

Commission Opinion

IN THE MATTER OF

**TELEBRANDS CORP., TV SAVINGS, LLC, AND AJIT
KHUBANI**OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9313; File No. 0223279**Complaint, Sept. 30, 2003--Opinion and Final Order, Sept. 19, 2005*

In a unanimous Opinion, the Commission addressed advertising practices used by Respondents Telebrands Corporation and TV Savings, L.L.C. – and their principal, Respondent Ajit Khubani – for the Ab Force, a belt-like device that uses electronic stimulation (“EMS”) to cause involuntary contraction of the muscles of the abdominal wall, and determined that certain of these practices violated Section 5 of the Federal Trade Commission Act. The Final Order, among other things, prohibits the respondents – 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 – from representing (1) that any such device causes or promotes loss of weight, inches, or fat; (2) that any such device causes or promotes well-defined abdominal muscles; (3) that use of any such device for any period of time is an effective alternative to regular exercise; or (4) that any such device makes a material contribution to any system, program, or plan that produces the results described in the first three clauses. The Order also prohibits the respondents from misrepresenting – in connection with the manufacturing or marketing of any EMS device – (1) that any such device causes or promotes loss of weight, inches, or fat; (2) that any such device causes or promotes well-defined abdominal muscles; (3) that use of any such device for any period of time is an effective alternative to regular exercise; or (4) that any such device makes a material contribution to any system, program, or plan that produces the results described in the first three clauses.

Participants

For the Commission: *Constance M. Vecellio, Walter C. Gross, III, Joshua S. Millard, Amy M. Lloyd, James Reilly Dolan, Elaine D. Kolish, James A. Kohm, Russell Porter, Susan P. Braman, and Gerard R. Butters.*

For the Respondent: *Edward F. Glynn, Jr. and Theodore W. Atkinson, Venable LLP.*

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OPINION OF THE COMMISSION

By LEIBOWITZ, Commissioner, For A Unanimous Commission:

This is a case about firm abs and phony ads. It illustrates how false and unsubstantiated claims can be communicated indirectly but with utter clarity – to the detriment of consumers and in violation of the laws this Commission enforces.

Respondents Telebrands Corporation (“Telebrands”), TV Savings, L.L.C. (“TV Savings”), and their principal, Ajit Khubani, appeal from Administrative Law Judge (“ALJ”) Stephen J. McGuire’s Initial Decision and Order holding them liable for violating Sections 5 and 12¹ of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45 and 52, by using unsubstantiated claims in multiple media to promote the “Ab Force,” a belt-like device that uses electronic stimulation to cause involuntary contraction of muscles in the abdominal wall. Complaint counsel cross-appeal the scope of the order’s coverage. We affirm liability under Sections 5 and 12 and partially modify the ALJ’s Order.

From December 2001 to at least April 2002, respondents marketed the Ab Force belt on television, radio, the Internet, and in print. On September 30, 2003, the Commission issued an administrative complaint charging respondents with making unsubstantiated claims that the Ab Force (1) causes loss of weight,

¹ Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits “unfair or deceptive acts or practices.” Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, services, or cosmetics. A “false advertisement” is any advertisement that is “misleading in a material respect.” 15 U.S.C. § 55(a)(1). Under Section 15 of the FTC Act, 15 U.S.C. § 55(d), a “device” includes “an instrument, apparatus, implement, machine, [or] contrivance *** which is *** intended to affect the structure or any function of the body of a man.”

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inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise. According to the complaint, respondents' failure to substantiate such claims constitutes an unfair or deceptive act or practice and the making of false advertisements in violation of Sections 5 and 12 of the FTC Act.

The ALJ found that the product name, visual images, and statements in respondents' advertising create the net impression that the Ab Force electronic muscle stimulation ("EMS") device provides health, fitness, weight loss, or exercise benefits; that those claims were false and misleading; and that the claims were material to consumers' purchasing decisions. ID at 41-43, 60-61.² Accordingly, he entered an order prohibiting respondents, *inter alia*, from representing that the Ab Force, or any substantially similar device, causes loss of weight, inches, or fat; promotes well-defined muscles; or is an effective alternative to exercise. Order ¶ II. The order also prohibits respondents from making such misrepresentations, expressly or by implication, about any EMS device. Order ¶ III. Paragraph IV of the ALJ's order further prohibits respondents from making any representation regarding, *inter alia*, the safety, efficacy, or benefits of any EMS device, or any product, service, or program relating to health, weight loss, fitness, and exercise without "competent and

² References to the record are abbreviated as follows:

IDF Initial Decision Finding

ID Initial Decision

Tr. Transcript of Trial Testimony

CX Complaint Counsel's Exhibit

RX Respondents' Exhibit

JX Joint Exhibit

RAB Respondents' Appeal Brief

CAB Complaint Counsel's Answering and Cross-Appeal Brief

RRB Respondents' Brief in Reply to Complaint Counsel's

Brief in Opposition to Respondent's Appeal and in
Opposition to Complaint Counsel's Cross-Appeal

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reliable scientific evidence” that substantiates the representation. Order ¶ IV.

Respondents’ principal contention on appeal is that the ALJ erred in finding that their advertising for the Ab Force conveyed the challenged claims. Complaint counsel cross-appeal the ALJ’s refusal to order fencing-in relief³ that would require respondents to substantiate all claims about weight, inch, or fat loss; muscle definition; or the health benefits, safety, or efficacy of any of respondents’ products, services, or programs. Complaint counsel also appeal the ALJ’s refusal to require respondent Khubani to obtain a performance bond of \$1 million to prevent future violations.

Based on our consideration of the entire record in this case and the arguments of counsel, we deny respondents’ appeal and grant in part, and deny in part, complaint counsel’s cross-appeal. We agree with the ALJ’s findings of fact and conclusions of law to the extent they are consistent with those set forth in this opinion and, except as noted herein, adopt them as our own. The Order we issue today supplements the fencing-in relief ordered by the ALJ with a provision prohibiting respondents from making claims about the health benefits, safety, or efficacy of any product, service, or program unless they possess and rely upon substantiation for their claims. With regard to complaint counsel’s request that respondent Khubani be required to post a performance bond, complaint counsel have not made an adequate showing that the \$1 million bond is appropriate in this case. Thus, although we reject respondents’ contention that the

³ “Fencing-in” relief refers to provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful. Fencing-in remedies are designed to prevent future unlawful conduct. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992).

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Commission lacks authority to impose such relief, we decline to order it in this case.

I. Factual Background and Proceedings Below

Respondent Telebrands develops, markets, and distributes a wide array of consumer products. IDF 4. It has marketed hundreds of products since 1987, principally through “direct response” advertising. IDF 3, 4, 20, 22; Khubani Tr. 435. Direct response advertising can include program-length infomercials, live TV shopping, or any medium that allows consumers to order products directly from the advertiser. IDF 17-19; Khubani Tr. 431-34.

Telebrands is solely owned by respondent Ajit Khubani, who oversaw the Ab Force promotional campaign and had primary responsibility for developing scripts for radio and TV advertising. IDF 10, 16. As President, CEO, and Chairman of the Board, he sets the general direction of the business and is heavily involved in new product development. IDF 10, 14-16; Khubani, Tr. 247. He tracks trends in the marketplace and in various channels of advertising, using industry publications that collect data and rank direct-response ads on a weekly basis. IDF 126; Khubani Tr. 248-50.

Several times a year, based on Mr. Khubani’s assessment of market trends, Telebrands enters the market by offering a product at a lower price than offered by competitors already in the market for the same or similar products. IDF 25; Khubani Tr. 247-48. Once Telebrands decides to market a particular product, it creates “test” advertising. IDF 26-27; Khubani Tr. 440. The term “test” ad is used throughout these proceedings to refer to ads that accompanied the product’s initial release and were run on a limited basis by respondents so that they could make a prediction as to a product’s likely success before committing to a full-scale national advertising campaign. IDF 27-31. The “test” ads were not simply shown to consumers who participated in focus groups or other types of consumer perception research, but were aired in

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selected markets for limited periods of time and generated actual sales. IDF 30, 44-45, 49. If consumers respond to the “test” advertising, Telebrands proceeds with a full-scale rollout of the new product promotion. IDF 31; Khubani Tr. 440-42. Respondents purport to conduct a review of the ads “from a claims perspective and a compliance perspective” before mounting a full-fledged national advertising campaign. Khubani Tr. 442; IDF 32-33.

Respondents’ business practices have drawn Commission scrutiny in the past. Since 1990, Mr. Khubani has entered three separate agreements with the Commission – in two cases, relating to Telebrands’ practices – resolving alleged violations of the Commission’s Mail Order Rule. Mr. Khubani and Telebrands also settled a separate action relating to false or unsubstantiated claims for two products, and misrepresentations about the company’s money-back guarantee. Mr. Khubani and Telebrands paid more than \$900,000 in civil penalties to resolve these actions.⁴

Respondents entered the market for EMS abdominal (“ab”) belts in December 2001. IDF 62. Mr. Khubani believed that ab belts – including the AbTronic, Ab Energizer, and Fast Abs – represented “one of the hottest categories to ever hit the industry.”⁵ IDF 63 (*quoting* Khubani Tr. 255). Ads for the AbTronic, Ab Energizer, and Fast Abs were among the most frequently aired infomercials in 2001 and early 2002. Indeed, according to a direct response television industry publication, the

⁴ See n.58, *infra*.

⁵ Respondent TV Savings, L.L.C., a Connecticut limited liability company, was created to handle respondents’ promotional campaign for the Ab Force. IDF 7, 9-10.

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J.W. Greensheet,⁶ infomercials for the AbTronic, Ab Energizer, and Fast Abs brands were among the 50 most frequently disseminated infomercials in the United States on numerous occasions between September 2001 and March 2002. IDF 125, 127-34. Ads for two of these products also appeared 34 times in the top 40 direct response spot rankings, as published by the *J.W. Greensheet*, in 2001 and 2002. IDF 131, 133.

The AbTronic, Ab Energizer, and Fast Abs belts are substantially similar in appearance to the Ab Force belt, IDF 119, and advertisements for them contain substantially similar images of well-muscled, bare-chested men and lean, shapely women wearing EMS devices around the waist and experiencing abdominal contractions. *Compare JX 2-5 with JX 7-9*; IDF 73-76, 78, 83, 119-24. They also depict men and women performing conventional abdominal exercises and close-ups of men and women showing off their trim waists and well-defined abdominals. IDF 119-24. The infomercials contain express and strongly implied claims that the ab belts are an effective alternative to exercise, and will cause users to develop tighter abdominals and lose inches, fat, or weight. IDF 120. According to industry monitoring services, more than 5,000 infomercials for the AbTronic, Fast Abs, and Ab Energizer aired from April 2001 to February 2002.⁷ CX 126.

⁶ The *J.W. Greensheet* is published for the direct response television industry on a weekly basis. IDF 125. Each issue contains a top 50 ranking of infomercials, a top 40 ranking of television spot ads, and a top 20 ranking of infomercial products. IDF 127. Its rankings are compiled on the basis of confidential media budgets and its own monitoring of national cable and selected broadcast markets. IDF 128. At the time of trial in this case, respondent Telebrands had subscribed to the *J.W. Greensheet* for about 12 years. IDF 126.

⁷ In addition to infomercials, the AB Energizer and Fast Abs belts were advertised in short spot ads. IDF 131, 133.

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The Commission, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), filed actions for permanent injunctive and equitable monetary relief against marketers of the AbTronic, Ab Energizer, and Fast Abs in May 2002, alleging that their advertisements made false representations that the devices were an effective alternative to exercise and caused users to lose weight, inches, and fat. IDF 135. In July 2003, the Commission settled with marketers of the Fast Abs device for a stipulated permanent injunction and more than \$5 million in equitable monetary relief. *FTC v. United Fitness of America, LLC*, CV-S-02-0648-KJD-LRL (D. Nev. July 24, 2003). In the AbTronic case, the Commission was awarded a permanent injunction and a judgment holding the defendants jointly and severally liable for \$83 million. *FTC v. Hudson Berkley Corp.*, No. CV-S-02-0649-PMP-RJJ (D. Nev. June 30, 2003). In April 2005, the Commission settled with marketers of the AB Energizer for a permanent injunction and more than \$80 million in equitable monetary relief. *FTC v. Electronic Products Distribution, LLC*, No. 02-CV-888-BEN (AJB) (S.D. Cal. April 26, 2005).⁸

Believing that he could sell an EMS ab belt device for significantly less than they were being offered in infomercials, Mr. Khubani contacted an overseas manufacturer and, with that company, began to develop an EMS ab belt based on the same technology. IDF 37, 39; Khubani Tr. 263-64, 534. In fact, the same manufacturer also produced the AbTronic, one of the competing EMS belts. IDF 38. Mr. Khubani settled on the name “Ab Force” for his product because, as he explained at trial, “it was designed to work primarily on the abdominal area” and it was “catchy, sort of like Air Force.” IDF 69 (*quoting* Khubani Tr. 264). In less than four months, respondents sold more than 700,000 Ab Force units and accessories, grossing more than \$19 million. IDF 41-42, 44, 46, 49-51.

⁸ See also IDF 119-24 (describing the AbTronic, Ab Energizer, and Fast Abs advertisements and the claims communicated in those infomercials).

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On September 30, 2003, the Commission issued an administrative complaint pursuant to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), charging respondents with making false and unsubstantiated claims that the Ab Force (1) causes loss of weight, inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise. Respondents stipulated that they had no substantiation for these claims. *See* JX 6 ¶¶ 16-19. They denied, however, that the alleged claims were conveyed by their Ab Force advertising.

After a three-day trial, the ALJ rendered a 72-page initial decision. Based on the interaction between and among various elements in the ads – the product name, visual images, text, and surrounding circumstances – the ALJ concluded that respondents’ ads strongly and clearly conveyed the alleged claims. ID at 41-43. The ALJ explained that the name of the product – “Ab Force” – suggests that the device “applies a force to the abdominal muscles and also implies that use of the device will make the abdominal muscles more forceful.” IDF 70; *see* ID at 41. In addition, the ALJ relied on the visual images in respondents’ TV advertising – *e.g.*, pulsating abdominal muscles; trim and fit male and female models; a male model performing abdominal crunches. IDF 73-76, 83. These visual images, he explained, “are effective in conveying claims and may also be used to determine implied claims.” ID at 41, *citing Kraft, Inc.*, 114 F.T.C. 40, 122-23 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Additionally, he noted, some ads contain statements (*e.g.*, “abs into great shape fast – without exercise;” “latest fitness craze;” “powerful and effective;” “powerful technology”) that “strongly and clearly imply” that the Ab Force provides users with health, weight loss, fitness, or exercise benefits. ID at 42; IDF 86-92.

Respondents’ failure to identify any other purpose for their EMS device was another factor the ALJ considered in determining the overall net impression of respondents’ ads. ID at 43. Most of

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the ads did not expressly state any purpose for the product;⁹ two television ads mentioned a massage function briefly – and then only in a video superscript – but the ALJ ruled that the use of the “single, momentary phrase ‘relaxing massage’ [in those ads did] not offset or counter the numerous oral and printed statements, in combination with the name and visual images * * *.” ID at 42-43; see IDF 97, IDF 100-09. The ALJ also observed that the models in respondents’ TV ads did not indicate that wearing the Ab Force device was a relaxing or soothing experience. IDF 108.

In addition, the ALJ considered the surrounding circumstances – most notably, evidence that respondents intended to disseminate the challenged claims. ID at 44-46. He reviewed evidence outside the four corners of the advertisements – *i.e.*, expert testimony and copy tests – and concluded that this evidence supported his conclusions regarding the meaning conveyed by the text and images in respondents’ advertising. The ALJ, however, did not credit the testimony of complaint counsel’s marketing expert, Dr. Michael Mazis, regarding so-called “indirect effects” – *i.e.*, the effects on consumers of previous exposure to ab belts through infomercials, word-of-mouth, or retail packaging for other EMS ab belts. ID at 49-51. While noting that respondents’ ads specifically invite consumers to think of infomercials for competing ab belts and expressly claim comparability to those other products, the ALJ found that it was not possible to conclude with confidence that consumers, upon hearing the reference to “those other ab belt infomercials,” would necessarily infer that the claims made in those other infomercials would apply to the Ab Force. ID at 50-51.

⁹ IDF 102. While the ads did not expressly state the purpose for the Ab Force, respondents’ ads made statements about the purpose of competitors’ ab belts – in some cases, direct statements – and indicated that the Ab Force was equally effective, allowing consumers to make the obvious logical connection. *See, e.g.*, CX 1 H, JX 2.

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At trial, both complaint counsel and respondents addressed the impact of consumers' preexisting beliefs about the Ab Force belts from sources other than the Ab Force ads themselves. Complaint counsel argued that respondents should be held liable for exploiting consumers' preexisting beliefs; respondents countered that the copy test – even as controlled with a control group – was unreliable because it failed to filter out preexisting beliefs completely. The ALJ rejected the argument that respondents should be liable for exploiting preexisting beliefs on the basis that there was not enough evidence of the “existence, extent, or impact of those preexisting beliefs,” but held that the copy test was reasonably reliable and probative. ID at 56-57; *see also* ID at 54-57 (reviewing arguments and case law on liability for preexisting beliefs).

Turning next to the question whether the challenged claims were false or misleading, the ALJ noted that respondents had stipulated that use of the Ab Force does not cause loss of weight, inches, or fat; does not create well-defined abdominals; is not an alternative to exercise; and, furthermore, that they had no substantiation for those claims. ID at 60; IDF 270-73. Given these stipulations, the ALJ held that the alleged claims were false and misleading. ID at 60. Moreover, the ALJ held, the claims related to the purpose and effect of using the product, and the evidence showed that respondents intended to make the implied claims. ID at 61. Accordingly, he reasoned, there was no question that the alleged claims were material to consumers' purchasing decisions. ID at 60-61.

Finally, the ALJ addressed the scope of appropriate relief. The ALJ declined to order respondent Khubani to post a performance bond, given the absence of any case law to support such relief in a litigated FTC adjudicative matter. ID at 63. As to fencing-in relief, the ALJ recognized the seriousness, deliberateness, and transferability of respondents' violations. ID at 64-65. Because respondents' history of prior consent orders did not involve findings of liability, the ALJ did not rely on them; he held, however, that a respondent “need not have a history of prior

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violations in order for fencing-in relief to be imposed.” ID at 65-66. He ordered fencing-in requiring respondents to “possess and rely upon competent and reliable scientific evidence” to substantiate any representation about weight, inch, or fat loss; muscle definition; exercise benefits; or the health benefits, safety, or efficacy of any products, devices, and services promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits. ID at 66, 70.

On appeal, respondents contend that the ALJ erred in concluding that their Ab Force advertising conveyed the challenged claims.¹⁰ Complaint counsel cross-appeal from the ALJ’s refusal to require respondents to post a performance bond before selling or promoting any “device,” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55. Complaint counsel also contend that the ALJ should have entered a broader order that would have prohibited respondents, in the absence of substantiation, from making any claim for any product, service, or program, instead of covering those products only when respondents made claims promoting their efficacy or pertaining to health, weight loss, fitness, or exercise benefits.

¹⁰ Although respondents’ notice of appeal purports to lodge an appeal from the initial decision insofar as it found that their ads were false or misleading, their brief focuses on the question whether the ads in fact conveyed the alleged claims to consumers. They do not argue that there is any substantiation for the alleged claims, or deny that the alleged claims are false, misleading, or material to consumers. Indeed, respondents and complaint counsel stipulated before trial that use of the Ab Force does not cause loss of weight, inches, or fat; does not cause well-defined abdominal muscles; and is not an effective alternative to regular exercise. ID at 60; IDF 270-72. The parties further stipulated that respondents did not have or rely on substantiation that the Ab Force would have those effects. ID at 60; IDF 273.

II. The Challenged Representations

A. Legal Standard

An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) ("Deception Statement"); *see, e.g., Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000); *Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 114 F.T.C. at 120. In addition, the Commission long has held that making objective claims without a reasonable basis constitutes a deceptive practice in violation of Section 5. *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) ("Substantiation Statement"); *see, e.g., Automotive Breakthrough Sciences, Inc.*, 126 F.T.C. 229, 293 & 293 n.20 (1998); *Jay Norris, Inc.*, 91 F.T.C. 751, 854 (1978), *aff'd as modified*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979).

The primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself. *Deception Statement*, 103 F.T.C. at 176; *see, e.g., Novartis*, 127 F.T.C. at 680; *Stouffer*, 118 F.T.C. at 798; *Kraft*, 114 F.T.C. at 121. Thus, to determine whether an advertisement conveys a particular claim, the Commission looks at the interaction between and among the constituent elements of the ad to determine the "net impression" that is conveyed by the ad as a whole. *Deception Statement*, 103 F.T.C. at 178; *see, e.g., Novartis*, 127 F.T.C. at 679; *Kraft*, 114 F.T.C. at 122. The Commission may rely on the ad itself and need not resort to extrinsic evidence if the text or depictions are clear enough that the Commission can "conclude with confidence" that the claim is conveyed to reasonable consumers. *Novartis*, 127 F.T.C. at 680; *see Stouffer*, 118 F.T.C. at 798; *Deception Statement*, 103 F.T.C. at 176. If an alleged claim is not manifest from the text and images in the ad, the Commission will look to "extrinsic evidence." *See Novartis*, 127

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F.T.C. at 680. Such evidence might include common usage of terms, expert opinion as to how an advertisement might reasonably be interpreted, copy tests, generally accepted principles of consumer behavior, surveys, or “any other reliable evidence of consumer interpretation.” *Cliffdale Associates*, 103 F.T.C. 110, 166 (1984); *see, e.g., Thompson Medical Co.*, 104 F.T.C. 648, 789-90 (1984) (expert testimony; consumer survey), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Novartis*, 127 F.T.C. at 611-12, 617-33, 682-84 (expert testimony; copy tests); *Kraft*, 114 F.T.C. at 121-22 (expert testimony; copy tests); *Figgie Internat’l, Inc.*, 107 F.T.C. 313, 337-39, 377 n.10 (1986) (expert testimony), *aff’d*, 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

The Commission has recognized that an ad may be amenable to more than one reasonable interpretation. *See, e.g., Kraft*, 114 F.T.C. at 120-21 n.8; *Thompson Medical*, 104 F.T.C. at 787 n.7. Where an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible. *See, e.g., Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff’d*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Moreover, an ad need not mislead a majority of reasonable consumers. An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim. *See, e.g., Kraft*, 114 F.T.C. at 122; *Deception Statement*, 103 F.T.C. at 177 n.20.

If an ad is targeted at a particular audience, the Commission analyzes ads from the perspective of that audience. *Deception Statement*, 103 F.T.C. at 178-79. Different target audiences come to an ad with different perceptions. Consumers cannot understand an ad – or any communication – without applying their own knowledge, associations, or cultural understandings that are external to the ad itself. For that reason, the purpose of ad interpretation is to determine the claims that consumers –

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particularly the target audience – take away from an ad, whether or not an advertiser intended to communicate those claims. On the other hand, ad interpretation focuses on the impact of the particular ad on reasonable consumers in the target group; an advertiser is not liable for an interpretation of an ad that a consumer may have based on an idiosyncratic perspective.

The final step in the analysis is to determine whether the challenged claims are “material,” or likely to affect a consumer’s purchasing decision. The Commission presumes that claims are material if, as in this case, they pertain to the “central characteristics of a product * * * such as those relating to its purpose * * * [or] efficacy” or to safety. *Thompson Medical*, 104 F.T.C. at 816-17.

B. Facial Analysis of Respondents’ Ab Force Advertising

We turn first to an examination of the text and images in respondents’ ads.¹¹ We agree with the ALJ that the challenged

¹¹ Respondents’ Ab Force promotion included the following ads: (1) a “test” radio ad (CX 1 H); (2) a “roll-out” radio ad (RX 49); (3) a one-minute “test” TV ad (JX 2 (tape); CX 1 B (transcript)); (4) a one-minute “roll-out” TV ad (JX 4 (tape); CX 1 F (transcript)); (5) a two-minute “test” TV ad (JX 3 (tape); CX 1 D (transcript)); (6) a two-minute “roll-out” TV ad (JX 5); (7) a print ad (CX 1 G; RX 48); (8) an Internet ad (RX 52); and (9) two email ads (RX 50-51). Again, all of the ads – including the so-called “test” ads for radio and TV – were disseminated and generated sales. IDF 43-45, 49. Respondents spent more than \$4 million on television advertising. IDF 52. The test ads for TV alone were broadcast nearly 96 times in January 2002; more than 4500 orders were called into the telephone number that appeared in those ads. IDF 44-45. The roll-out versions of respondents’ television spots were broadcast more than 11,000 times from January 19, 2002 through April 7, 2002. IDF 46-47. The telephone numbers that appeared in the TV ads were associated

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claims are clearly communicated in ads for the Ab Force belt.¹² As shown below, it is not necessary to look beyond the four corners of respondents' ads to reach this conclusion. This is a straightforward case.

1. Visual Images and Ad Copy

a. Radio Advertisements

Respondents opened their promotion in December 2001 with a 60-second radio spot.¹³ The ad invites consumers to recall "those

with more than 300,000 orders for the Ab Force. IDF 48. The radio advertising was more limited, generating a total of only 1,340 orders. IDF 49. The print ad ran for about one week in 13 newspapers and for another week as a newspaper insert. IDF 50. The print and Internet ads together accounted for less than 3 percent of all orders. IDF 50-51.

¹² Respondents challenged the ALJ's findings of fact as to ad interpretation, arguing that the ALJ based the findings on the messages communicated by the Ab Force ad campaign as a whole rather than the messages communicated by each individual ad. We do not agree that the ALJ erred in analyzing the ads but, in any case, the Commission has examined each ad individually and determined that the ads communicate the challenged claims.

¹³ The text of respondents' first radio ad – the opening ad of the campaign – is as follows:

Have you seen those fantastic Electronic Ab Belt (sic) 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! Why so cheap?

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fantastic Electronic Ab Belt infomercials on TV.” It then declares: “They’re amazing . . . promising to get our abs into great shape fast – without exercise! They’re the latest fitness craze to sweep the country!” CX 1 H. The ad continues by claiming that the Ab Force is “just as powerful and effective” as “the expensive ab belts on TV,” and would send “just the right amount of electronic stimulation to [a user’s] abdominal area.” *Id.*

Respondents made several minor changes in the ad after “final review and legal review” and “discussions with counsel” – that is, after the test radio ad had aired. IDF 90 (*quoting* Khubani Tr. 275, 278), IDF 92.¹⁴ These modifications did not change the fundamental ad messages. Again, the rollout radio ad invites comparison to their competitors’ “fantastic” and “amazing” ab belts, which they claim are “the latest craze to sweep the country.” RX 49. But while the “test” ad claims that the Ab Force is “just as powerful and effective” as “the expensive ab belts on TV” (CX

Because intense competition and mass production have forced prices down. We cut a deal with the factory to buy up to 1 million units at a very special price and we are passing the savings on to you. *The Abforce (sic) 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. Best of all, they’re only 10 dollars and have a full money back guarantee. Call now [telephone number omitted]. Don’t miss out. Get the amazing electronic Abforce (sic) belt – the latest fitness craze for just \$10 [phone numbers omitted].

CX 1 H (emphasis added).

¹⁴ Mr. Khubani admitted that he was aware at the time that there was no substantiation for certain claims about Ab Force, for example that a user could get into shape quickly without exercise and could get a flatter stomach without doing sit-ups. IDF 58-60.

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1 H), the “rollout” ad declares that the Ab Force has the “same powerful technology as those expensive Ab Belts.”¹⁵ IDF 91; RX 49. The revised text does not expressly identify any particular purpose for the Ab Force. It states, however, that it is “[c]apable of directing 10 different intensity levels at [the user’s] abdominal area.” IDF 100; RX 49.¹⁶

¹⁵ The script of the rollout radio ad reads as follows:

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 Abforce (sic) that you can buy right now for just 10 dollars. That’s right, just 10 dollars! Why so cheap? Well just like cell phones and VCRs, the price of electronic products keeps coming down. We were able to cut a special deal directly with the factory and are passing the savings on to you. The Abforce (sic) uses the same powerful technology as those expensive Ab Belts (sic). Capable of directing 10 different intensity levels at your abdominal area (sic). Best of all, the Abforce (sic) is just 10 dollars and has a full money back guarantee. Demand is overwhelming. Don’t miss out [on this] tremendous opportunity. Call now [phone numbers omitted].

RX 49 (emphasis added).

¹⁶ Clearly, the process of reviewing and refining advertising claims to remove potentially misleading claims – before an ad is disseminated, not after – is critical, and we encourage advertisers strongly to review their ads. Respondents, however, merely toned down the most obvious false statements in the initial ads. Even though the radio and television rollout ads were revised, the ad copy (and, in the television ads, the visual images) communicated the same messages just as clearly.

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The ALJ concluded that the challenged Ab Force radio advertisements conveyed the claims alleged in the Commission’s complaint. ID at 41-43. We agree. Respondents’ “test” ad for radio expressly reinforces the performance claims that their competitors were disseminating for their own ab belts – *e.g.*, that the belts will get a user’s abs “into great shape fast – without exercise” – and then goes on to claim that the Ab Force is “just as powerful and effective.” CX 1 H. Even consumers who might not have seen ads for competing ab belts or might not remember the ads they had seen would conclude from the text that the Ab Force is as effective as the referenced ab belts in getting their abs “into great shape fast – without exercise.” Respondents later eliminated some of the text that described their competitors’ efficacy claims, focusing instead on the Ab Force’s “powerful technology” and its ability to direct ten different intensity levels at a user’s abdominal muscles. RX-49. Respondents’ slight modifications to the original text did not alter the elements that communicated deceptive claims as to the product’s purpose but only removed claims that would be most likely to attract regulators’ attention. While the rollout ad is less direct, the promise that the product has the same “powerful technology” as the other ab belts is not simply a comparative statement: in context, it clearly implies that the product has *some* power and effect on the body. Combined with the claim that the belt is “[c]apable of directing 10 different intensity levels at [the user’s] abdominal area,” it also clearly implies that the product would exert a “powerful” force and “intensity” at the user’s abdominal area. Given respondents’ failure to offer any other purpose for the product, listeners would reasonably conclude that such “powerful” technology was designed to develop a fitter abdomen and help them slim down and trim down without exercise.

b. Television Advertisements

Respondents’ TV spots feature substantially the same kinds of images as those used by competitors in their ab belt infomercials. IDF 73-76, 121. Each of the Ab Force spots displays images of well-muscled, bare-chested men and trim women in tight-fitting

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exercise apparel wearing Ab Force belts and experiencing abdominal contractions. ID at 41; IDF 73-76. Close-up images highlight the models' trim waists and well-defined abs. JX 2-5. Additionally, the spot ads depict stock images of men without ab belts performing abdominal crunches on an exercise bench (JX 3, 5) and bikini-clad women, also shown without ab belts, showing off their well-toned bodies and trim waistlines in the background. See JX 2-5 (Ab Force TV ads); JX 7-10 (infomercials); ID at 41; IDF 83.¹⁷ It was no accident that the models were not only slender and fit but also had well-muscled abdomens – the commercial casting agents were specifically looking for “great abs.” IDF 79-80. The producer of the commercials admitted that people viewing the television ads were supposed to aspire to become like the bikini-wearing models in the ads. IDF 85 (*citing* JX 6 at 2 (Liantonio Dep. at 70)).

These visual images of well-toned Ab Force users juxtaposed with images of men executing conventional exercises and trim bikini-clad models clearly convey the message that the Ab Force is not only an alternative to exercise, but also that users of the device will achieve the same trim waists and well-developed abdominal muscles as those displayed by respondents' models. The accompanying text reinforces this message. For example, referring to those “fantastic” and “amazing” ab belt infomercials on TV, respondents claim that the Ab Force is “just as powerful and effective” and characterize the impact of those prior ab belts as “the latest fitness craze.” JX 2 (tape); CX 1 B (transcript). For example, one of the early 60-second television advertisements claimed as follows:

[Spokesperson]: 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.

¹⁷ Other stock images in the ads included dollar signs and falling numbers. IDF 81-82.

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The Ab Force is just as powerful and effective as those expensive ab belts sold by others—

ON SCREEN: image of electronic stimulation of abdominal muscles

[Spokesperson]: – designed to send just the right amount of electronic stimulation to your abdominal area.

JX 2 (tape); CX 1 B (transcript). Coupled with visual images of fit, muscled men and fit, trim women wearing the Ab Force belt and experiencing abdominal contractions, the text strongly suggests that consumers can achieve the same results with the Ab Force. Like the radio ad (CX 1 H), the statement that the product was “designed to send just the right amount of electronic stimulation to your abdominal area” implies that the product will send the right amount of stimulation to your abdominal area *to do something*.

In a two-minute television spot, respondents’ spokesperson appears in a business suit.¹⁸ She does not state exactly what the Ab Force is supposed to do, but she does claim that it is “just as powerful and effective” as the infomercial ab belts and that it uses “sophisticated electronic technology” that is “designed to send just the right amount of electronic stimulation to your abdominal area.” JX-3 (tape); CX 1 D (transcript). She also states that the product is so comfortable that “[consumers] can wear it under clothes.” *Id.* Indeed, directing the viewer’s attention to her own abdomen, she indicates that the product “is working while [she is] working.” *Id.*; IDF 77. The obvious message for consumers is that the Ab Force device is an effective and convenient alternative to exercise.

¹⁸ This ad, like the other television ads, showed well-muscled men and trim women showing off the ab belt, an image of a woman with trim abs in a bikini, a man preparing to exercise, etc. JX-3 (tape); CX 1 D (transcript).

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In some ads the claims are conveyed in more subtle fashion but still are clearly communicated. For example, in one ad, a 60-second television spot, respondents refer to ab belts as the “latest craze,” dropping the word “fitness.” IDF 89; JX 4 (tape); CX 1 F (transcript). Additionally, instead of asserting that the Ab Force is as “powerful and effective” as competing ab belts in infomercials, the female spokesperson states that the device has “10 completely different intensity levels directed at your abdominal area.” IDF 100; JX 4, CX 1 F. JX 5, a 120-second television spot, likewise claims that the Ab Force has “sophisticated computer components” and the “same powerful technology” as other ab belts advertised in infomercials. Furthermore, respondents claim, with “10 completely different intensity levels directed at [a user’s] abdominal area,” the product is “designed for comfort in mind” and is “so comfortable [that consumers] can wear it under [their] clothes.” To illustrate the point, respondents’ spokesperson – again gesturing towards her abdomen – reveals that the device is “working while [she is] working.” This is truly “a high quality, *powerful*, comfortable” product that is in high demand, she declares. JX 5 (emphasis added). A consumer would reasonably believe that a product designed – supposedly – to work out for them would help them lose weight or inches, just as exercising would.

While the intended purpose of an Ab Force device – as opposed to competitors’ ab belts – is not stated explicitly in any of the ads, the product name and references to “sophisticated” and “powerful” technology strongly suggest that it is effective in honing the abdominal muscles to make them more powerful or forceful. The visual images are used by respondents to convey the impression that their device is an alternative to conventional exercise. The juxtaposition of a male model who is executing abdominal crunches on an exercise bench with men and women in fitness clothing who are wearing Ab Force belts and effortlessly experiencing abdominal contractions drives home the message. Respondents’ spokesperson states that her Ab Force belt is “working” while she is “working” in her business suit. Given the spokesperson’s business attire, consumers would reasonably

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believe that the device can be used in any setting to give their abdominal muscles the stimulation they need to make them fit.

c. Print Advertisement

Respondents' print ad appeared in thirteen newspapers in February 2002 and in a newspaper insert in March 2002. CX 1 G; RX 48. It follows the same basic format as respondents' radio and TV ads – *e.g.* reminding consumers of “the latest craze to sweep the country” and referring to “those fantastic” and “amazing” ab belt infomercials on TV. RX 48. Respondents claim that the Ab Force has the “same powerful technology as those Ab Belts sold by other companies on infomercials” and consumers “can even wear it under [their] clothes.” *Id.* Indeed, the ad continues, it “is capable of directing 10 completely different intensity levels at [a user's] abdominal area * * *.” *Id.* Coupled with a close-up photograph of a well-defined male torso wearing an Ab Force belt, respondents' statements strongly imply that consumers can achieve the same well-developed, toned abs as the model merely by wearing an Ab Force belt under their clothes.

d. Internet and Email Advertisements

Respondents' Internet ads (RX 51-52) use the same basic format to remind consumers that the Ab Force is comparable to those “fantastic” and “amazing” electronic ab belt infomercials on TV. The photographic image of a well-defined, sculpted male torso wearing an ab belt and its accompanying label – that “AbForce (sic) uses the same powerful technology as those expensive ab belts sold through infomercials” – strongly imply that (1) by using “those fantastic” and “amazing” electronic ab belts that are advertised on TV, consumers can achieve the same well-defined muscles as those displayed in the accompanying photograph; and (2) because it uses the “same powerful technology,” purchasers can achieve similar results by wearing an Ab Force. The email ad (RX 50) is less compelling, but it too claims that the “AbForce (sic) uses the same powerful technology as those Ab Belts (sic) sold by other companies on infomercials.”

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2. Product Name

As respondents undoubtedly recognized, IDF 69, a product name can help the advertiser convey a claim about the central attributes of a product. *See, e.g., Jacob Siegel Co. v. FTC*, 327 U.S. 608, 609 (1946) (“Alpacuna” suggests that the product contains vicuna); *Thompson Medical*, 104 F.T.C. at 793 (name “Aspercreme” implies the product contains aspirin). The product name “Ab Force” is an artful choice of words that easily suggests that consumers will achieve more forceful or well-developed abdominal muscles. ID at 41; IDF 70. We agree with the ALJ that the product name itself, in combination with the text and visual images in each of the ads, played an obvious role in conveying respondents’ implied claims to consumers. ID at 41.

Based on our own review of the challenged advertising, we conclude that consumers would reasonably interpret respondents’ Ab Force ads to mean that the device (1) causes loss of weight, inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise – even if the consumers had not seen ads for competing ab belts. As shown below, our facial analysis is confirmed by the surrounding circumstances and extrinsic evidence, including expert opinion and a copy test of respondents’ most widely disseminated TV ad.

C. Other Considerations

Our facial analysis of the ads is informed by the market context in which the ads were disseminated and respondents’ intent to take advantage of that context by presenting the AbForce as a substitute for other heavily advertised but more expensive “ab belts.” As discussed above, respondents presented the Ab Force as an “ab belt,” and expressly drew comparisons to other products with which many consumers had been made familiar through prior

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advertising¹⁹ and which – as respondents knew²⁰ – were advertised as improving the physical condition of the user’s abdominal muscles.²¹ It may be possible, of course, for a seller to use a particular product description while at the same time making clear through its advertising that it does not claim a particular functionality for the product. The respondents can point to no such efforts, though, in the context of the Ab Force campaign.

We agree with the ALJ that an advertiser’s failure to make a statement about the purpose or core function of its product can play a role in determining which implied claims are conveyed to consumers. ID at 43; *cf. Thompson Medical Co.*, 104 F.T.C. at 793 (noting “absence of any elements giving a contrary impression, such as express disclosures”). Given the absence of any statements in the later TV and radio ads about the purpose of using an Ab Force device (IDF 97) and the express invocation of ads for other ab belts that did communicate the products’ purpose, there is nothing to act as a counterweight to respondents’ conspicuous visual images or the general notion that an “ab belt” is a device that purports to improve the condition of the abdominal muscles and slim down and firm up users. Although the phrase “relaxing massage” flashes briefly on the screen in two of respondents’ TV ads (*see* IDF 100-01; JX 4-5),²² we agree with

¹⁹ *See* IDF 125, 127-34 (advertisement monitoring service rankings showing that infomercials for the competing ab belts were among the 50 most frequently disseminated infomercials and in the top 40 direct response spot rankings in the United States on a number of occasions in 2001 and 2002).

²⁰ *See, e.g.*, Khubani Tr. 273-74, 445, 461, 471-72.

²¹ *See* IDF 117-24 (referencing claims made in infomercials for the Fast Abs, AbTronic, and Ab Energizer ads).

²² We recognize that a few ab belts – including the respondents’ own Ab Pulse – have been advertised as a massage

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the ALJ that it is not nearly sufficient to offset the central message that respondents convey repeatedly with the name of the product and the audio and video elements of the ads. ID at 42-43; *see Kraft*, 114 F.T.C. at 123-24; *Removatron Int'l Corp.*, 111 F.T.C. 206, 294 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Thompson Medical*, 104 F.T.C. at 797-98. It is not clear, for example, why an ad for a massage product would include images of men performing ab crunches on exercise equipment, or why an ad for a massage product would reference competing products' claims to "get [one's] abs into great shape fast – without exercise!" Indeed, the visual images of men and women experiencing rapid and intense abdominal contractions through electronic muscle stimulation seem inconsistent with any commonsense notion of a relaxing experience. As noted by the ALJ, the men and women who were shown wearing an Ab Force device in the TV ads gave no indication that wearing the device was a soothing or relaxing experience. IDF 108; JX 4-5. Finally, at oral argument, counsel for respondents repeatedly declined to represent that the product was intended as a massage device. In fact, he repeatedly stated that he did not know what the Ab Force product was supposed to do. *See, e.g.*, Oral Argument Tr. at 7-11. For example:

tool. Clearly, however, despite a passing reference to "relaxing massage" – in only two of the Ab Force ads – the product was not intended as a massage tool. *See infra*; *see also* Oral Argument Tr. at 7-11 (colloquy about purpose of Ab Force product in which respondents' counsel claimed he did not know the purpose of the product). The primary focus of the advertising for ab belts as a product category was their supposed efficacy as a health, weight loss, and fitness device. IDF 120-24, 142-46. In fact, respondents' advertising for Ab Pulse, which attempted to position that product as a massage product, tried to distinguish the product from other ab belts on the market. IDF 112; CX 2. Unlike ab belts that were sold for health, weight loss, and fitness, the Ab Pulse product was unsuccessful and quickly pulled from the market. ID at 44; IDF 113; Khubani, Tr. 281.

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Commissioner Swindle: * * * What was the purpose of the ab belt, I mean, the Abforce belt?

Counsel: I have no idea, Your Honor. I'm basically saying what I'm taking is the language of the commercial. They have the same technology, but they're a lot cheaper.

In fact, all Mr. Khubani was trying to do was to provide a reference point to other products that were being advertised.

Chairman Majoras: What does the technology do?

Counsel: I don't know what the technology does.

Id. at 8-9.

