complaint Counsel's Proposed Findings of Fact and Conclusions of Law; Complaint Counsel's Trial Exhibit Index and Witness Index* to be filed and served as follows:

(1) the original and one (1) paper copy filed by hand delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W. Room H-112
Washington, D.C. 20580

(3) one (1) paper copy by hand delivery and one (1) electronic copy via email to:

Edward F. Glynn, Jr., Esq.
Theodore W. Atkinson, Esq.
VENABLE LLP
575 Seventh St., N.W.
Washington, D.C. 20004

Amy M. Lloyd