Moreover, there is ample evidence that respondents intended to convey the challenged claims, which provides further support for our facial analysis. ID at 45-46; *see, e.g.*, IDF 65-102. A showing of an intent to make a particular claim is not required to find liability for violating Section 5 of the FTC Act. *See, e.g., Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); *Novartis*, 127 F.T.C. at 683; *Kraft*, 114 F.T.C. at 121. However, a showing of intent is powerful evidence that the alleged claim in fact was conveyed to consumers. *See, e.g., Novartis*, 127 F.T.C. at 683; *Thompson Medical*, 104 F.T.C. at 791.

The timing of respondents' decision to enter the market – after reading about the AbTronic and determining that it was a “hot category” – coupled with their decision to invite consumers to recall the (deceptive) advertisements for those products while viewing the Ab Force ads suggests strongly that respondents intended to jump on that bandwagon with the same messages for consumers that had turned ab belts into “one of the hottest categories to hit the market.” IDF 63 (*quoting* Khubani Tr. 255). As demonstrated by the text of the ads, respondents' promotion specifically targeted consumers who were already familiar with ab belt infomercials. *See, e.g.*, CX 1 H (“Have you seen those

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fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs into great shape fast – without exercise!"); JX 2 (tape), CX 1 B (transcript) ("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."); RX 49 ("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!"). By explicitly referencing the ads for their competitors' "amazing" and "fantastic" ab belts products at the outset of each and every one of their ads (*see* IDF 114), respondents clearly intended to spur consumers' recall of those advertisements' claims²³ and intended consumers to understand that they could accomplish the same fitness goals with the Ab Force that respondents' competitors promised – *i.e.*, tighter abs, loss of inches, weight or fat, and an alternative to conventional exercise. In short, respondents' ads targeted consumers who had seen competitors' ads.

Respondents contend that they merely made express and truthful "compare and save" claims, which they used to create a "bandwagon effect."²⁴ RAB at 7. They argue that they had to refer to competitors' products to make the price comparison, but suggest that they made no claim about the purpose of the product.

²³ Many consumers did see the competitors' ads based upon the rankings – clearly, the respondents assumed that they had and the frequency with which those ads aired bears out that assumption. *See* IDF 125, 127-34. Moreover, because consumers typically watch TV in multiple time slots, a viewer could easily see an infomercial for one or more of respondents' competitors and also see an ad for the Ab Force on a different channel and in a different time slot. Mazis Tr. 184-85.

²⁴ A "bandwagon effect" refers to the advertiser's effort to generate interest in a product based on the idea that consumers should buy a product because of its popularity. IDF 96.

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They contend that consumers would want to purchase the Ab Force simply because it is a popular product that other people are buying, even if they are unaware of the product's function. As noted above, respondents' ads clearly communicated the product's purpose within the four corners of the ad. In any case, the suggestion that consumers were buying a product like the Ab Force – without knowing what the product was for – merely because the ad promised that many other people were buying it is not only not credible but also disingenuous. While a product's perceived popularity may motivate a consumer's purchase of items such as clothing or decorations or novelties – witness the “Pet Rock” fad of the 1970s – it is not plausible that consumers would have purchased an Ab Force belt without any idea as to its purpose or function. The comparability claims – *i.e.*, that the Ab Force has the same “powerful” technology and is “just as effective” as their more expensive competitors – reinforced the message that the Ab Force was effective. The references to competitors' (admittedly deceptive) advertisements make little sense unless respondents expected and knew that significant numbers of consumers would recall the claims that respondents' competitors made in their infomercials and interpret respondents' ads with those in mind.²⁵

²⁵ Similarly, in respondents' ad campaign for a later product that was positioned as a massage tool, the respondents also acknowledged that consumers had likely seen the infomercials for the competing ab belts, although respondents attempted to distinguish the Ab Pulse product from those products. Respondents cautioned viewers not to confuse the Ab Pulse “with an electronic ab belt you've seen on infomercials,” emphasizing the point by depicting a red “X” superimposed on the image of a model wearing an ab belt and the on-screen legend, “infomercial ab belts.” CX 2. To be sure, the ALJ erred in finding that respondents brought the Ab Force to market after disappointing sales of the Ab Pulse belt. *Compare* ID at 44-45 with CX 31 & CX 108. Nonetheless, regardless of the time sequence, it is doubtful that respondents would have found it necessary to

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**D. Extrinsic Evidence Supplements and Confirms the
Commission’s Facial Analysis of the Ab Force Ads**

Based on our facial analysis of respondents’ Ab Force ads, we conclude that they clearly convey the claims alleged in the Commission’s complaint. Although extrinsic evidence is not necessary to reach our decision, consistent with our practice we have examined the extrinsic evidence that the parties have offered about the meaning of the challenged Ab Force ads. *See, e.g., Stouffer*, 118 F.T.C. at 799. This includes (1) Dr. Mazis’s expert testimony and report regarding how respondents’ TV ads would be perceived by consumers; (2) a copy test that Dr. Mazis designed, based on the most widely disseminated TV ad; and (3) a critique by respondents’ expert, Dr. Jacob Jacoby, of the methodology that Dr. Mazis adopted. As discussed below, we conclude that the extrinsic evidence confirms our facial analysis of the Ab Force ads.²⁶

1. Expert Testimony

Dr. Mazis testified that respondents’ ads communicated certain core performance claims to consumers as a direct result of the text and images in the ads (“direct effects”) and, indirectly, as a result

distinguish their Ab Pulse from “infomercial ab belts” in this manner unless they assumed that consumers would associate the images of models wearing an ab belt in the Ab Pulse ads with the express fitness claims made for the “infomercial ab belts.”

²⁶ Although, as respondents note (RAB at 42 n.6), the extrinsic evidence offered by complaint counsel relates to the trial and rollout versions of respondents’ TV ads, many of the elements considered by Dr. Mazis also appear in the print, radio, Internet, and email ads.

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of their familiarity with infomercials for other ab belts (“indirect effects”).²⁷

With regard to the “direct effects” of the ads, Dr. Mazis identified the main visual images in respondents’ ads – trim models with well-developed abdominal muscles, and an Ab Force belt shown causing a model’s abs to pulsate (Mazis Tr. 59-60, 66) – and concluded that together with the name of the product they were likely to convey the message that by using the Ab Force consumers would achieve well-developed abdominal muscles and loss of inches around the waist. Mazis Tr. 59-61, 66-67, 165. “[E]ven if you had never heard of an ab belt before, * * * you

²⁷ Dr. Mazis testified that the ads conveyed four implied claims. According to Dr. Mazis, the two most prominent claims – that users of the Ab Force will achieve well-developed muscles and lose inches around the waist – were conveyed through the visual imagery in respondents’ ads. Mazis Tr. 61. Dr. Mazis also testified that consumers may associate the Ab Force with losing weight and view the product as a substitute for exercise principally because of the association with previous ab belt ads. Mazis Tr. 61-62. Of course, even if one had not seen the prior ads, those claims were neatly incorporated into the Ab Force ads themselves. *See, e.g.*, CX 1 H (Ab Force is “just as powerful and effective as the expensive ab belts on TV” that supposedly would “get our abs into great shape fast – without exercise”); JX-3 (tape), CX 1 D (transcript) (Ab Force is “just as powerful and effective” as the infomercial ab belts, uses “sophisticated electronic technology” that is “designed to send just the right amount of electronic stimulation to your abdominal area,” and “is working” on the abdomen even under business wear); RX 48 (promises that Ab Force has the “same powerful technology as those Ab Belts sold by other companies on infomercials” and “is capable of directing 10 completely different intensity levels at [a user’s] abdominal area * * *” paired with a close-up of a muscled male torso).

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could see the ad and you could make inferences because there's certain implied claims in the ads." Mazis Tr. 66.²⁸

Dr. Mazis also testified as to the "indirect effects" of the ads, which he attributed primarily to respondents' efforts to "exploit" or "free-ride" on a blitz of infomercial advertising for three other EMS ab belts – the AbTronic, Ab Energizer, and Fast Abs. CX 58 ¶ 19-20, 48; IDF 163-66; Mazis Tr. 64-66. Infomercials for the AbTronic, Ab Energizer, and Fast Abs contained "numerous representations about how using the products causes consumers to obtain well-defined abdominal muscles and to lose inches around the waist." CX 58 ¶ 17; *see* IDF 122-24. The infomercials also claimed that the products were an alternative to conventional exercise and that consumers could lose weight by using them.²⁹ CX 58 ¶ 18; IDF 120-24. These claims and representations were conveyed through statements (*e.g.*, "six-pack abs," "washboard abs," "rock-hard abs"); before-and-after photographs; testimonials; and depictions of models with trim waists and highly defined abs. CX 58 ¶ 17. The infomercials aired from 2001 to early 2002 – *i.e.*, the period of time leading up to, and overlapping with, respondents' own Ab Force promotion. IDF 125, 129-33; CX 58 ¶ 15; CX 96 (AbTronic); CX 98 (Ab Energizer); CX 100 (Fast Abs). Given the timing of the promotional campaigns and the similarity in name, appearance, and function of all four EMS products, Dr. Mazis concluded that the infomercial advertising was likely to have had an impact on consumers' perceptions of

²⁸ Respondents' expert, Dr. Jacoby, was also qualified to testify as an expert witness in consumer behavior, consumer psychology, and consumer comprehension, but did not offer his own views as to the meaning of the ads.

²⁹ According to Dr. Mazis, "[t]hese are claims that appear in some of the ads for the other EMS ab belts," but they are not as "prominent" as claims that the products cause users to develop well-defined abs and to lose inches around the waist. CX 58 ¶ 21.

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respondents' Ab Force ads. CX 58 ¶¶ 16, 19-21, 48; Mazis Tr. 48, 59-67. As described by Dr. Mazis,

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

CX 58 ¶ 19.

Based on the psychological and consumer behavior theory of “categorization,”³⁰ Dr. Mazis testified that those consumers who had been exposed to infomercials for competing ab belts, word-of-mouth, and retail packaging for ab belts would have developed an “ab belt category of beliefs.” IDF 163, 166, 169. Such general category beliefs would have included an association between ab belts with well-developed abs, loss of weight and inches, and alternatives to regular exercise. IDF 164. According to Dr. Mazis, respondents' Ab Force ads would trigger such beliefs and cause consumers to read them into the Ab Force ads. IDF 167. The fact that respondents' advertising specifically relied on the fact that many viewers would have seen infomercials for other EMS ab belts (*e.g.*, “I’m sure you’ve seen those fantastic ab belt infomercials on TV”) was cited by Dr. Mazis as further support for concluding that respondents were “free-riding” on claims their

³⁰ The consumer behavior theory of “categorization” is premised on evidence that people place objects in categories based on their similarity. ID at 49-50; IDF 169.

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competitors were making for the other EMS ab belts.³¹ *See* JX 7-10; CX 58 ¶ 19; Mazis Tr. 47-48.

With regard to the “direct effects” of the ads, the ALJ rejected respondents’ contention that Dr. Mazis’s facial analysis was not a proper subject of expert testimony. ID at 48. He explained that while Dr. Mazis’s testimony regarding the claims directly conveyed by the four corners of the ads was “not necessary,” it was “relevant” and “valuable not as an expression of his personal opinion, but rather as expert opinion regarding his knowledge and experience of consumer perceptions and claims that consumers would take away from the four corners of the advertising at issue.” *Id.* Dr. Mazis has taught undergraduate and graduate courses in consumer behavior at American University for more than a decade, and has served as a consultant on advertising issues and

³¹ Respondents’ ads referred to “those fantastic ab belt infomercials.” As shown in industry monitoring publications, infomercials for the AbTronic, Ab Energizer, and Fast Abs EMS ab belts aired frequently in the period leading up to, and during much of, respondents’ Ab Force promotion. IDF 125. Indeed, they were the only ab belt infomercials among the 50 most frequently aired infomercials during the relevant time period. IDF 134. Although the GymFitness device was advertised in infomercials, it was not widely advertised; it did not achieve a Top 50 infomercial ranking at any point during respondents’ promotion of the Ab Force. IDF 143. While respondents placed on the record promotional materials for other EMS devices (IDF 137-46), three of these – the IGIA Electrosage, the Mini Wireless Massage System, and the Accusage – are not electronic ab belts. IDF 139-141. Advertisements for another four devices – the Smart Toner, ElectroGym, Slim Tron, and SlendertoneFlex – appeared as short spots, not infomercials (IDF 142, 144-46), so they were evidently not the ads that inspired the references in the respondents’ ads. In any case these ads – like those for the AbTronic, Ab Energizer, and Fast Abs – touted the products’ health, fitness, and weight loss benefits. IDF 142, 144-46.

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consumer behavior for federal and state governments and for private industry. IDF 148-49. Additionally, he has conducted hundreds of surveys and research studies and published numerous articles in academic journals. IDF 151. Based on his knowledge and experience, he was properly qualified by the ALJ as an expert in the area of consumer perception.

Respondents contend that Dr. Mazis did not attempt to explain how his expertise was relevant to his opinions, or how his opinions were logically related to that expertise. RAB at 44. Accordingly, they claim, under the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), his facial analysis must be set aside. RAB at 43-49.³² We reject respondents' contention that *Daubert* and *Kumho* require the Commission to reject Dr. Mazis's testimony. In the context of the so-called "soft sciences," federal district courts are allowed discretion to choose which factors are appropriate and relevant, according to the expertise in question and the subject of the proffered expert testimony. *Kumho*, 526 U.S. at 149-50; *see, e.g., Betterbox Communications Ltd. v. BB Technologies, Inc.*, 300 F.3d 325, 329-30 (3d Cir. 2002) (in trademark infringement case district court did not abuse discretion in receiving expert opinion

³² *Daubert* and *Kumho* do not apply directly to administrative agencies' adjudicative proceedings. *See, e.g., Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001); *cf. FTC v. Cement Institute*, 333 U.S. 683, 705-06 (1948) (FTC adjudicative proceedings are not governed by the "rigid rules of evidence"). The Commission nonetheless is guided by the spirit of *Daubert* and *Kumho* in making a determination as to the admissibility of expert testimony. *See* 16 C.F.R. § 3.43(b)(1) ("[R]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded."). *See also Niam*, 354 F.3d at 660; *Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (Fed. Cir. 1999).

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testimony regarding likelihood of confusion that was based on expert's personal knowledge and experience). To the extent Dr. Mazis's testimony merely identifies elements in the ads that communicate the challenged claims, his testimony adds little to a facial analysis. We agree with the ALJ, however, that Dr. Mazis's testimony regarding how consumers tend to perceive ads – *e.g.*, that consumers remember visual images in an ad for a longer period than the ad's text (Mazis Tr. 59) – is relevant and probative “as expert opinion regarding his knowledge and experience of consumer perceptions and claims * * *.” ID at 48; *see, e.g., Kraft*, 114 F.T.C. at 122; *Thompson Medical*, 104 F.T.C. at 790. Considering evidence that shows “how consumers might ordinarily be expected to perceive or understand representations like those contained in the ads we are reviewing” is fully consistent with our past practice. *Thompson Medical*, 104 F.T.C. at 790; *see Kraft*, 114 F.T.C. at 122.

As to the “indirect effects” of the ads, however, the ALJ refused to credit Dr. Mazis's testimony. According to the ALJ, Dr. Mazis's testimony that “many consumers would have been exposed” to infomercials for other ab belts was not credible in the absence of empirical research regarding “exactly how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired * * *.” ID at 50-51.³³ We disagree with the ALJ's conclusion that additional

³³ Dr. Mazis relied in part on the psychological and consumer behavior theory of “categorization” to discuss the effects of consumers' prior exposure to ab belts and ab belt advertising on their perception of messages in respondents' ads. ID at 49-50. Respondents' expert did not question the validity of categorization theory. Rather, he questioned whether Dr. Mazis had been able to confirm that consumers were “exposed to or recall (sic) the exemplars that formed the foundation for the categories that they, in his estimation, have developed.” Jacoby Tr. 345. However, as discussed below, given the manner in which respondents *expressly pitched their ads to consumers who were already familiar with*

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empirical evidence was required to demonstrate that the wave of infomercial ab belt advertising influenced consumers' perceptions of respondents' Ab Force ads. *See* ID at 51. By crafting an advertising campaign that expressly capitalized on consumers' familiarity with the infomercial EMS ab belts, respondents effectively conceded – and in fact intended – that the content of their competitors' ads would influence how consumers would perceive their Ab Force ads. Surely respondents would not have structured their entire advertising campaign around comparisons to infomercials for other ab belts unless they believed that, when prompted by ads for the Ab Force, a significant number of consumers would recall their competitors' claims. Contrary to respondents' contention (RAB 1), the Commission therefore breaks no new ground in concluding that a significant number of such consumers would respond to respondents' comparability claims by associating competitors' claims with the Ab Force device. While we also find such claims within the four corners of respondents' ads, there is no doubt that those efficacy claims would resonate most strongly with consumers targeted by respondents who had already been exposed to repeated advertisements for other ab belts during the same time period. *See Deception Statement*, 103 F.T.C. at 177-78 (when representations are targeted to a specific audience the Commission will consider the representations from the perspective of the targeted group); *Porter & Dietsch*, 90 F.T.C. 770, 864-65 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979) (same), *cert. denied*, 445 U.S. 950 (1980); *Pfizer, Inc.*, 81 F.T.C. 23, 58 (1972) (same).

infomercial advertising for EMS ab belts, it is not necessary for the Commission to address the question that troubled the ALJ (ID at 50-51) – *i.e.*, what empirical evidence would be necessary to establish that consumers' prior exposure to infomercial advertising influenced their perception of claims in respondents' advertising.

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2. Copy Test

Dr. Mazis designed a copy test of the most widely disseminated Ab Force TV ad to help determine whether it conveyed the claims alleged in the Commission's complaint. IDF 193, 195. Using a questionnaire designed by Dr. Mazis, a contractor conducted a mall intercept study in suburban shopping malls in nine different geographic regions. IDF 197, 199. Interviewers screened consumers to bring into the study those who might have some propensity to buy the product – *i.e.*, those who had bought products or used a service for massage or to lose weight or tone muscle within the last 12 months. IDF 206, 209. The questionnaire was designed to screen out consumers who had not made purchases by responding to direct response TV ads or infomercials as well as anyone with specialized knowledge of fitness, weight loss, massage, and research methodology. IDF 207-08, 210.

Consumers who qualified to participate in the study were then assigned at random to a “test group” or a “control group.” IDF 214; Mazis Tr. 90. The “test group” viewed a version of the most widely aired Ab Force TV ad,³⁴ while the “control group” viewed a “cleansed” version of one of respondents’ two-minute rollout ads. IDF 214; CX 104, 105. In this case, Dr. Mazis, working with a video editor, created the cleansed “control” ad by eliminating respondents’ references to infomercials for other ab belts, stock images of a woman in a bikini and a man performing an abdominal crunch, and some – but not all – images of models wearing the Ab Force device. IDF 217; Mazis Tr. 83-84. (It was not possible to remove every element without fundamentally redesigning the original ad. Mazis Tr. 83, 108.) Dr. Mazis also

³⁴ The tape that Dr. Mazis used in the copy test was received into evidence as CX 104. It depicts the same ad – the most widely disseminated AB Force TV ad – as the tape that was received as JX 4. The transcript of the ad was received as CX 1 F.

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added the statement “Ab Force for a relaxing massage” to suggest a massage purpose. CX 58 ¶ 28.

As Dr. Mazis explained, a control ad is the equivalent of a placebo in medical studies – *i.e.*, it accounts for responses that are attributable to factors other than the ad itself.³⁵ Mazis Tr. 83-84. A control ad is similar to the challenged or “test” ad but, to the extent possible, it is cleansed by eliminating those elements of the ad that allegedly communicate the challenged claims. IDF 216. Generally, the numbers of consumers who perceive the challenged claim in the control ad are subtracted from the numbers who perceive the challenged claim in the test ad. IDF 258-62. If all the challenged elements have been removed from the control ad, the difference between the two figures (“net takeaway”) represents the percentage of consumers whose perception of the challenged claims is based on the particular elements of the test ad. *See* CX 58 ¶ 28; *Stouffer*, 118 F.T.C. at 762 (Initial Decision).

Survey participants saw the test ad or control ad twice. IDF 227. Eighty-one participants were eliminated from the study after they could not recall the name of the product. IDF 228-30. The remaining participants were asked a series of questions, beginning with an open-ended (*i.e.*, “unguided”) question which asked consumers to state in their own words what they perceived in the ads. IDF 231-32. Consumers were then asked about their perceptions using a progressively narrowing series of open-ended

³⁵ The control group responses represent what is sometimes referred to as “noise” – *i.e.*, preexisting beliefs, confusion, or other factors other than the ad at issue that would account for the participant’s affirmative response. Absent other considerations, a survey generally tests more precisely the influence of the stimulus at issue when this “noise” is deducted from the test group responses. *See, e.g., Novartis*, 127 F.T.C. at 619 (Initial Decision); *Stouffer*, 118 F.T.C. at 806.

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and closed-ended questions.³⁶ After eliminating consumers whose responses to a “filtering question” indicated they would be inclined to guess,³⁷ interviewers instructed participants that they would hear a list of statements (*i.e.*, the “closed-ended questions”) of which some, all, or none may have been implied by or made in the ad.³⁸ IDF 236. Participants were then presented with eight

³⁶ By asking questions in this order of successively narrowing focus, Dr. Mazis ensured that consumers’ answers would not be biased by knowing the content of the questions in advance. *See, e.g., Kraft*, 114 F.T.C. at 70 (Initial Decision); *Stouffer*, 118 F.T.C. at 804.

³⁷ The filtering question asked: “Does or Doesn’t (sic) the Ab Force commercial say, show, or imply that Ab Force improves users’ appearance, fitness, or health?” CX 58 ¶ 33. Consumers who answered that the commercial does not say, show, or imply that Ab Force improves users’ appearance, fitness, or health were not asked to respond to the five key closed-ended statements. They were funneled to the next question in the survey because their responses to the more specific questions might not be reliable. *See* CX 58 ¶ 33; Mazis Tr. 95.

³⁸ Only five of the statements that were read to study participants related to claims alleged in the Commission’s complaint:

“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.”

IDF 238.

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statements, five of which related to the allegations of the Commission's complaint, and provided the opportunity to select one of three possible answers: (1) "YES, it is implied by or made in the Ab Force Commercial;" (2) "NO, it is not implied by or made in the Ab Force commercial;" or (3) "You DON'T KNOW or you have NO OPINION." IDF 237-40. An additional three statements – relating to matters that were not at issue (stomach ulcers, nausea, and blood pressure) – were "masking" or "control" questions that Dr. Mazis used to ensure that participants were paying attention and not merely just saying yes to every question (*i.e.*, "yea-saying"). IDF 239.

The copy test results demonstrate that respondents' most widely disseminated TV ad conveyed each of the claims alleged in the Commission's complaint. In this particular copy test, there are three different ways to look at the copy test results: 1) the responses to the open-ended questions (no controls are necessary for these responses); 2) the responses to the closed-ended questions as controlled by the control group responses; and 3) the responses to the closed-ended questions as controlled by the control or "masking" questions.

a. Open-ended Questions

Open-ended questions allow survey participants themselves to articulate the central claim or claims in the ad – those that first come to mind. Marketing experts have found that credible evidence can be obtained from the responses to open-ended questions. *See, e.g., Stouffer*, 118 F.T.C. at 781 (Initial Decision). We agree with the ALJ that it is appropriate to consider the open-ended responses without netting out any controls. ID 58 (*citing Stouffer*, 118 F.T.C. at 808). In this instance, the open-ended question "What did the commercial say, show, or imply about Ab Force?" was followed by asking, "Anything else?" to elicit additional responses. CX 58 ¶ 32.

The copy test showed that a total of 22.3% of participants who viewed the test ad indicated that the ad conveyed that Ab Force

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causes users to achieve leaner or flatter abs, loss of weight or fat, a better physique, or loss of inches around the waist. IDF 256-57; CX 58 ¶ 42. As the ALJ determined, these results show that a significant number of respondents took away those claims. ID at 59. These results, if anything, likely understate the consumer take-away because consumers are unlikely to volunteer all of the messages they glean from an ad. The response rate for open-ended questions is usually “much lower than for closed-ended questions where the respondent need only check off the response.” *Sears Roebuck & Co.*, 95 F.T.C. 406, 451 (1980) (Initial Decision), *aff’d*, 676 F.2d 385 (9th Cir. 1982). *See also Stouffer*, 118 F.T.C. 746 at 805 (citing testimony of an expert for Stouffer that “often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful”); *Thompson Medical*, 104 F.T.C. at 697 (Initial Decision) (“open-ended questions . . . do not draw out a complete or exhaustive list of all the things respondents may have on their minds. Rather, respondents will play back the dominant theme or primary impression and, having done that, will probably stop.”); *American Home Products Corp.*, 98 F.T.C. 136, 416 (1981) (“the open-ended questioning technique used by ASI does not elicit an exhaustive playback from consumers of all the representations that may be perceived in the tested advertising”), *enforced as modified*, 695 F.2d 681 (3d Cir. 1983).

b. Closed-ended Questions as Controlled by the Control Group

Marketing experts also rely upon the results to closed-ended questions as indicative of consumer responses to ads. *See Kraft*, 114 F.T.C. at 108 (Initial Decision). Closed-ended questions, however, have the potential to direct participants to certain aspects of an ad. Consequently, participants may respond to such questions based upon yea-saying, inattention, pre-conceptions, or other “noise.” Thus, closed-ended questions require the use of some type of control mechanism. *See Stouffer*, 118 F.T.C. at 808. An appropriate control can involve the use of a control ad, *Kraft*, 114 F.T.C. at 110 (Initial Decision); *Thompson Medical*, 104

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F.T.C. at 805, or a control question, *see Stouffer*, 118 F.T.C. at 809. The use of both is not required.

In this case, Dr. Mazis used both a control ad and control or masking questions. Examining first the closed-ended responses as controlled by the control ad group, the ALJ found that 43% of participants in the test ad group and 28.1% of the participants in the control group perceived the message that using the Ab Force belt results in loss of weight. IDF 258; CX 58 ¶ 47. Taking these results and subtracting the control group responses from the test group responses results in a net difference of 14.9%, indicating that 14.9% of consumers perceived the deceptive weight loss claim from the test ad.³⁹ To the statement that using the 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, resulting in a net difference of 15.7%. IDF 259; CX 58 ¶ 47. The statement that using the Ab Force results in well-defined abdominal muscles received positive responses from 65.4% of the test group and 48.1% of the control group, leaving a 17.3% net difference. IDF 261; CX 58 ¶ 47. For the statement that the Ab Force is an effective alternative to conventional exercise, there was an affirmative response from 39.1% of the test group and 28.6% from the control group, with a net difference of 10.5%. IDF 262; CX 58 ¶ 47. By contrast, for the statement that the Ab Force removes fat deposits, 22.9% of the test group and 19% of the control group responded in the affirmative, with a net difference of only 3.9% that was not statistically significant,

³⁹ The ALJ's findings report a net difference of 15.7% for the question relating to weight loss. *See* IDF 258. It is apparent, however, that this figure is a typographical error and the ALJ inadvertently used the figures that Dr. Mazis reported for the closed-ended questions relating to loss of inches around the waist. *Compare* IDF 258 *with* IDF 259. The actual net difference reported by Dr. Mazis for the question relating to weight loss was 14.9%. Mazis Tr. 107; CX 58 ¶ 47.

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indicating that the test ad did not clearly communicate this claim compared to the control ad. IDF 260.⁴⁰

c. Closed-ended Questions as Controlled by Control Questions

Closed-ended responses in copy tests can also be adequately controlled by control or masking questions. *See Stouffer*, 118 F.T.C. at 808-09. These questions typically ask about a product attribute reasonably associated with the advertised product or product category, but not one closely linked to the explicit claims in the ad. *See id.* at 806 & n.24. Responses to the control question or questions – like a control group – measure the number of participants who answered based upon yea-saying, inattention, the halo effect, or other “noise.” *See id.* at 806. To eliminate the effect of such external factors, the responses to the control or masking questions are subtracted from responses to the test questions.⁴¹

⁴⁰ All of the results were also reported in terms of statistical significance. IDF 266; CX 58 ¶ 44, 46. The results for the question relating to well-defined abdominal muscles was statistically significant at the .001 level. Mazis Tr. 106. The questions relating to loss of inches around the waist and loss of weight were statistically significant at the .01 level. Mazis Tr. 106-07. The net difference for the question relating to using the Ab Force as an effective alternative to exercise was statistically significant at the .05 level. Mazis Tr. 107. The net difference for the question relating to fat deposits was not statistically significant. *Id.* *See also* CX 58 ¶ 47.

⁴¹ When a copy test uses control or masking questions to control for noise in responding to closed-ended questions, one only needs to examine the results from the test ad group. *See Stouffer*, 118 F.T.C. at 806. Results for the control ad group can be ignored.

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In this case, the control or masking questions that Dr. Mazis used asked about stomach ulcers, nausea, and blood pressure. CX 58 ¶ 34. Claims about those conditions were not communicated in the ad, so participants should have responded in the negative to closed-ended questions asking whether the ad made claims about those conditions. The highest percentage of participants who responded affirmatively to one of the three control questions – whether due to inattention, preconceptions about the product, or some other reason – was 5 percent. To be conservative, this “noise” was eliminated by subtracting 5 percent from the percentage of participants who responded affirmatively to each of the five closed-ended questions that related to the claims challenged in the Commission’s complaint. After eliminating this noise level from each of the closed-ended questions, 38% of the survey participants perceived the message that using the Ab Force belt results in loss of weight. To the statement that using the Ab Force causes users to lose inches around the waist, 53.1% of survey participants responded affirmatively. The statement that using Ab Force results in well-defined abs got positive responses from 60.4% of participants. For the statement that the Ab Force is an effective alternative to conventional exercise, there was an affirmative response of 34.1%. Finally, for the statement that the Ab Force removes fat deposits, 17.9% of survey participants responded in the affirmative. IDF 264. These results show that – with the exception of the fat deposit claim – at least one third of survey participants found that the ad communicated the challenged claims, a remarkably high takeaway.

d. Copy Test Analysis

Respondents did not offer a copy test of their own to support their interpretation of the challenged ads. Rather, they contend that methodological flaws in the copy test render the results unreliable. RAB at 50-60. Primarily, respondents allege that the copy test was not probative because they believe that it did not

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control for preexisting beliefs of the survey participants.⁴² RAB at 51. Consequently, they argue, it is not possible to determine with any confidence whether the message that consumers took away from their TV ads is attributable to their claims or to consumers' preexisting beliefs about ab belts. RAB at 54-57. Respondents also allege that Dr. Mazis used an overbroad sampling universe, asked leading open-ended and closed-ended questions, and improperly excluded 81 survey participants. RAB at 51.

We conclude that the copy test was probative and that it confirms our facial analysis of respondents' most widely disseminated TV ad. The standard that the Commission applies in determining whether a copy test is methodologically sound is whether it "draw[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." *Thompson Medical Co.*, 104 F.T.C. at 790. Dr. Mazis's copy test satisfies this standard.

Respondents contend that the control ad was not completely "cleansed" of all the elements that Dr. Mazis indicated were responsible for conveying the challenged claims. Consequently, they argue, it is not possible to identify with precision how many of the control group participants provided affirmative answers to the closed-ended questions solely as a result of their preexisting beliefs or other potential influence on their answers. *See* RAB at 54-57.⁴³ We agree that the control ad for the copy test was not –

⁴² As noted by Dr. Mazis, the level of affirmative responses for the control was relatively high, most likely due to the influence of the product name, visual images, and preexisting beliefs about ab belts on the study participants' perceptions of the test Ab Force ad. IDF 266.

⁴³ Respondents' reliance on our decision in *Kraft* for the proposition that a copy test invariably must control for preexisting beliefs is misplaced. RAB at 53-54. As we observed subsequently in *Stouffer*, there is no basis for arguing that such a

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and could not be – cleansed of every element that communicated the challenged claims.⁴⁴ ID at 54; IDF 217-220. Dr. Mazis acknowledged this limitation (IDF 221; Mazis Tr. 108),⁴⁵ but this purported “flaw” actually worked in respondents’ favor. Regardless of the cause – whether due to preexisting beliefs or ad elements that could not be removed altogether from the control ad – the net difference between the test group and control group responses was, if anything, *reduced* as a result of the relatively high percentage of control group participants who reported affirmative responses to the closed-ended questions. ID at 54. Thus, there is no merit to the contention that respondents were prejudiced by using an incompletely “cleansed” control ad, as any reduction in net takeaway would favor respondents.⁴⁶

control is invariably required. *Stouffer*, 118 F.T.C. at 810.

⁴⁴ This case illustrates the difficulties inherent in designing a control ad where the product name and visual elements appearing throughout the ad communicate the challenged messages to consumers. On the one hand, it may not be feasible in such cases to excise all of the ad elements without creating something that would not be recognizable as an actual ad. On the other hand, writing a completely new control ad to show consumers is not a viable option because it would introduce new, uncontrolled sources of bias into the copy test.

⁴⁵ While the copy test may be flawed for its failure to excise from the control ad all of the elements that communicated the challenged claims, copy tests do not have to be flawless to be reasonably reliable and probative. *See, e.g., Novartis*, 127 F.T.C. at 699 n.24; *Stouffer*, 118 F.T.C. at 807; *Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975).

⁴⁶ Respondents suggest that the random assignment of copy test participants to the test group or the control group is inadequate to control for preexisting beliefs. RAB at 54-57. That is exactly what the control group is for, however. One cannot

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Regardless of the reduction in the difference between the test group and control group responses, the ALJ held correctly that as a matter of law the net takeaway – which ranged from 10.5% to 17.3% for all claims except the fat deposit claim⁴⁷ – was sufficient to conclude that the challenged claims were communicated. ID at 57-58 (setting forth Commission cases and Lanham Act cases where net takeaway of 10% – or even lower – supported finding that the ads communicated the claims at issue); *see, e.g., Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (it would be “hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public”); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (10% net takeaway was enough to support finding that claim was communicated in Lanham Act case); *Goya Foods, Inc. v. Condal Distribs., Inc.*, 732 F. Supp. 453, 456-57 (S.D.N.Y. 1990) (net takeaway of 9% justified finding claim was made).

Furthermore, though respondents argue that consumers’ preexisting beliefs fatally undermine the copy test results, we believe that their intentional invocation of other ab belt infomercials cuts the other way. In an attempt to argue that the copy test is unreliable, respondents claim that, among other things, “the existence of other, heavily disseminated advertising

possibly account for all of the differences between people – whether based on education level, income, ethnicity, or any other factor – that could possibly affect consumers’ perception of an ad. Randomization is the proper technique to control for these possible differences. Mazis Tr. 153. Statistically significant results for comparisons of the test group and control group responses – here, for all but the fat deposit claim – belie the suggestion that the results could be due to chance assignment between the two groups.

⁴⁷ For this claim, the 3.9% net difference is not statistically significant. Thus, this result indicates nothing about consumer perception of this particular claim.

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may have contributed to consumers' exposure to previous claims, thus influencing their results." RAB at 53-54. Yet respondents' strategy in promoting the Ab Force was to invite consumers to recall the claims in advertising that consumers had previously seen for other ab belts – advertising to which respondents referred in every one of their ads.⁴⁸ Indeed, it was exactly that "other, heavily disseminated advertising" that respondents took pains to evoke in their own advertising – including claims that respondents knew were unsubstantiated. *See, e.g.,* Khubani Tr. 273-74, 490; ID at 45; IDF 58-60; CX 1 H.⁴⁹ Where, as here, an advertiser exploits preexisting beliefs deliberately by inviting consumers to recall the claims in other ads to help convey a message, it makes little sense to remove the influence of those other ads. *See Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (the fact that a false belief "is attributable to factors other than the advertisement itself does not preclude the advertisement from being deceptive"). Accordingly, we believe that the copy test results as controlled by the control group – which serves to filter out the effects of preexisting beliefs – likely understate the extent to which the challenged claims were communicated.

⁴⁸ IDF 114. *See, e.g.,* CX 1-H ("Have you seen those fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs in great shape fast – without exercise!"); JX 2 (tape), CX 1 B (transcript) ("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."); RX 49 ("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!").

⁴⁹ This is not a case where an advertiser selling an item for one purpose is simply aware of a consumer misperception that the product is effective for another use. Respondents' campaign was built around the existence of and exploited that misperception.

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In this instance, because of respondents' consistent, overt references to competitors' advertising claims, it is clear that respondents specially targeted consumers who had preexisting misperceptions based on those ads. We recognize, however, that many cases may not be so simple. In some cases, for example, an advertiser might not be liable for misperceptions that consumers hold – even if the advertiser is aware of them – if an ad does not exploit that misperception. In other cases, however, an advertiser might be liable if the ad leads reasonable consumers to take away a misleading message, even if the ad does not invoke other ads and even if there is no evidence that the advertiser intended to communicate a misleading message. Our holding, therefore, is limited to these facts: here, it is unnecessary to control for preexisting beliefs that are due in part to the extensive prior advertising that respondents' ads invoke.

We turn next to respondents' contentions that Dr. Mazis improperly excluded 81 survey participants, used an overbroad sampling universe, and asked leading open-ended and closed-ended questions. RAB at 51. We agree with the ALJ (ID at 57) that Dr. Mazis's exclusion of inattentive participants was consistent with the goal of a copy test – *i.e.* to identify a universe of potential purchasers of the product and determine what messages they perceive in an ad. Given that persons who cannot recall the name of a product would not be likely to purchase it (*see* Mazis Tr. 94), it was reasonable for Dr. Mazis to exclude such inattentive participants from the survey universe and, in fact, it is commonly done. Mazis Tr. 102; *see, e.g., Kraft*, 114 F.T.C. at 70 n.2 (excluding participants who could not remember brand name or responded “don't know” to a question asking them to restate the points in the ad).

Respondents' remaining objections to the copy test similarly lack merit. With regard to the sampling universe, the ALJ rejected respondents' contention that the survey population – *i.e.*, those who in the last 12 months had purchased a product or service for weight loss, toning, or massage and also purchased any product by responding to a direct response TV ad – was

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overbroad. ID at 52-53. Respondents would have limited the survey to those who had purchased a product for weight loss, toning, or massage from a direct response ad. Jacoby Tr. 355-56; *see* RAB at 51. The ALJ held that Dr. Mazis's definition of the survey universe was "reasonably reliable and probative." ID at 53. We agree. The goal of the study was to determine whether potential purchasers of the Ab Force – *i.e.*, those consumers that respondents intended to persuade – perceived the misrepresentations that were alleged in the Commission's complaint. CX 58 ¶ 22. There is no basis for assuming that only consumers who had purchased weight loss, toning, or massage products from direct response TV, rather than by some other means, would be potential Ab Force purchasers. As they had already purchased other products through that venue and demonstrated an interest in this type of product, it is not unreasonable to include them as potential Ab Force purchasers.

With regard to the allegation that the closed-ended questions were leading (RAB at 51), we conclude that the copy test instructions (CX 58 ¶ 34 & Exh. D) were adequate to ensure that participants would give equal weight to all possible responses. *See* ID at 53. In addition, using two different versions of the questionnaire, Dr. Mazis changed the order of the questions. CX 58 ¶ 29; Mazis Tr. 92, 96. The rotation in the order in which the questions were posed supplemented other controls. ID at 53-54; Mazis Tr. 96.

Turning to respondents' allegation (RAB at 51) that the wording of the closed-ended questions invited "yea-saying," we agree with the ALJ that Dr. Mazis used appropriate techniques to ensure that the copy test results would not be compromised by the yea-saying phenomenon or other factors. ID at 53. These techniques included using a filter question to eliminate guessing; rotating the order of questions; and reading the three possible answers to each question before asking any survey question. *Id.* Dr. Mazis also used control or "masking" questions – *i.e.*, questions about attributes that are not closely linked to the alleged claims in the ads – to identify participants whose affirmative

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answers to closed-ended questions about the test ad could be attributed to yea-saying, inattention, or other factors. *Id.* at 53-54.

To summarize, we conclude that, although extrinsic evidence was not required to find liability, the copy test and other extrinsic evidence helped confirm our own determination that respondents' ads communicated the challenged claims to significant numbers of reasonable consumers.

III. First Amendment Claims

Respondents' contention that the First Amendment limits the Commission's ability to conduct a facial analysis of ads to "a narrow category of cases" in essence rearticulates their previous objections to the ALJ's interpretation of their ads. RAB at 64. Simply put, respondents' First Amendment argument is equally without merit: they cannot manufacture a constitutional issue out of a straightforward deceptive advertising case. The First Amendment does not protect deceptive commercial speech. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

Respondents concede, as they must, the Commission's authority "to engage in facial analysis and to find, in an appropriate case, the existence of implied claims without reliance on extrinsic evidence * * *." RAB at 63. Respondents contend, however, that there is no basis for the ALJ's facial analysis and "no reliable extrinsic evidence that consumers actually took such claims away from the advertisements." RAB at 61. According to respondents, "substantial constitutional problems" concerning regulation of commercial speech would be raised if the alleged implied claims "have to be teased and constructed out of background elements." RAB at 64.

This plainly is not a case in which implied claims "have to be teased and constructed out of background elements." *Id.* The challenged claims are clearly communicated. Moreover, the

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Commission's facial analysis of the implied claims is buttressed by extrinsic evidence, including expert testimony and a copy test.

Moreover, contrary to respondents' claim (RAB at 67), nothing in *In re R.M.J.*, 455 U.S. 191, 202 (1982), or its progeny suggests that facial analysis runs an "inherent risk" (RAB at 68) of restricting protected commercial speech. Indeed, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985), the Supreme Court squarely rejected that proposition, ruling that no consumer survey was required to prove that the public would be misled by a law firm's ad that claimed "if there is no recovery, no legal fees are owed by our clients." Although at issue was the public perception of the distinction between such technical terms as "fees" and "costs," the Court relied on commonsense assumptions as to how consumers would interpret the language to find that the possibility of deception was so "self-evident" that it would not require state disciplinary authorities to "conduct a survey of the public before it [may] determine that the [advertisement] had a tendency to mislead." *Id.* at 653 (*quoting Colgate-Palmolive Co.*, 380 U.S. at 391-92). In *R.M.J.*, the Supreme Court considered a different issue – whether a state regulatory scheme that broadly prohibited attorney advertising without regard to whether the solicitations were false or misleading was constitutional. Because such blanket prohibitions risk snaring truthful expression along with fraudulent and deceptive speech, the Court concluded that to justify a prophylactic rule the government must demonstrate that the prohibited conduct is either inherently likely to deceive, or provide record evidence that a particular method of advertising in fact has been deceptive. *R.M.J.*, 455 U.S. at 202. Such prophylactic rules are not at issue here. Rather, this case involves an adjudicative finding that the particular ads challenged in this case are false and misleading.

Thus, respondents' cited decisions provide absolutely no support for the proposition that the First Amendment requires that the government provide extrinsic "evidence that a particular form or method of advertising has in fact been deceptive." RAB at 67.

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See American Home Products Corp. v. FTC, 695 F.2d 681, 687 n.10 (3d Cir. 1982) (argument that the First Amendment requires an order to be based on empirical evidence that the public was misled is “distortion” of *R.M.J.*). When implied claims are self-evident, as they are in this case, there is no constitutional mandate for the government to survey consumers before it can find that an ad is misleading. *Zauderer*, 471 U.S. at 652-53; *see Kraft*, 970 F.2d at 320; *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985).⁵⁰ *See also Zauderer*, 471 U.S. at 652-53 (when the alleged deception rises to a “commonplace,” a court may itself find the deception to be “self-evident”).⁵¹

In the present case, the Commission has considered carefully all the extrinsic evidence and, notwithstanding respondents’ allegations of methodological flaws, we conclude that it

⁵⁰ Even if facial analysis might, in rare cases, raise the sorts of concerns that respondents have raised about an “inherent risk of restricting protected speech” (RAB at 68), that problem would not arise with respect to an order that, as here, simply prohibits false and deceptive claims and requires advertisers to have substantiation for any claims they might make in the future.

⁵¹ Respondents also contend that a facial analysis is necessarily a “subjective measure that looks into the minds of the Commissioners.” RAB at 62. According to respondents, such an analysis effectively denies a respondent “meaningful appellate review” of the Commission’s decision except in “the most extreme cases” because a reviewing court may not inquire into the minds of agency decision makers. RAB at 65. Given that a reviewing court can conduct an independent review of the ads, there is no foundation for the argument that a facial analysis of the ads would deny respondents effective review of an adverse Commission decision. Moreover, this contention would logically apply to any exercise of the Commission’s authority to determine implied claims; yet respondents admit that, except in unusual cases, the Commission has authority to determine implied claims.

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corroborates the Commission's own interpretation of the ads. Thus, respondents' concern about an "inherent risk of restricting protected speech" (RAB at 68) is inapposite. The challenged claims are obvious from the face of the ads. *See Kraft*, 970 F.2d at 320-21.

In its amicus brief, the National Association of Chain Drug Stores ("NACDS") raises concerns about chilling commercial speech, specifically comparative advertising. NACDS asks the Commission to clarify when the sponsor of a "compare and save" advertisement may be deemed "derivatively liable" for misleading implied claims in an advertisement that is part of the "target universe" for the sponsor's "compare and save" advertisement. Amicus at 13. To be sure, truthful comparative advertising, including "compare and save" advertising, is generally valuable for consumers and competition. *See Federal Trade Commission Statement of Policy Regarding Comparative Advertising*, 16 C.F.R. § 14.15(b) (1979). Head-to-head product comparisons can demonstrate a product's superiority over a competitor or highlight a price differential. As noted above, however, this case does not stand for the proposition that compare and save advertisers are derivatively liable for all advertising claims made by a competitor by virtue of a comparison. Putting aside the fact that respondents' ads communicated the challenged claims within the four corners of the ads, the comparisons in this case are readily distinguishable from the prototypical "compare and save" advertising where an advertiser places a terse, "Compare to ____" message on a product package or "shelf talker" that names a competing brand's product. Respondents' ads expressly referred consumers to advertisements for the comparison products – not just to the products themselves – and then proceeded to repeat and incorporate claims from those ads. Moreover, as respondents knew,⁵² ab belts as a product class were consistently positioned as products that would improve a user's health or fitness or cause weight loss, but the competing ab

⁵² *See, e.g.,* Khubani Tr. 273-74, 445, 461, 471-72.

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belts – and the Ab Force, as respondents again knew⁵³ – had no actual value for those purposes. This case does not present the question, and the Commission does not address, what implied claims are communicated when an advertiser merely claims that it is comparable to a competitor’s product without conveying additional information.

As for the possible “chilling effect” on the dissemination of truthful “compare and save” advertising, we reject the proposition that implied claims are inherently unpredictable. *Kraft*, 970 F.2d at 320-21 (rejecting First Amendment challenge “when the alleged deception although implied, is conspicuous”). Indeed, this case provides a good example of implied claims that are so conspicuous and self-evident from the face of an ad that extrinsic evidence is simply not required to determine what messages the ad likely conveys to a reasonable consumer. We recognize, of course, that the role of consumer perception creates an inevitable continuum of meaning in ad interpretation.⁵⁴ It does not follow, however, that finding liability based in part on respondents’ parroting of competitors’ ad claims will have a “chilling effect” on the dissemination of legitimate “compare and save” advertising. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 n.4 (1996) (Thomas, J., concurring) (commercial speech, the “offspring of economic self-interest,” is a “hardy breed of expression”) (*quoting Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557, 564 n.6 (1980) (internal quotation marks omitted)).

A respondent who believes that an advertisement does not communicate an implied claim may, of course, choose to conduct a copy test or submit other evidence demonstrating that consumers

⁵³ *See* ID at 45; IDF 58-60; Khubani, Tr. 490; JX 6 ¶¶ 16-19.

⁵⁴ Indeed, even where extrinsic evidence has been introduced, differences of opinion can emerge as to which claims are conveyed to consumers.

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do not take away such a claim. These respondents did not. The Commission will consider carefully all the extrinsic evidence, including consumer surveys, that the parties may introduce as to the meaning of challenged ads. *See Stouffer*, 118 F.T.C. at 799; *Kraft*, 114 F.T.C. at 121-22; *Thompson Medical*, 104 F.T.C. at 789-90.

IV. Remedy

In considering the breadth of appropriate fencing-in, the ALJ acknowledged respondents' substantial resources, their experience and sophistication in marketing a broad array of products, and the deliberate nature of their violations. ID at 64-65. He nonetheless limited fencing-in relief to any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." ID at 66. Complaint counsel contend that more comprehensive fencing-in relief is necessary, including a performance bond and a requirement that respondents have substantiation prior to advertising the "Ab Force, any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program" for any representation "about weight, inch, or fat loss, muscle definition, or the health benefits, safety, or efficacy" of the product. CAB at 67. We conclude that more comprehensive fencing-in relief is warranted but are not persuaded that the record supports a performance bond requirement.

Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that it must bear a reasonable relationship to the unlawful practices. *See, e.g., Colgate-Palmolive Co.*, 380 U.S. at 394-95; *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co.*, 327 U.S. at 612-13. In determining the appropriate scope of relief, the Commission considers three factors: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violation may be transferred to other products; and (3) whether the respondent has a history of prior violations. *See Stouffer*, 118 F.T.C. at 811;

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Thompson Medical, 104 F.T.C. at 833. All three elements need not be present to warrant fencing-in. See *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Porter & Dietsch*, 605 F.2d at 306.

As the ALJ found, the first two elements weigh in favor of broad fencing-in. ID at 64-65. We agree. First, as discussed above, the alleged violations were serious and deliberate.⁵⁵ This is not a case where the product advertised was essentially fit for the intended purpose but the advertising oversold the product's qualities in some way. Rather, respondents promised that Ab Force users would get health, fitness, and weight loss benefits, but without substantiation that the device provided any such benefits to those who purchased it. Indeed, Mr. Khubani admitted that he knew before the ad campaign started that he lacked substantiation for the claims that users "could get into shape fast without exercise" and could get "a flatter tummy without painful sit-ups." ID at 45; IDF 58-60; Khubani, Tr. 490. Yet the day after he removed those direct claims from a proposed television script, a radio ad he had authored hit the air waves; the ad proclaimed that the Ab Force "is just as powerful and effective" as other ab belts that "promis[ed] to get [one's] abs into great shape fast – without exercise." Khubani, Tr. 484-86; CX 1 H.

Respondents contend that the evolution of the advertising campaign demonstrates that they took their compliance obligations seriously. Although the respondents slightly modified

⁵⁵ The ALJ seems to have treated a portion of Mr. Khubani's trial testimony as an admission that express claims in the so-called "test" ads were still communicated implicitly in respondents' "rollout" ads. IDF 87-89. In our view, the cited testimony is inconclusive on this point. Compare Khubani Tr. 492 ("[A]ll these scripts were the same message.") with Khubani Tr. 496 ("There were some minor changes made in the wording. In my opinion, the message was – was still the same, compare and save."). Accordingly, we do not rely on it.

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their claims in the ads that were disseminated most widely, we have no doubt that the respondents deliberately intended to communicate the implied claims even in the later ads, as the ALJ determined. ID at 64-65.⁵⁶ It is not plausible that the respondents expected to sell the Ab Force as a mere phenomenon. The record demonstrates that respondents carefully and deliberately timed their launch of the Ab Force promotion to coincide with an ongoing infomercial promotion of EMS ab belts by respondents' competitors – a situation that respondents quickly put to their advantage with their repeated comparisons between the Ab Force and “those ‘fantastic electronic Ab belt infomercials on TV’” or “ab belts sold by other companies.” IDF 114. Respondents were well aware of the express claims in those infomercials – claims that respondents concede were not only unsubstantiated, but false. *See* ID at 60; IDF 270-73; JX 6 ¶¶ 16-19. As the ALJ concluded, while Mr. Khubani did not want to make those claims expressly, “the evidence shows that Khubani intended to imply those same claims. Merely removing false express claims will not protect an advertisement where the same claims are implied.” ID at 45

⁵⁶ For example, after legal review, the phrase “relaxing massage” was added as a briefly flashing superscript in two roll-out television ads. IDF 100-01. Neither that phrase nor the word “massage” were used in any other ads or in any of Mr. Khubani's radio and television scripts, however. IDF 106. The user manual – which consumers received only after the purchase – stated that the product was “intended to provide a relaxing massage. Ab Force is not intended for medical use, for the treatment of any medical condition, or for any permanent physical changes.” RX 45-46; IDF 104-05. This disclaimer must have been mystifying to consumers who purchased the product – for example, consumers who purchased the Ab Force after responding to the ad that opened respondents' promotional campaign. That ad compared the Ab Force to other ab belts that “promis[ed] to get our abs into great shape fast – without exercise” and said ab belts were “the latest fitness craze to sweep the country,” but said nothing about massage. IDF 86, 93, 104-08; CX 1 H.

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(citing *Thompson Medical*, 104 FTC at 792). Furthermore, the nationwide dissemination in multiple media, cost of the campaign, and risk that purchasers of the Ab Force would view the product as a substitute for regular exercise all demonstrate that the violations were serious.

Second, as for the ease with which the claims may be transferred to other products, respondents market a broad range of products and services. ID at 65; IDF 4. Respondents' marketing strategy is potentially applicable to almost any kind of product or service, including the many products it already markets. They already employ the same strategy with other products – in fact, it is one of the company's standard techniques. Khubani Tr. 247-49.⁵⁷ Given that the violations were serious and deliberate and easily transferable to other products, we conclude that comprehensive fencing-in relief is necessary to ensure that respondents will not be able to use the same or similar strategies to mislead consumers in the future.

These two factors – the serious and deliberate nature of respondents' violations and the ease with which they can be transferred to any one of the myriad of services and products offered by respondents – are sufficient, without more, to justify comprehensive coverage in our final order. Nevertheless, respondents' history of entering into multiple consent orders with

⁵⁷ Indeed, as described by respondent Khubani, a strategy that Telebrands has used on a number of occasions (one or two times a year on average) is to identify existing popular products and then enter the market as a competitor at a lower price. Khubani Tr. 439. To be clear, there is nothing wrong with this approach, but the fact that respondents' deceptive practice here is easily transferable to the other products that it markets in this manner is relevant to the remedy.

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the FTC⁵⁸ – the third element that we consider – provides additional support for more stringent fencing-in. Thus, we disagree with the ALJ’s conclusion that Mr. Khubani’s previous consent agreements “cannot be utilized to form the basis for

⁵⁸ In the past 15 years, Mr. Khubani has entered into three separate consent agreements with the Commission resolving alleged law violations – some addressing multiple counts – and agreed to a modification of one consent agreement; Mr. Khubani and Telebrands paid more than \$900,000 in civil penalties. In 1990, respondent Khubani and a mail order company he operated, Direct Marketing of Virginia, settled allegations they were violating the Commission’s Mail Order Rule by paying a \$30,000 civil penalty. *United States v. Azad Int’l, Inc.*, No. 90-CV-2412-PLN (S.D.N.Y. April 12, 1990). Subsequently, in September 1996, Mr. Khubani and Telebrands paid a \$95,000 civil penalty to settle charges that they failed to ship their products in a timely manner in violation of the Mail Order Rule. *United States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 18, 1996). Also in 1996, Mr. Khubani and Telebrands settled charges that they had made unsubstantiated performance and efficacy claims for two products, the WhisperXL hearing aid and Sweda Power Antenna, and misrepresented the terms of a money-back guarantee. They stipulated to entry of an administrative cease and desist order that prohibited them from making unsubstantiated or false performance claims with respect to the Sweda Power Antenna and any hearing aid. *In re Telebrands Corp.*, 122 F.T.C. 512 (1996). Finally, in 1999, respondents Telebrands and Mr. Khubani stipulated to a modification of the 1996 Mail Order Rule civil penalty order providing that those respondents pay \$800,000 in civil penalties and requiring, as an additional remedy, that they fund an independent monitor with expertise in mail or telephone order fulfillment. *United States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 1, 1999).

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imposing a broad fencing in order in this case.”⁵⁹ ID at 65. We

⁵⁹ The ALJ held that broad fencing-in relief was warranted based on the deliberateness and seriousness of the violations and the ease with which respondents’ unlawful conduct could be transferred to other products. ID at 66. With regard to complaint counsel’s contention that respondents’ history of prior consent orders should also be considered, the ALJ ruled that the consent orders were not in evidence and did not involve any findings of liability. ID at 65. Accordingly, he declined to consider them in determining the appropriate scope of fencing-in relief.

We agree with the ALJ that the deliberateness, seriousness, and transferability of respondents’ violations are sufficient, without more, to warrant broad fencing-in relief. However, we do not agree with the ALJ that complaint counsel’s failure to offer the prior consent orders into evidence precludes the Commission from considering them in fashioning its order. The Commission may take official notice of them to the extent they are on the public record. *See, e.g., Chicago Bridge & Iron Co.*, 2005 FTC LEXIS 70 at *39 n.82 (2005) (taking official notice of SEC K-1 filing); *South Carolina State Board of Dentistry*, FTC Docket No. 9311, slip op. at 11-12 (July 30, 2004) (matters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and reports and records of administrative agencies); *Avnet Inc.*, 82 F.T.C. 391, 464 n.31 (1973) (taking official notice of U.S. Census report), *aff’d*, 511 F.2d 70 (7th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975). Furthermore, while complaint counsel could have filed a formal motion before the ALJ to take judicial notice of the consent orders earlier in the proceedings, respondents have no claim of prejudice; indeed, the existence of the consent orders is undisputed. As for complaint counsel’s alleged “failure to follow the formalities” (RRB at 63), the Commission’s adjudicative rules specifically anticipate the possibility that in rendering a decision on the merits the Commission *sua sponte* will take official notice of a material fact. *See* 16 C.F.R. 3.43(d) (“When any decision of an [ALJ] or of the

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recognize that litigants may settle matters for a variety of reasons; indeed, whether in federal court or at the Commission, most litigation is settled. Settlement is often an efficient way of resolving legal disputes. Holding a prior consent agreement against a party in a subsequent action may affect that party's decision to settle. Having said that, if every consent agreement were inadmissible, the Commission could never fashion relief appropriate to address a pattern of conduct by someone who repeatedly violates the law but invariably settles. Moreover, we are well aware that a majority of the Commissioners must have "reason to believe" that the law has been violated before issuing a proposed complaint, 15 U.S.C. § 45, including any proposed complaint accompanied by a proposed consent agreement.

Thus, we hold that it is appropriate to consider a pattern of consent agreements. The fact that a party has entered into one prior consent agreement with the Commission may say little about the appropriate scope of relief in a future case. *See Thompson Medical*, 104 F.T.C. at 833 n.78 ("Because consent orders do not constitute a legal admission of wrongdoing, we will not use a single consent order as a basis for concluding that Thompson has a history of past violations."). The Commission, however, may properly take into account a respondent's pattern and practice of alleged law violations that result in a succession of narrowly tailored injunctive orders in determining whether more comprehensive relief is called for. *See Sterling Drug Inc.*, 102

Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."). Thus, the Commission's ability to take official notice of a fact does not turn on whether any of the parties has filed a formal motion before the ALJ, as respondents seem to suggest. *Cf. Dobrota v. INS*, 195 F.3d 970, 973 (7th Cir. 1999) (taking *sua sponte* judicial notice of updated country conditions in light of parties' failure to introduce such information).

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F.T.C. 395, 793 n.54 (1983) (five outstanding advertising orders, one litigated and four by consent), *aff'd*, 741 F.2d 1146 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Jay Norris Corp.*, 91 F.T.C. at 856 n.33 (three consent orders in 15 years); *see also FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1270-72 (S.D. Fla. 1999) (seven prior court and administrative orders entered by consent). Respondents' previous consent order with the Commission relating to allegedly unsubstantiated advertising claims for a hearing aid and an antenna – leaving aside the troubling misrepresentation relating to the company's money-back guarantee – demonstrates that respondents were well aware of the Commission's advertising substantiation requirements, including requirements for "devices" such as the Ab Force. Moreover, the alleged violations that resulted in a succession of consent orders relating to Mail Order Rule violations – culminating in an order that required the company to hire a third party monitor to oversee compliance – suggests a troubling inability to comply with the consumer protection laws enforced by the Commission.

Accordingly, we modify the fencing-in provisions in the ALJ's order to take into account the demonstrated need to protect the public from future unfair or deceptive acts or practices by respondents. Our Order requires respondents to substantiate all claims about weight, inch, or fat loss; muscle definition; or the health benefits, safety, or efficacy of any product, service, or program. This broader product coverage is warranted in light of the seriousness of this violation; the ease of transferability of these deceptive practices to products of all types; and the pattern of alleged illegal activity that resulted in the previous consent orders.

All product coverage is reasonably related to the Commission's goal of protecting the public. As the Supreme Court stated in *Colgate-Palmolive*, "We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements." 380 U.S. at 395; *id.* at 394-95 (upholding order prohibiting deceptive mock-ups in advertisements for "any product" and noting that "courts will not interfere except where the remedy

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selected has no reasonable relation to the unlawful practices found to exist”). *See also Jay Norris Corp.*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (affirming Commission order fencing-in claims for all products). We recognize that this order will impose some additional burden on respondents to substantiate claims for products that the ALJ’s order would not cover, but Commission law requires such substantiation for any advertiser in any case. *See, e.g., Substantiation Statement*, 104 F.T.C. at 839. In limiting these provisions to a prohibition on deceptive and unsubstantiated claims, the Commission’s order leaves respondents free to advertise in any way they choose, except deceptively. Moreover, respondents market a wide range of products; efficacy claims for most of these products would not be covered by the ALJ’s order as they do not relate to health, weight loss, fitness, or exercise benefits.⁶⁰ In fact, one of the respondents’ previous consent orders⁶¹ relates to unsubstantiated performance and efficacy claims for an antenna – the type of deception that would violate Section 5 of the FTC Act but not the ALJ’s order. As the Commission held in *Litton Industries, Inc.*, 97 F.T.C. 1 (1981), *aff’d as modified*, 676 F.2d 364 (9th Cir. 1982):

⁶⁰ Products respondents have marketed in the past include Ambervision Sunglasses, the Magic Hanger, Dental White Tooth Whitening System, the Safety Can Opener, the Audobon Singing Bird Clock, the Better Pasta Pot, and the Roll-a-Hose Flat Hose. IDF 22. Another recent Telebrands product was the Cyclone Diet, a blended powder that would supposedly cause users to “lose ten pounds in two days,” a seemingly impossible claim. Khubani Tr. 251-52. *Cf.* Federal Trade Commission, *Red Flag: Bogus Weight Loss Claims*, available at <www.ftc.gov/bcp/online/edcams/redflag/beyond.html> (setting forth claims for weight loss products that are false on their face because they are not scientifically feasible).

⁶¹ *See In re Telebrands Corp.*, 122 F.T.C. 512 (1996).

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The rationale for entry of a multi-product order based upon violations in the advertising of only one or a few products is that many kinds of deceptive advertising are readily transferrable to a variety of products, and it would serve the public poorly to halt the use of a deceptive tactic in the advertising of one product if the respondent remained free to repeat the deceptive practice in another guise, with no threat of sanction save for another order to cease and desist.

Id. at 78-79 (citations omitted).

We turn then to complaint counsel's request that the Commission order respondent Khubani to obtain a performance bond of \$1 million before engaging in or assisting others in engaging in any manufacturing, sale, or promotion of any "device," as that term is defined in Section 15(d) of the FTC Act, 15 U.S.C. § 55(d).⁶² As the ALJ observed, although the Commission has accepted numerous consent agreements that require respondents to obtain performance bonds, it has not required a performance bond in a litigated administrative case. *ID* at 63. However, this is not a proper basis for declining to impose such relief.⁶³ Courts have recognized that the Commission has

⁶² While Mr. Khubani challenges the application of a bond requirement to himself as an individual rather than to the corporation, it is not only appropriate but sometimes preferable to make the principal of a corporation subject to fencing-in so that the individual cannot circumvent the order by establishing a new company with a different name.

⁶³ Respondents' reliance on *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) for the proposition that such relief is beyond the Commission's remedial authority is misplaced. *RRB* at 65-67. In *Heater*, the Ninth Circuit specifically recognized the Commission's authority to order affirmative relief, but treated restitution as a private, retroactive remedy – tantamount to an award of damages – that was beyond the Commission's authority

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broad discretion in its choice of remedies and is authorized to impose fencing-in provisions to prevent a recurrence of the same or similar violations and “to close all roads to the prohibited goal” so the respondent cannot simply circumvent the order. *Ruberoid*, 343 U.S. at 473. The Commission has employed a wide variety of fencing-in remedies to achieve effective relief. *See, e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 606 (1966) (divestiture order); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (corrective advertising), *cert. denied*, 435 U.S. 950 (1978); *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (compulsory licensing of intellectual property), *appeal after remand, Pfizer Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); *Chicago Bridge & Iron Co. N.V.*, 2004 FTC LEXIS 250 (Dec. 21, 2004) (appointment of monitor trustee); *Brake Guard Products, Inc.*, 1998 FTC LEXIS 184 (Jan. 23, 1998) (brand name excision). Such fencing-in relief may include a performance bond requirement that, together with the prospect of monetary penalties for violating an order, is likely to spur a respondent to take appropriate measures to ensure compliance and, failing that, provide some measure of relief for consumers who were harmed by the illegal conduct.

In determining whether a performance bond is warranted as fencing-in, we apply the same standard enunciated in *Ruberoid*. We consider the likelihood of a respondent’s future violations, the deliberateness and egregiousness of any past violations, and the

in an administrative proceeding. Even assuming, *arguendo*, that the *Heater* court correctly treated an administrative award of restitution as a private remedy, a performance bond operates *prospectively* by ensuring that a fund will be available for consumers should respondent Khubani violate the order in the future, and increasing his incentives to comply. *See FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992), *modified by*, 1992 U.S. Dist. LEXIS 6152 (N.D. Ill. May 6, 1992), *aff’d sub nom. FTC v. Vlahos*, 1995 U.S. App. LEXIS 6092 (7th Cir. Mar. 6, 1995).

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transferability of the unlawful practices to other products or situations. As discussed above, after consideration of those factors, we believe that broad injunctive relief is warranted here.

The Commission, of course, also considers other factors to decide whether a performance bond is reasonably necessary to supplement other forms of fencing-in. In this instance, we decline to order Mr. Khubani to obtain a performance bond because complaint counsel has presented insufficient evidence as to the amount of the performance bond that would likely be necessary to prevent future law violations. The Commission must determine whether a performance bond is reasonably necessary to secure Mr. Khubani's compliance with the order yet there is no evidence in the record as to his financial resources. Such information would assist the Commission in determining whether a bond requirement is appropriate – and, if so, at what amount – to ensure his compliance and in assessing the financial burden that a bond might impose on him. The amount may have to be more than the \$1 million requested or less than that amount, but the Commission does not have enough information to weigh the reasonableness of the request. Although Mr. Khubani's compliance with the order will not be secured by the performance bond, we believe that the order's requirement that respondents substantiate objective claims for all of their products – while not a substitute for the bond – will help protect consumers in the future.

V. Conclusion

Contrary to respondents' claim, this case does not involve a novel theory of liability. It involves false and unsubstantiated claims that are communicated with such utter clarity that, even without any consideration of extrinsic evidence, we are able to conclude with confidence that the claims were made. Undoubtedly, as a result of respondents' calculated efforts to capitalize on their competitors' ongoing infomercial promotions, respondents' claims for the Ab Force resonated more strongly with those who had viewed those infomercials or were familiar with the competing ab belts. But respondents' ads are not subtle:

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even putting aside the claims used in the so-called “test” phase of their Ab Force promotion – which generated sales, like the rollout ads – the images and text in the other ads clearly conveyed each of the claims alleged in the Commission’s complaint. The copy test amply confirms this conclusion. We emphasize, moreover, that this is not a case in which the product was merely “oversold.” Respondents’ advertising left no doubt that the Ab Force was an amazing tool that would work wonders on the body, but they had no evidence that the product did any such thing. The product is useless for the health, weight loss, and fitness purposes for which it was advertised, as respondents were well aware. The idea that consumers were purchasing the Ab Force simply to share in the excitement of buying a popular product is not credible.

For all the foregoing reasons, we affirm the ALJ’s finding as to liability and conclude that a broad cease and desist order applicable to all products is appropriate here. As discussed above, however, we decline to require respondent Khubani to obtain a performance bond.

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FINAL ORDER

This matter having been heard by the Commission upon the appeal of Respondents and the cross-appeal of Complaint Counsel, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED THAT the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent it is not inconsistent with the findings of fact and conclusions of law contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED THAT the following Order to cease and desist be, and it hereby is, entered:

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.

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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;

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- 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; or
- 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; or
- 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.

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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, performance, or efficacy of any product, service, or program, unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be 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 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

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- 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.

VI.

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.

VII.

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

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shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

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.

IX.

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.

X.

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:

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- 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.

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COMPLAINT

The Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Telebrands Corp. (“Telebrands”), TV Savings, LLC (“TV Savings”), and Ajit Khubani (“Khubani”), individually and as president of Telebrands and sole member of TV Savings (collectively “respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Telebrands is a New Jersey corporation with its principal office or place of business at 79 Two Bridges Road, Fairfield, NJ 07004.
2. Respondent TV Savings is a Connecticut limited liability company with its principal office or place of business at 79 Two Bridges Road, Fairfield, NJ 07004.
3. Respondent Khubani is president of Telebrands and sole member of TV Savings. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of these two business entities, including the acts and practices alleged in this complaint. His principal office or place of business is the same as those of Telebrands and TV Savings.
4. The foregoing respondents have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force, an electronic muscle stimulation (“EMS”) device, which is a “device” within the meaning of Sections 12 and 15 of the FTC Act.
5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

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The Ab Force EMS Device

6. The Ab Force EMS device is comprised of: (1) a black elasticized belt; (2) a thin black pad measuring approximately 8 inches by 4 inches; and (3) a small control unit, powered by a coin-sized battery, which attaches to the pad and, in some models, enables the user to control the intensity of electronic stimulation. These three components assemble to form a belt with the pad and unit in the middle. According to respondents' instructions, the user should apply a water-based gel to the pad and place this pad against the abdomen, bicep, or thigh to send the electrical current generated by the control unit to the body.

Advertising and Promotion of the Ab Force EMS Device

7. From December 2001 to May 2002, respondents disseminated, or caused to be disseminated, advertisements and promotional materials for the Ab Force, including but not necessarily limited to 60 and 120 second television commercials, Internet advertisements, radio advertisements, and print advertisements. Respondents offered the Ab Force for the price of \$10. Gross sales of the Ab Force, including accessories like batteries and gels, exceeded \$19 million.
8. Respondents spent more than four million dollars to televise commercials for the Ab Force. These commercials appeared more than 10,000 times on cable, satellite, and broadcast television outlets, and were among the most frequently aired commercials on cable television during the weeks and months in which they appeared, according to an industry monitoring service.
9. Through advertisements for the Ab Force, respondents represented that the Ab Force used the same technology and was just as powerful and effective as other more expensive EMS devices that were advertised on program-length television commercials ("infomercials") during or shortly before the time period in which the Ab Force commercials appeared.

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10. The Ab Force advertisements, including but not limited to the attached Exhibits A through H, contained the following statements or depictions, among others:

- a. PAT MURPHY: 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.

ON SCREEN: UP TO \$120 EACH!

PAT MURPHY: The problem is, they're expensive, selling for up to \$120 each.

ON SCREEN:

AB FORCE

PAT MURPHY: Well, that's why we developed the Ab Force that you can buy right now for just \$10.

ON SCREEN: JUST \$10!

PAT MURPHY: That's right, just \$10.

...

PAT MURPHY: . . . The Ab Force is just as powerful and effective as those expensive ab belts sold by others - -

ON SCREEN: ELECTRONIC STIMULATION

PAT MURPHY: - - designed to send just the right amount of electronic stimulation to your abdominal area!

—Exhibit A (videotape of television commercial); Exhibit B (Certified transcript of 60-second television commercial).

These statements are accompanied by 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.

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- b. PAT MURPHY: 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.

ON SCREEN: UP TO \$120 EACH!

PAT MURPHY: But the problem is they're expensive, selling for up to \$120 each.

ON SCREEN:

AB FORCE

PAT MURPHY: Well, that's why we developed the Ab Force that you can buy right now for just \$10.

ON SCREEN: JUST \$10!

PAT MURPHY: That's right, just \$10.

ON SCREEN:

AB FORCE

PAT MURPHY: 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.

ON SCREEN: HIGH QUALITY

PAT MURPHY: The Ab Force is truly a high quality product.

ON SCREEN: SOPHISTICATED COMPUTER COMPONENTS

ELECTRONIC STIMULATION

PAT MURPHY: Using sophisticated electronic technology, the Ab Force is designed to send just the right amount of electronic stimulation to your abdominal area.

. . .

PAT MURPHY: . . . It is so comfortable that you can even wear it under your clothes. In fact, I'm wearing one right now and it's working while I'm working.

ON SCREEN:

AB FORCE

High Quality

Powerful

Complaint

Comfortable

PAT MURPHY: The Ab Force is high quality, powerful, comfortable - -

ON SCREEN:

AB FORCE**JUST \$10**

PAT MURPHY: - - and best of all it's just \$10

ON SCREEN: 30 DAY**SATISFACTION GUARANTEE!**

PAT MURPHY: . . demand for the ab force is overwhelming and - -

ON SCREEN: NOT AVAILABLE IN STORES

PAT MURPHY: - - it's not available in stores anywhere. So, don't miss out on this incredible opportunity. Call to reserve your electronic Ab Force now.

—Exhibit C (videotape of television commercial); Exhibit D (Certified transcript of 120-second test television commercial).

These statements are accompanied by 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.

c. **ON SCREEN: Consult Your Physician Before Using the Ab Force**

PAT MURPHY-STARK: Hi, Pat Murphy-Stark here.

ON SCREEN:

AB FORCE

Do not use if you have a pacemaker, a heart or medical condition, or are pregnant.

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PAT MURPHY-STARK: 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.

ON SCREEN: Up to \$120 Each

PAT MURPHY-STARK: But the thing is, they're expensive, selling for up to \$120 each.

ON SCREEN:

AB FORCE

PAT MURPHY-STARK: Well, that's why we developed the Ab Force that you can buy right now for just \$20.

...

PAT MURPHY-STARK: The Ab Force uses the same powerful technology as those expensive ab belts - -

ON SCREEN: RELAXING MASSAGE

10 INTENSITY LEVELS

PAT MURPHY-STARK: - - Capable of directing 10 different intensity levels at your abdominal area.

ON SCREEN: HERE'S AN EVEN BETTER DEAL!

PAT MURPHY-STARK: And here's an even better deal

ON SCREEN: 1-800-322-4343

PAT MURPHY-STARK: Call right now and we'll double your order.

ON SCREEN: 2 for \$20

1-800-322-4343

PAT MURPHY-STARK: That's two electronic Ab Force belts for just \$20. Don't miss out on this incredible opportunity. Call Now.

—Exhibit E (videotape of television commercial); Exhibit F (Certified transcript of 60-second television commercial).

These statements are accompanied by 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

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bikini-clad woman showing off her trim waist and well-defined abdominal muscles.

- d. “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?”
—Exhibit G (print advertisement).

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.”

- e. “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

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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.”
—Exhibit H (radio advertisement).

Advertising and Promotion of Other EMS Devices on Infomercials

11. From April 2001 through May 2002, during or shortly before the time period in which the Ab Force commercials appeared, several other EMS devices were offered for sale, sold, and distributed throughout the United States. Three of these EMS devices, the “AbTronic,” “AB Energizer,” and “Fast Abs,” were substantially similar in appearance to the Ab Force, were comprised of components substantially similar to those identified in Paragraph 6, and were widely advertised through television infomercials. All three EMS devices were more expensive than the Ab Force.
12. The AbTronic EMS device was offered for the price of \$120. According to an industry monitoring service, AbTronic infomercials appeared more than 2,000 times on cable television stations from April 2001 through March 2002, at an estimated cost of more than \$18 million. AbTronic infomercials were among the most frequently-aired infomercials on cable television during the weeks and months in which they appeared. Gross sales of the AbTronic EMS device, including accessories like batteries and gels, exceeded \$106 million dollars.
13. The AB Energizer EMS device was offered for the price of \$59.95. According to an industry monitoring service, AB Energizer infomercials appeared more than 1,600 times on cable television stations from October 2001 through February 2002, at an estimated cost of more than \$11 million. AB Energizer infomercials were among the most frequently-aired infomercials on cable television during the weeks and months in which they appeared. Gross sales of

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the AB Energizer EMS device, including accessories like batteries and gels, exceeded two million units, that is, approximately \$120 million.

14. The Fast Abs EMS device was offered for the price of \$39.95. According to an industry monitoring service, Fast Abs infomercials appeared more than 1,200 times on cable television stations between November 2001 and February 2002, at an estimated cost of more than \$12 million. Fast Abs infomercials were among the most frequently-aired infomercials on cable television during the weeks and months in which they appeared. Gross sales of the Fast Abs EMS device, including accessories like batteries and gels, exceeded 660,000 units, that is, more than \$26 million dollars.
15. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained the following depictions, among others: (1) well-muscled, bare-chested men and lean, shapely women wearing EMS devices around the waist and experiencing abdominal muscle contractions; (2) men and women performing conventional abdominal exercises such as sit-ups or crunches; and (3) close-up images of men and women in revealing clothes showing off their trim waists and well-defined abdominal muscles.
16. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained the following representations, among others, that the advertised device causes the loss of weight, inches, or fat:

a. **ON SCREEN: K.T. Roberge**

Homemaker

Results based on use and muscle response

TESTIMONIALIST K.T. ROBERGE: When I first started using the AbTronic System, I was skeptical at first, thinking it's just too easy, strapping it on, nothing to plug

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in, and it just contracts your muscles. But for three weeks, I have used it now and I've lost two inches in my waist.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 19.

**b. ON SCREEN: Kathy Horn
Tanning Salon Owner**

TESTIMONIALIST KATHY HORN: After using the AbTronic System, I've lost three inches on my waist in the matter of two weeks and my abdominals look so much better.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 32-33.

c. ON SCREEN: Before and After photographs

UNIDENTIFIED MALE: The Ab Energizer System I've used for five weeks and I've gotten incredible results.

ON SCREEN: Lost 40 lbs.

Size 37 to 34

Results not typical. Individuals results may vary.

UNIDENTIFIED MALE: I've lost 40 pounds. I've gone from a waist 37 to a waist 34. The Ab Energizer and the Ab Energizer System has changed my life and it's really given my life back to me.

—*Federal Trade Commission v. Electronic Products Distribution, LLC, et al.*, 02CV0888 H(AJB), (May 7, 2002), Complaint Exhibit 2 at 30-31

d. SPOKESWOMAN KITA PELLY: The AB Energizer System is absolutely incredible for people who want tighter abs and want to lose inches around the midsection.

—*Federal Trade Commission v. Electronic Products Distribution, LLC, et al.*, 02CV0888 H(AJB), (May 7, 2002), Complaint Exhibit 2 at 29-30.

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- e. MALE ANNOUNCER: People everywhere are sitting back and relaxing while they firm up, slim down, and shed inches quickly.

—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2002), Complaint Exhibit B at 4, 23, 54; Complaint Exhibit D at 4, 23-24, 45, 57.

- f. MALE ANNOUNCER: You'll drop four inches in the first 30 days. We guarantee it.

—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2002), Complaint Exhibit B at 31, 59; Complaint Exhibit D at 32, 63.

- 17. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained the following representations, among others, that the advertised device causes well-defined abdominal muscles:

- a. MALE ANNOUNCER: AbTronic is the electronic dream machine that will show you immediate improvement without strenuous time-consuming workouts. You'll develop that six-pack you've always wanted in the easiest way imaginable.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 13, 27, 38.

- b. MALE ANNOUNCER: Now, with one touch of a button, you can get that six-pack you always wanted, guaranteed.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 4 at 3.

- c. MAIL ANNOUNCER: Now, with a touch of a button, you can go from flab to rock-hard abs.

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—*Federal Trade Commission v. Electronic Products Distribution, LLC, et al.*, 02CV0888 H(AJB), (May 7, 2002), Complaint Exhibit 2 at 22, 39, 50, 62.

- d. MALE ANNOUNCER: 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.

—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2001), Complaint Exhibit B at 3-4, 22.

- e. SPOKESWOMAN KATHY DERRY: “The simple, fast, easy, effective tool to help tool and reshape your body and help(s) get those washboard lean sexy abs is finally here. With Fast Abs, we’ll guarantee fast results with no sweat.”

—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2002), Complaint Exhibit B at 52; Complaint Exhibit D at 54.

- 18. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained the following representations, among others, that use of the advertised device is equivalent to or more effective than regular exercise:

- a. MALE ANNOUNCER: You’ll see how the AbTronic System gives you the results of 600 sit-ups in just 10 minutes without any effort.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 3-4.

- b. **ON SCREEN: Idrise Ward-El**
Professional Bodybuilder

IDRISE WARD-EL: When I first used the AbTronic System, it looked small and I didn’t have any idea what it

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would feel like. When I did use it, I had a very strong contraction, a lot stronger than doing sit-ups. Even after 100 sit-ups, you don't get the kind of contraction you get here, because normally, when doing sit-ups you get tired first. Then it starts to work. Doing the first AbTronic systems, the first contraction feels like you've done already 100, 150 sit-ups.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 20.

- c. MALE ANNOUNCER: [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.

—*Federal Trade Commission v. Hudson Berkley, Corporation, et al.*, CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 14, 27, 39; Complaint Exhibit 4 at 3.

- d. MALE ANNOUNCER: The secret is Ab Energizer's electronic impulses that stimulate your abs so they contract and relax as if you're doing a sit-up.

**ON SCREEN: Up to 700 Muscle Contractions
10 Minutes!**

MALE ANNOUNCER: Now you can get up to 700 muscle contractions in just 10 minutes and get the tone and definition you've always wanted.

—*Federal Trade Commission v. Electronic Products Distribution, LLC, et al.*, 02CV0888 H(AJB), (May 7, 2002), Complaint Exhibit 2 at 62,63.

- e. DR. DONALD FURNIVAL [introduced as a chiropractor specializing in "natural healthcare"]: There are several studies that have been done that show that electrical muscle stimulation is more effective and more efficient than regular working out or going to the gym.

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—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2002), Complaint Exhibit B at 15.

- f. MALE ANNOUNCER: The secret is EMS, electronic muscle stimulation. This tiny transformer sends out safe, gentle impulses that trigger your motor nerves and activate deep muscle contractions. Tests have proven that this unique isometric action can be—

ON SCREEN: 30% More Effective!

MALE ANNOUNCER: —30 percent more effective than anything you can do on your own with normal exercise.

—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2002), Complaint Exhibit B at 24.

- g. SPOKESWOMAN KATHY DERRY: In fact, just 10 minutes of Fast Abs is like doing 600 sit-ups. Imagine that. 600 sit-ups.

ON SCREEN: 10 minutes = 600 sit ups.

—*Federal Trade Commission v. United Fitness of America, LLC, et al.*, CV-S-02-0648-KJD-LRL, (May 7, 2002), Complaint Exhibit B at 11; see also Fast Abs Ex. B at 5, 23, 35, 43, 50, 54-55

Violations of Sections 5 and 12 of the FTC Act

19. Through the means described in Paragraphs 9 and 10, respondents represented, expressly or by implication, including, but not limited to, references to products and infomercials with representations such as those described in Paragraphs 11 through 18, that:
- a. Ab Force causes loss of weight, inches, or fat;
 - b. Ab Force causes well-defined abdominal muscles; and

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- c. Use of Ab Force is an effective alternative to regular exercise.

20. In truth and in fact:

- a. Ab Force does not cause loss of weight, inches, or fat;
- b. Ab Force does not cause well-defined abdominal muscles; and
- c. Use of Ab Force is not an effective alternative to regular exercise.

Therefore the representations set forth in Paragraph 19 were, and are, false and misleading.

- 21. Through the means described in Paragraphs 9 and 10, respondents represented, expressly or by implication, including, but not limited to, references to products and infomercials with representations such as those described in Paragraphs 11 through 18, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 19, at the time the representations were made.
- 22. In truth and fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 10, at the time the representations were made. Therefore, the representation set forth in Paragraph 21 was deceptive.
- 23. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

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NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless

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otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on February 2, 2004, at 10:00 A.M. in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from the record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Telebrands Corp., TV Savings, LLC, and Ajit Khubani, individually and as president of Telebrands and sole member of TV Savings, might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate, including corrective advertising or other affirmative disclosure.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

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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

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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

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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.

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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

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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 *In the Matter of Telebrands Corp., et al.*, Docket No. 9313.” 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

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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

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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.

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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 thirtieth day of September, 2003, has issued this complaint against respondents.

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INITIAL DECISION

By Stephen J. McGuire, Chief Administrative Law Judge

I. INTRODUCTION

A. Overview and Summary of Decision

This case addresses the advertising campaign for the Ab Force, an electronic muscle stimulation ("EMS") ab belt device. Telebrands Corporation ("Telebrands"), TV Savings, L.L.C. ("TV Savings"), and Ajit Khubani ("Khubani") (collectively "Respondents") marketed the Ab Force through spot television, print, radio, internet, and email advertisements. Complaint Counsel alleges: (1) that Respondents' advertising campaign for the Ab Force makes claims that the use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise; (2) that these claims are false or misleading; and (3) that these claims are material to consumers. Respondents' primary argument is that the Ab Force advertisements did not contain the challenged claims.

The parties focus on the issue of whether Respondents should be held liable for dissemination of ads that capitalize on preexisting consumer beliefs regarding the effects of using ab belts. As discussed more fully in Section III(B)(1), *infra*, this theory of liability is neither central nor determinative of the case. Rather, the central issue is whether the advertisements are likely to mislead consumers, acting reasonably under the circumstances, in a material respect. This matter is resolved utilizing traditional case law analysis.

As set forth in this Initial Decision, the record indicates that the advertisements at issue made false and misleading claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. These claims, relating to health, weight loss, fitness, or exercise benefits, are clearly made based upon a facial analysis of the advertisements. Extrinsic evidence, although not

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necessary to the determination of these issues, further supports the ultimate conclusion that the advertising was likely to mislead consumers, acting reasonably under the circumstances, in a material respect. The remedy imposed is an appropriate cease and desist Order.

B. Summary of Complaint and Answer

The Federal Trade Commission ("FTC") issued its Complaint in this matter on September 30, 2003. The Complaint charges that Telebrands, TV Savings, and Khubani, individually and as president of Telebrands and sole member of TV Savings, violated Sections 5 and 12 of the Federal Trade Commission Act, as amended ("FTC Act"). Complaint, PP 1-4. The Complaint charges Respondents with making false and misleading claims that the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. Complaint, PP 19-20.

In its Answer filed on October 23, 2003, Respondents denied the material allegations of the Complaint and asserted that the evidence would show that the alleged claims were not made in the Ab Force advertising. Answer, PP 19-23.

C. Procedural Background

Complaint Counsel filed a Motion for Summary Decision on March 23, 2004. Respondents filed a Motion for Summary Decision on March 24, 2004. Both motions were denied on April 13, 2004 on the basis that whether the advertisements conveyed the alleged claims raised genuine issues of material facts requiring a trial on the merits.

The final prehearing conference was held on April 30, 2004. Trial in this proceeding commenced on May 4, 2004. The last day on which testimony was received was May 6, 2004. The parties subsequently filed post hearing briefs, proposed findings of fact and conclusions of law, and replies thereto. Closing arguments were heard on June 17, 2004.

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The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated June 18, 2004. This Initial Decision is filed within one year of the issuance of the Complaint and within ninety days of the close of the record, pursuant to Commission Rule 3.51(a).

D. Evidence

The Initial Decision is based on the transcript of the testimony, the exhibits properly admitted in evidence, and the briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties. Citations to specific numbered Findings of Fact in this Initial Decision are designated by "F." n1

n1 References to the record are abbreviated as follows:

CX -- Complaint Counsel Exhibit
RX -- Respondents Exhibit
JX -- Joint Exhibit
Tr. -- Transcript of Testimony before the Administrative Law Judge
Dep. -- Transcript of Deposition
CCPFF -- Complaint Counsel's Proposed Findings of Fact
CCRPFF -- Complaint Counsel's Response to Respondents' Proposed Findings of Fact
CCB -- Complaint Counsel's Post Hearing Brief
CCRB -- Complaint Counsel's Post Hearing Reply Brief
RPFF -- Respondents' Proposed Findings of Fact
RRPFF -- Respondents' Response to Complaint Counsel's Proposed Findings of Fact
RB -- Respondents' Post Hearing Brief
RRB -- Respondents' Post Hearing Reply Brief

This Initial Decision addresses only material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses

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thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. In re Amrep Corp., 102 F.T.C 1362, 1670 (1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 193-94 (1959).

II. FINDINGS OF FACT**A. Factual Background****1. Respondents**

1. Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani worked together on the marketing and distribution of the Ab Force product. (JX 1, P 6).

a. Telebrands Corporation

2. 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, P 2).

3. Telebrands was formed in 1987 as the successor to Direct Connection, which Ajit Khubani formed in 1983. (Khubani, Tr. 430).

4. Telebrands is in the business of developing, marketing, and distributing a wide variety of consumer products through direct response advertising. (Khubani, Tr. 431).

5. Telebrands either develops its own products or licenses the right to market products from inventors. (Khubani, Tr. 438).

6. Telebrands provided the financing necessary to perform media management services, credit card processing, customer response services, customs clearance, accounting, and bookkeeping services and acted as importer of record for TV Savings with respect to the Ab Force, as required under the

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Service Agreement between Telebrands and TV Savings. (JX 1, P 14).

b. TV Savings, L.L.C.

7. Respondent TV Savings, L.L.C. ("TV Savings"), a Connecticut limited liability company, was organized on January 22, 2002. (JX 1, PP 4, 5).

8. TV Savings has offices at 81 Two Bridges Road, Fairfield, New Jersey 07004. (JX 1, P 3). TV Savings shares office space with Telebrands. (Khubani, Tr. 282).

9. TV Savings was created to handle the Ab Force campaign. (Khubani, Tr. 282-83).

c. Ajit Khubani

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

11. Khubani's office is located at 79 Two Bridges Road, Fairfield, New Jersey 07004. (Answer, P 3).

12. Khubani has been involved in direct response television ("DRTV") since 1987 and has been involved with the direct response advertising industry since 1983. (Khubani, Tr. 434).

13. Khubani is a guest lecturer at Princeton University and belongs to the Electronic Retailing Association, where he served on the Board of Directors from 1999 to 2002. (Khubani, Tr. 430-31).

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

15. Khubani was appointed by Telebrands as the "Program Manager" pursuant to the Service Agreement dated January 22, 2002 between Telebrands and TV Savings. (JX 1, P 13). He was also TV Savings' representative under the Service Agreement. (JX 1, P 13). As the Program Manager appointed by Telebrands and

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as TV Savings' representative under the Service Agreement, Khubani represents both entities with regard to the responsibilities and duties of each under the Service Agreement. (JX 1, P 13).

16. Khubani was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign and was primarily responsible for the creation and development of the scripts for the Ab Force television and radio advertising of the Ab Force product. (JX 1, P 11; Khubani, Tr. 271-72). Khubani also set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, P 12).

2. The Direct Response Advertising Industry

17. Direct response advertising typically describes a product and offers the consumer a vehicle to order the product directly by telephone, by internet, or through a mailing address. (Khubani, Tr. 431-32). Unlike most traditional advertising, direct response advertising allows a consumer to order the product directly from the advertiser. (Khubani, Tr. 432).

18. The direct response industry is significant in scope and includes every form of advertisement to which a customer responds by ordering the product directly, including the internet, catalogues, direct mail, credit card inserts, print media, radio, and television. (Khubani, Tr. 434, 441).

19. DRTV advertising generally takes three forms. One is long form commercials, also called "infomercials." (Khubani, Tr. 432). These are usually program length commercials, typically 28 minutes, 30 seconds in length. (Khubani, Tr. 432). The second form is short form spot DRTV, which are commercials that are typically 30 seconds, 60 seconds, 90 seconds or 120 seconds in length. (Khubani, Tr. 432). The third form is live shows, many of which are broadcast twenty four hours per day, seven days a week. These include QVC, Home Shopping Network, and Shop NBC. (Khubani, Tr. 432-33).

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3. Telebrands' Marketing Practices and Techniques

20. Telebrands sells a variety of 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. 245-46; JX 1, P 2).

21. Telebrands has employed all three types of DRTV -- infomercials, short form, and live television -- but relies primarily on short form commercials. (Khubani, Tr. 433). Khubani testified that short form commercials are most effectively used to advertise simple products typically sold for twenty dollars or less. (Khubani, Tr. 433).

22. Telebrands has marketed hundreds of products throughout its history and has had a number of successful products that have sold three to fifteen million units each. (Khubani, Tr. 435) (successful products include: Ambervision Sunglasses, the Magic Hanger, Dental White Tooth Whitening System, the Safety Can Opener, the Audubon Singing Bird Clock, the Better Pasta Pot, and the Roll-a-Hose Flat Hose).

23. Telebrands uses a variety of strategies in determining whether to market a product. (Khubani, Tr. 438-43).

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

25. If Telebrands believes it has a competitive advantage and/or strategy for competing, Telebrands will compete with products already in the market. (Khubani, Tr. 439). Several times per year, Telebrands identifies existing popular products in the marketplace and enters the market as a competitor by offering a similar product at a lower price. (Khubani, Tr. 439-40).

26. Once Telebrands decides to market a product, it undertakes several steps to bring that product to the marketplace. (Khubani, Tr. 440-43).

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

28. Telebrands typically runs test ads for thirty to forty products per year; about ten percent of which it expects will be successful. (Khubani, Tr. 442-43).

29. This test advertising may take the form of print, radio, television, or direct mail advertising. (Khubani, Tr. 441).

30. Test advertisements are disseminated to the public for a limited period of time. (Khubani, Tr. 440).

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

32. Before a full-fledged, expensive nationwide campaign is rolled out, Telebrands undertakes a thorough review of its advertising and its acquisition plans so as to minimize risks of loss and ensure compliance with applicable regulations. (Khubani, Tr. 442). This includes a review of intellectual property, production plans, and a compliance review of any rollout advertising. (Khubani, Tr. 442).

33. The final legal review includes "final review of the TV commercial from a claims perspective and a compliance perspective" because "you don't want there to be any issues from any government agencies." (Khubani, Tr. 442). The substantiation for any claims that are made in the advertisements is also reviewed. (Khubani, Tr. 441).

4. The Ab Force Ab Belt

a. The Product

34. The Ab Force ab belt is comprised of a black elasticized belt; a thin, diamond-shaped pad measuring approximately nine by five inches that is purple on one side and silver/gray on the other; a warning and instruction label attached to the silver/gray

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side of the pad that divides the silver/gray side of the pad into two areas; and a small, battery powered control unit attached to the purple side of the pad. (Answer, P 6).

35. 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, P 15). Electronic muscle stimulation makes one's muscles contract involuntarily. (Khubani, Tr. 455, 505).

36. The Ab Force is designed so that some amount of electricity goes into the body. (Khubani, Tr. 506).

37. Khubani contacted an overseas manufacturer and, with that manufacturer, began to develop the ab belt product to be sold by Telebrands. (JX 1, P 19).

38. The manufacturer of the Telebrands ab belt product informed Khubani that it was also the manufacturer of the AbTronic ab belt, another EMS device. (Khubani, Tr. 264; JX 1, P 20).

39. The manufacturer informed Khubani that the Telebrands ab belt product would have the same power output as two other advertised ab belt products, the AbTronic and the Fast Abs belts. (Khubani, Tr. 266; CX 18). Khubani believed 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, P 20).

40. Khubani posed the question of technical comparability to the manufacturer because he wanted to make sure that his advertisements were truthful in saying that the Ab Force used the same technology as ab belts which sold "for as much as \$ 120." (Khubani, Tr. 266-67). The AbTronic sold for \$ 120 and was the ab belt to which Khubani was referring. (Khubani, Tr. 267).

b. Sales

41. Gross sales for the Ab Force, including accessories such as batteries and gels, exceeded nineteen million dollars. (JX 1, P 36).

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42. Respondents sold approximately 747,000 units of the Ab Force and consumers placed a total of 330,510 orders for the Ab Force. (JX 1, PP 25-26).

43. Each of the ads disseminated by Respondents for the Ab Force generated orders from consumers. (JX 1, PP 25-26).

44. The 60 second and 120 second test television commercials (AB-B-60 and AB-B-120, respectively) ran in January of 2002 and were cleared for broadcast nearly ninety-six times. (JX 1, P 24; RX 60).

45. Consumers placed 2,392 orders for the Ab Force by using the telephone number found in the 60 second test commercial. (JX 1, P 27). Consumers also placed 2,238 orders for the Ab Force by using the telephone number found in the 120 second test commercial. (JX 1, P 28; RX 61).

46. The final versions of the 60 second and 120 second television commercials for the Ab Force (AB-E-60 and AB-E-120, respectively) ran from January 19, 2002 until April 7, 2002. (JX 1, P 29).

47. The AB-E-60 and AB-E-120 versions of the television spots were cleared for broadcast 11,508 times. (JX 1, P 30). The Ab Force spots ran during all media day parts and appeared on cable, satellite, and broadcast television outlets in major national markets. (Khubani, Tr. 513; Answer, P 8).

48. Consumers placed 74,566 orders for the Ab Force using the telephone number displayed in the 120 second spot (AB-E-120) and 240,440 orders using the telephone number listed in the 60 second spot (AB-E-60). (JX 1, P 31; RX 61). This constitutes approximately ninety five percent of all orders placed. (JX 1, P 31; RX 61).

49. The radio advertisement ran from December 23, 2001 through January 23, 2002. (RX 61; Khubani, Tr. 272-73). The radio advertisement generated a total of 1,340 orders, 211 for the test spot, and 1,129 for the final radio spot. (Khubani Tr. 493-94; JX 1, P 32; RX 61).

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

51. The internet advertising ran from February 26, 2002 through April 6, 2002 and generated 2,663 orders in response, totaling less than one percent of all orders placed. (RX 61).

52. Respondents spent over four million dollars to televise commercials for the Ab Force. (Complaint, P 8; Answer, P 8).

53. Khubani set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, P 12).

c. Advertisements

54. Khubani wrote the scripts for the radio and print ads on December 18, 2001. (Khubani, Tr. 480-81, 488-89).

55. Khubani testified that he provided those two scripts to Collette Liantonio, the producer of the television advertisements, "so she would have a basis for writing her TV commercials." (Khubani, Tr. 482).

56. Liantonio has a regular working relationship with Telebrands. (RX 81 (Liantonio, Dep. at 26)). Her firm has produced more than a dozen television commercials for Telebrands. (RX 81 (Liantonio, Dep. at 26)).

57. Liantonio testified, however, that no one at Telebrands told her what the Ab Force was designed to do. (RX 81 (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. (RX 81 (Liantonio, Dep. at 30, 32-33)).

58. On December 22, 2001, the day the commercials were shot, Liantonio provided Khubani with a script which began with

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the statement: "do you wish you could get into shape fast without exercise? Wouldn't you love to have a flatter tummy without painful sit-ups?" (Khubani, Tr. 490).

59. Khubani rewrote Liantonio's scripts, creating two new scripts (AB-B-60 and AB-B-120) that were used to shoot the test ads. (Khubani, Tr. 490, 492-93). It was Khubani's regular practice to rewrite Liantonio's scripts. (RX 81 (Liantonio, Dep. at 36)).

60. Khubani testified that he did not want to make the express claims in Liantonio's scripts "because we didn't possess substantiation to make those claims." (Khubani, Tr. 490).

61. In addition to television, radio, and print advertising, Telebrands also created internet and email advertising. (JX 1, P 33).

62. The Ab Force advertisements ran from December 2001 through April 2002. (Answer, P 7; JX 1, PP 21-22).

63. Khubani believed the product category that included the AbTronic, Ab Energizer, and Fast Abs ab belts was "one of the hottest categories to ever hit the industry." (Khubani, Tr. 255; CX 61).

64. Khubani testified that he felt safe 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 asked the factory how the Ab Force compared to those ab belts and was told by the factory that the Ab Force had the same output as the AbTronic and the Fast Abs belts. (Khubani, Tr. 266, 540-41).

B. Claims Made in the Ab Force Advertising

1. Facial Analysis

65. The Ab Force advertisements expressly claim that the Ab Force is technologically comparable to other ab belts and that the Ab Force is significantly less expensive than those other ab belts. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

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66. The alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are not expressly made in the Ab Force advertisements. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

67. Khubani's intention regarding the advertising did not change from one draft to the other. (Khubani, Tr. 492, 498). For example, Khubani testified that "all these scripts were the same message" and that the "message was . . . still the same" even after changes were made to the scripts. (Khubani, Tr. 492, 496, 497, 498).

68. Each television commercial refers to the product name, includes visual images of primary models and stock footage, and includes oral and written statements. (JX 2; JX 3; JX 4; JX 5).

a. Product Name

69. Khubani testified that he selected 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).

70. The name Ab Force implies that the device applies a force to the abdominal muscles and also implies that use of the device will make the abdominal muscles more forceful. (See JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

71. In the short test ad, AB-B-60, the name Ab Force is mentioned three times and in the long test ad, AB-B-120, the name Ab Force is mentioned nine times. (JX 2; JX 3). Moreover, in both test ads, the name Ab Force appears on the screen in a large font size at least four times, not including the order screen. (JX 2; JX 3).

72. In the short rollout ad, AB-E-60, the name Ab Force is mentioned four times and in the long rollout ad, AB-E-120, the name Ab Force is mentioned ten times. (JX 4; JX 5). Moreover, in both rollout ads the name Ab Force appears on the screen in a large font size at least four times, not including the order screen. (JX 4; JX 5).

b. Visual Images**i. Primary Models**

73. The television advertisements all feature a female spokesperson, two female models, and a male model. (JX 2; JX 3; JX 4; JX 5).

74. The spokesperson is wearing a business suit; the male model is bare chested with exercise shorts or pants and both female models are wearing sports bras and exercise shorts or pants. (JX 2; JX 3; JX 4; JX 5).

75. Each model has abdomens that are bare except for the Ab Force. (JX 2; JX 3; JX 4; JX 5). Each model is thin with well-defined abs. (JX 2; JX 3; JX 4; JX 5).

76. There are over a dozen depictions of the models wearing the Ab Force and experiencing abdominal muscle contractions. (JX 2; JX 3; JX 4; JX 5).

77. In the longer test and rollout ads, the spokesperson indicates that she is wearing the Ab Force under her business suit, although it is not visible in the ads. (JX 3; JX 5) ("I'm wearing one right now, and it's working while I'm working.").

78. Khubani testified that he 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).

79. Liantonio and her employees at Concepts TV made handwritten notes in the course of creating television commercials for Ab Force. These notes indicate that Ab Force television models were required to wear sportswear and have great abdominal muscles. (CX 4; CX 5; CX 6).

80. A Concepts TV talent confirmation sheet for Ab Force states: "seeing your abs is important." (CX 6). A production job

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card for the Ab Force states: "girl with great abs." (CX 4). Another talent confirmation sheet for Ab Force states: "please have Abs looking their best!" (CX 5). For wardrobe, this talent confirmation sheet calls for a "selection of fitness outfits, a sports bra and bike shorts type look." (CX 5).

ii. Stock Footage

81. Khubani asked Liantonio to insert some stock visual images into the advertising as background for the spokesperson. (Khubani, Tr. 541-42, 553-54).

82. The stock footage selected for the commercials included dollar signs, falling numbers, and wheels of technology, which reinforced the message of lower price. (JX 2; JX 3; JX 4; JX 5). There is also stock footage of a spinning globe and an American flag. (JX 2; JX 3; JX 4; JX 5).

83. The stock footage also includes close-up images of a bikini-clad woman showing off her thin waist and well-defined abdominal muscles. (JX 2 (twice); JX 3 (twice); JX 4 (once); JX 5 (once)). The longer ads include a close-up image of a bare-chested, thin, well-muscled man performing a crunch. (JX 3; JX 5). In these stock images, the models are not wearing the Ab Force or any exercise belt. (JX 2; JX 3; JX 4; JX 5).

84. Liantonio testified that Ab Force television commercials contained these stock images of bikini-clad models because "it's a beautiful body," conveying "beauty, the ideal." (RX 81 (Liantonio, Dep. at 69)).

85. 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, Liantonio responded, "yes." (RX 81 (Liantonio, Dep. at 70)).

c. Statements

i. Oral Statements

86. The test radio ad contains the statement: "have you seen those fantastic Electronic Ab Belt infomercials on TV? They're

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amazing . . . promising to get our abs into great shape fast -- without exercise!" (CX 1 H). Khubani testified that this language was included in the test radio script while he was determining "what sounds the best." (Khubani, Tr. 489).

87. The "abs into great shape fast without exercise" language was eliminated from the rollout radio ad and was not included in any of the other ads, although Khubani stated that he felt the print ad and television commercials had the same message as the radio ad. (Khubani, Tr. 488-89, 492, 496, 498).

88. Khubani was asked "there's a reference in the radio ad to no exercise, and the subsequent radio ad did not have that reference. Do you recall that change?" to which he answered, "yes." (Khubani, Tr. 498). The next question asked "did you intend to change the meaning from one ad to the next?" to which Khubani answered, "no, I didn't." (Khubani, Tr. 498).

89. The test ads refer to the "latest fitness craze" while the rollout ads refer to the "latest craze." (JX 2; JX 3; JX 4; JX 5). However, Khubani testified that the message was still the same. (See Khubani, Tr. 495-96).

90. Khubani took out the word "fitness" during a "final review and legal review" and "based on discussions with counsel." (Khubani, Tr. 275, 278).

91. The rollout ads refer to the "same powerful technology as those expensive ab belts" and "same powerful technology as those ab belts sold by other companies," while the test ads state that the Ab Force is "just as powerful and effective" as other ab belts. (JX 2; JX 3; JX 4; JX 5).

92. The sentence "Ab Force is just as powerful and effective" was changed to "Ab Force uses the same powerful technology" during the legal and final review process, although according to Khubani "quite frankly, not that I thought that the other copy was inaccurate." (Khubani, Tr. 276).

93. The opening to the test commercials contain the 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

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problem is they're expensive, selling for up to \$ 120 each." (JX 2; JX 3; CX 1 B; Khubani Tr. 491).

94. Khubani testified that this language was included to serve as a point of reference for his price saving claims. (Khubani, Tr. 486-89).

95. Khubani also testified that this language was included to create excitement as part of an "everyone wants one" bandwagon effect. (Khubani, Tr. 491-92).

96. A "bandwagon effect" is a frequently observed phenomenon in advertising used to generate interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby, Tr. 373).

97. There are no oral statements in the television or radio advertisements about the purpose or effects of using the Ab Force. (JX 2; JX 3; JX 4; JX 5; CX 1 H).

ii. Written Statements

98. The words on the screen in the rollout ads include the name Ab Force, the price, and ordering information. (JX 4; JX 5).

99. While the announcer is discussing the price savings, the words that appear reinforce that message by stating: "Price of Electronics Comes Down; Mass Production; Factory Deal; Pass Savings On To You!" (JX 2; JX 3; JX 4; JX 5).

100. In the 60 second rollout ad, the phrase "RELAXING MASSAGE" flashes for a brief moment while the spokesperson says "capable of directing." The words then change to "10 INTENSITY LEVELS" while the announcer says "ten different intensity levels at your abdominal area." (JX 4; Khubani, Tr. 279).

101. In the 120 second rollout ad, the phrase "RELAXING MASSAGE" appears briefly while the spokesperson says "it is so comfortable that you can even wear it under . . ." (JX 5). As the words disappear, she finishes the sentence, saying ". . . your clothes." (JX 5).

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102. There are no other written statements in the advertisements about the purpose or effect of using the Ab Force. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

d. No Massage Claims Made

103. Telebrands prepared two User's Manuals to accompany the two different models of the Ab Force product. (Khubani, Tr. 499; RX 45; RX 46).

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

105. Consumers did not receive the Ab Force User's Manual until after they received the Ab Force ab belt. (Khubani, Tr. 551).

106. The television and radio scripts written by Khubani do not use the word "massage." (Khubani, Tr. 538; CX 1 H). The print, internet, and email ads Khubani wrote also do not use the word "massage." (CX 1 G; RX 50; RX 51; RX 52).

107. Operations Manager of CCT Marketing, Mark Golden, who worked on the Ab Force campaign, was never told that Ab Force was a massager. (Golden, Tr. 223).

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

109. None of the Ab Force advertisements used the term electrical muscle stimulation or "EMS." (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

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e. Surrounding Circumstances

i. The Ab Pulse Campaign

110. Ab Pulse was another ab belt marketed by Telebrands. (Golden, Tr. 191). Ab Pulse was similar in appearance to the Ab Force. (CX 2). The Ab Pulse was expressly described in the television advertisement as a "massaging ab belt." (Golden, Tr. 218; CX 2).

111. Elements of the television advertisements for the Ab Pulse were strikingly similar to elements in the television advertisements for the Ab Force. Both advertisements contained: identical oral statements regarding a cost savings from mass production and special deals with the factory; identical oral statements that "I'm wearing one right now and it's working while I'm working;" the identical written statement "Price of Electronics Comes Down; Mass Production; Factory Deal; Pass Savings On To You!"; the same stock images of falling numbers, wheels of technology, and the American flag; the same spokeswoman; and male and female models in sports clothing with abdominal area bare except for the ab belt. (CX 2; JX 2, JX 3; JX 4; JX 5).

112. The primary difference from the Ab Force advertisements was that the Ab Pulse ad affirmatively stated that Ab Pulse was unlike electronic ab belts sold through infomercials by: describing the product as "the most innovative massaging ab belt to hit the market," stating, "don't confuse the Ab Pulse with an electronic ab belt that you've seen on infomercials," and by showing a graphic of a red X superimposed on an ab belt displayed alongside the on-screen legend "infomercial ab belts." (Golden, Tr. 218-19; CX 2). In addition, there are express claims in the Ab Pulse ads that the belt is soothing and comfortable and the product is distinguished from other ab belts which "some people find uncomfortable." (CX 2).

113. Based on sales results, Khubani considered the Ab Pulse campaign a failure. (Khubani, Tr. 281). Ab Pulse was offered for about a month and did not receive high call volume. (Golden, Tr. 222).

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ii. Other Companies' Ab Belt Infomercials

114. Unlike the Ab Pulse advertising campaign, the four Ab Force televisions ads, the radio, print, and internet ads, and one of the email ads expressly referred to those "fantastic electronic Ab belt infomercials on TV." (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 49; RX 51; RX 52). The other Ab Force email ad expressly referred to "Ab belts sold by other companies on infomercials." (RX 50).

115. When Respondent Khubani wrote the script for the Ab Force radio, print, and television ads, and the text for the internet and email ads, he testified that he was attempting to create a "compare and save" advertisement and to establish a point of reference. (JX 1, P 11; Khubani, Tr. 486-87, 489-90).

116. Khubani testified that 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).

117. The AbTronic, Ab Energizer, and Fast Abs infomercials were among the ab belt infomercials to which Khubani was referring. (Khubani, Tr. 273-74).

118. 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, P 37).

119. 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; JX 3; JX 4; JX 5; JX 7; JX 8; JX 9; JX 10; Mazis, Tr. 60). The Fast Abs and the AbTronic resemble the Ab Force in the button configuration on the belts. (Khubani, Tr. 271).

120. The advertising for the AbTronic, Ab Energizer, and Fast Abs ab belts made express and strongly implied claims that consumers using these devices would lose weight, fat, and inches; gain well-defined abdominal muscles; and achieve such results without the need for exercise. (JX 7; JX 8; JX 9; JX 10; Mazis, Tr. 47-48).

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121. The television advertising for the AbTronic, Ab Energizer, and Fast Abs ab belts contained extensive footage of thin male and female models with well-defined abs wearing the belts over their abdominal areas. (JX 7; JX 8; JX 9; JX 10). These images were displayed on the screen while the infomercial hosts repeatedly represented that the devices caused weight, inch, or fat loss; caused well-developed abs; and were an effective alternative to regular exercise. (JX 7; JX 8; JX 9; JX 10).

122. 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;" "with systems like the AbTronic where we can stimulate these muscles and you do both things, both the system of losing some weight, losing those inches, and then firming and toning the muscles underneath, that muscle definition will, therefore, show through much better and give you better cosmetic improvement;" and "watch 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, Ex. 2 at 10-11, 14, 27, 39).

123. 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" and that "with a touch of a button, you can go from flab to rock-hard abs." (JX 8; CX 98, Ex. 2 at 3, 10, 11). 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;" "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;" and "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, Ex. 4 at 3, 4, 5).

124. The Fast Abs infomercial contained the following statements: "you'll drop four inches in the first 30 days. We guarantee it;" "in fact, just 10 minutes of Fast Abs is like doing

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600 sit-ups;" and "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, Ex. B at 11, 31, 53, 59; CX 100, Ex. D at 32, 63).

125. Infomercials for the AbTronic, Ab Energizer, and Fast Abs ab belts were aired frequently before and during much of the Ab Force campaign, according to the J.W. Greensheet. (CX 126; JX 1, P 37). The J.W. Greensheet is a DRTV industry publication published weekly by Jordan Whitney, Inc. (Khubani, Tr. 248-49).

126. Telebrands has subscribed to the J.W. Greensheet for about twelve years. (JX 1, P 18; Khubani, Tr. 249, 525). The J.W. Greensheet costs approximately \$ 250 per week. (Khubani, Tr. 249).

127. 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).

128. The J.W. Greensheet states that it 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. 288).

129. The AbTronic electronic ab belt appeared twenty four times in the Top 50 infomercial rankings published in the J.W. Greensheet reports between September 3, 2001 and March 4, 2002. (Towers, Tr. 296-97; CX 72 at T011047; CX 73 at T011036; CX 74 at T011025; CX 75 at T011014; CX 76 at T011001; CX 77 at T011160; CX 78 at T011145; CX 79 at T011129; CX 80 at T011112; CX 62 at T011098; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011406; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011349; CX 95 at T011503).

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130. The Ab Energizer infomercial appeared nineteen times in the Top 50 infomercial rankings published in the J.W. Greensheet reports between October 15, 2001 and March 4, 2002. (Towers, Tr. 297; CX 77 at T011161; CX 78 at T011145; CX 79 at T011129; CX 80 at T011112; CX 62 at T011098; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011407; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011350; CX 95 at T011504).

131. The Ab Energizer television spot appeared nineteen times in the Top 40 direct response spots rankings published in the J.W. Greensheet reports between October 15, 2001 and March 4, 2002. (CX 77 at T011163; CX 78 at T011147; CX 79 at T011131; CX 80 at T011114; CX 62 at T011100; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011339; CX 86 at T011327; CX 87 at T011315; CX 88 at T011301; CX 89 at T011287; CX 90 at T011409; CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011351; CX 95 at T011505).

132. Fast Abs infomercials appeared fifteen times in the Top 50 infomercial rankings published in the J.W. Greensheet reports between November 19, 2001 and March 4, 2002. (Towers, Tr. 298; CX 62 at T011099; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011406; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011349; CX 95 at T011503).

133. The Fast Abs television spot appeared fifteen times in the Top 40 direct response spots rankings published in the J.W. Greensheet reports between November 19, 2001 and March 4, 2002. (CX 62 at T011101; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011340; CX 86 at T011328; CX 87 at T011315; CX 88 at T011301; CX 89 at T011287; CX 90 at T011410; CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011352; CX 95 at T011506).

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134. 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. 305).

135. The Federal Trade Commission issued complaints against the advertisers of the Ab Energizer, Fast Abs, and AbTronic on May 7, 2002. (JX 1, P 46).

136. Television advertisements for Ab Force were ranked five times in the Top 40 television spot rankings published in the J.W. Greensheet between February 4, 2002 and March 4, 2002. (CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011351; CX 95 at T011505).

iii. Other EMS Device Advertisements

137. Respondents placed on the record promotional materials for eight EMS devices: (1) IGIA 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).

138. Khubani admitted that the EMS ab products being marketed at the time made a variety of statements, from weight loss and rock hard abs to relaxing massage, toning, and strengthening claims. (Khubani, Tr. 471-72).

139. The IGIA Electrosage is not an electronic ab belt and was advertised in spot advertising, not infomercials. (RX 72; Towers, Tr. 304). The IGIA Electrosage was advertised to provide a massage that would leave users "feeling refreshed, relaxed, and reenergized." (RX 72). From September 2001 through February 2002, the short spot for the IGIA Electrosage appeared approximately twenty times in the J.W. Greensheet Top 40 direct response spot rankings. (Towers, Tr. 304; CX 73 at T011038; CX 74 at T011027; CX 75 at T011016; CX 76 at T011003; CX 77 at T011162; CX 78 at T011147; CX 79 at T011131; CX 80 at T011114; CX 81 at T011100; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011339; CX 86 at

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T011327; CX 87 at T011315; CX 88 at T011301; CX 90 at T011409; CX 91 at T011395; CX 92 at T011381; CX 93 at T011367).

140. The Mini Wireless Massage System product is not an electronic ab belt and was advertised in spot advertising, not infomercials. (RX 73; Towers, Tr. 301, 304). The television commercial for the Mini Wireless Massage System promises a "soothing and relaxing massage" and promises to "relieve muscle pain, soreness, and stiffness." (RX 73; Khubani, Tr. 459). The television spot for the Mini Wireless Massage System did not appear in the Top 40 commercial spot rankings published in the J.W. Greensheet from September 2001 through February 2002. (CX 62; CX 72-CX 95).

141. The Accusage product is not an electronic ab belt. (RX 74; Towers, Tr. 301-02). The Accusage promises a "relaxing muscle massage." (RX 74). The Accusage was listed once in the Top 40 Direct Response Spots in the J.W. Greensheet for the weeks of December 24, 2001 (CX 86 at T011328) and January 14, 2002 (CX 88 at T011309).

142. 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" and "in fact, we'll guarantee you'll lose two inches from your waist in just two weeks, or your money back." (RX 75). Product testimonials in the Smart Toner ab belt commercial assert the loss of fifteen pounds, "a big reduction in body fat," and "over two inches lost in the waistline." (RX 75). The Smart Toner advertisement provided by Respondents was a short spot, not an infomercial. (RX 75). The television spot for the Smart Toner ab belt did not appear in the Top 40 commercial spot rankings published in the J.W. Greensheet from September 2001 through February 2002. (Towers, Tr. 302; see also CX 62; CX 72-CX 95).

143. The GymFitness advertisement mentions both massage and fitness, promising to "condition your muscles without working out;" offering "a relaxing massage;" promising to "work [] your abs and condition your muscles, toning them perfectly;" and repeatedly states that it is for use "when you can't get to the

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gym." (RX 76). The infomercial for the GymFitness ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings in the J.W. Greensheet from September 2001 through February 2002. (Towers, Tr. 302-03; see also CX 62; CX 72-CX 95).

144. The ElectroGym advertisement provided by Respondents was a short spot, not an infomercial. (RX 77). The ElectroGym product briefly appeared in an infomercial for the IGIA Electrosage. (RX 72). In this infomercial, the ElectroGym ab belt was offered as a "free gift" in connection with the sale of the IGIA Electrosage. (RX 72; Khubani, Tr. 451). This infomercial contains a statement that the ElectroGym ab belt offers "a great workout." (RX 72; Khubani, Tr. 451). The television spot for the ElectroGym appeared approximately eight times in the Top 40 commercial spot rankings in the J.W. Greensheet from September 2001 through February 2002. (Towers, Tr. 303).

145. The Slim Tron advertisements indicates that the product will "tone your muscles and [you will] get a great looking body," and indicates that users will lose three inches off their waist. (RX 78). The television spot for the Slim Tron ab belt appeared approximately three times in the Top 40 commercial spot rankings in the J.W. Greensheet from September 2001 through February 2002. (Towers, Tr. 303; see also CX 62; CX 72-CX 95).

146. The Slendertone Flex advertisement provided by Respondents was a short spot, not an infomercial. (RX 79). Slendertone Flex is an electronic ab belt. (RX 79). 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 states: "You mean I don't have to do sit-ups anymore?" and "9 in 10 users reported firmer, tighter abs." (Khubani, Tr. 447 (playing exhibit); RX 79). Television advertising for the Slendertone Flex ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings in the J.W. Greensheet from September

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2001 through February 2002. (See Towers, Tr. 305; CX 62; CX 72-CX 95).

2. Extrinsic Evidence

147. Complaint Counsel offered the expert opinion of Michael Mazis, Ph.D. to provide extrinsic evidence of the claims conveyed by the Ab Force ads. (Mazis, Tr. 35 et seq.; CX 58).

148. Mazis is Professor of Marketing at the Kogod School of Business, American University. (CX 58, P 2; Mazis, Tr. 37). He has been a faculty member at American University for over twenty years, serving ten years as chair of the Department of Marketing. (CX 58, P 2; Mazis, Tr. 37). For over a decade, he has taught undergraduate and graduate courses in marketing research and consumer behavior. (CX 58, P 2; Mazis, Tr. 37-38).

149. Mazis served as a consultant on advertising issues and consumer behavior for the FTC, Food and Drug Administration, Consumer Product Safety Commission, Department of Justice, U. S. Mint, Bureau of Alcohol, Tobacco, and Firearms, the State of California, and Warner-Lambert Pharmaceutical Company. (CX 58, PP 4-5).

150. Mazis is a member of the American Marketing Association and a member and former director of the Association for Consumer Research. (CX 58, P 6). 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, P 6; Mazis, Tr. 38).

151. Mazis has conducted hundreds of surveys and research studies. (Mazis, Tr. 38). Mazis has published over sixty articles in academic journals including 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, P 7; Mazis, Tr. 38).

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152. Respondents offered the expert opinion of Jacob Jacoby, Ph.D who severely criticized Mazis's analysis and conclusions. (Jacoby, Tr. 335 et. seq).

153. Jacoby holds an endowed chair at the Stern School of Business at New York University where he teaches research methodology and consumer behavior courses. (Jacoby, Tr. 336-37).

154. Jacoby served as a peer reviewer on the chapter on survey research evidence in the Reference Manual on Scientific Evidence published by the Federal Judicial Center and wrote the chapter on consumer psychology in the International Encyclopedia of the Social and Behavioral Sciences. (Jacoby, Tr. 337-39).

155. Jacoby served as president of the Association for Consumer Research and the Society for Consumer Psychology and is a fellow of both institutions and has received awards from the Association for Consumer Research and from the Society for Consumer Psychology for research excellence. (Jacoby, Tr. 339-40).

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

a. Mazis's Facial Analysis of the Ab Force Ads

157. Mazis opines that consumers took away from the Ab Force ads 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. (Mazis, Tr. 61-62).

i. Direct Effects Within the Four Corners of the Ab Force Ads

158. Direct effects within the four corners of the ad cause consumers to make inferences about Ab Force and take away implied claims. (Mazis, Tr. 66-67).

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159. "Even if you had never heard of an ab belt before, even if you didn't have any category beliefs about ab belts, you could see the ad and you could make inferences because there's certain implied claims in the ads." (Mazis, Tr. 66).

160. "Visual images are really more important than the verbal messages, because they really remain in people's memories." (Mazis, Tr. 59).

161. Direct effects in the challenged ads include the appearance of fit, trim models and the depiction of the Ab Force belt, itself, shown visibly pulsating the abdominal muscles of the models. (Mazis, Tr. 66-67).

162. Another direct effect is the name Ab Force which could have a double effect on consumers: "on the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words, it makes your abs noticeable, that they . . . are really well developed." (Mazis, Tr. 60).

ii. Indirect Effects of the Ab Force Ads

163. Mazis refers to the effects generated on consumers because of previous exposure to ab belts through either the infomercials for AbTronic, Ab Energizer, or Fast Abs, word-of-mouth about ab belts, and retail packaging for ab belts as "indirect effects" which cause consumers to develop an ab belt category of beliefs. (Mazis, Tr. 48, 65-66).

164. Mazis testified that these beliefs would cause consumers to associate ab belts with well-developed abs, losing inches, losing weight, and effective alternatives to exercise. (Mazis, Tr. 48). As a result of these indirect effects, Mazis opines that the Ab Force television spots contain implied claims that using Ab Force will result in well-developed abs and loss of inches around the waist. (Mazis, Tr. 61).

165. In identifying indirect effects that could shape and influence a consumer's category beliefs, Mazis reviewed and considered the Complaint and exhibits in this matter; transcripts and videotapes of the infomercials for AbTronic, Ab Energizer,

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and Fast Abs; and infomercial ranking reports for the AbTronic, Ab Energizer, and Fast Abs products. (Mazis, Tr. 120-21; CX 58, P 9).

166. Mazis testified that the ab belt category beliefs may be effected by 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, or by seeing the packaging for them on display in retail outlets. (Mazis, Tr. 64-65, 169-70). According to 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).

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

168. Mazis provided no empirical evidence that Ab Force advertisement viewers who happened to see the ads for AbTronic, Ab Energizer, or Fast Abs would remember or take away that information. (Mazis, Tr. 184).

169. Mazis's opinion is grounded in the psychological/consumer behavior theory of "categorization." (Mazis, Tr. 49, 156-57). 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).

170. The categorization theory is generally accepted in the field of consumer behavior. (Mazis, Tr. 49). A leading proponent of the theory, Mita Suján, published a well-known peer-reviewed article on the subject in the Journal of Consumer Research about fifteen years ago. (Mazis, Tr. 49).

171. According to Suján, the "basic premise [of the categorization approach] is that people naturally divide the world of objects around them into categories enabling an efficient

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understanding and processing of the environment. . . . If a new stimulus can be categorized as an example of a previously defined category, then the affect associated with the category can be quickly retrieved and applied to the stimulus." (CX 57 at 31).

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

173. While Respondents' marketing expert, Jacoby, testified that he was familiar with the theory and with Sujan's article, he did not agree with application of the theory to this case. (Jacoby, Tr. 344-45).

174. Jacoby testified that according to categorization theory consumers will form an understanding of categories and will place objects into categories, and thus will interpret and infer things about those objects. (Jacoby, Tr. 344).

175. Jacoby objected to the application of categorization theory to this case because, as presented by Sujan, categorization theory relies on the participants having a preexisting category of beliefs and there is no evidence that consumers have a preexisting ab belt category of beliefs. (Jacoby, Tr. 344-45).

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

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sufficient to trigger any category beliefs that consumers may have. (Jacoby, Tr. 367).

177. Jacoby indicated that in order to determine whether there was an impact on consumers, further research needs to be conducted. (Jacoby, Tr. 370-72).

178. Mazis, however, testified that four key elements in the Ab Force commercials would cause consumers to categorize the Ab Force with the AbTronic, Ab Energizer, and Fast Abs ab belts. (Mazis, Tr. 59-60). These four elements are: references in Ab Force ads to the other ab belts on television, the visual images of models with well-developed abs and slim bodies, the physical appearance of the Ab Force product which is similar to the other ab belts, and the similarity of the name Ab Force to the names of the other ab belts. (Mazis, Tr. 59-60).

179. When asked at trial whether he should have considered other EMS ab products in reaching his opinions, Mazis testified that while consumers would form a category belief based on seeing EMS ab belts, they would not include in that category other EMS ab products unless they were "relatively similar" in appearance. (Mazis, Tr. 135-36).

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

181. Mazis indicated that there "might be a different category" established for products that looked different (for example, products that had wires) and that made some different claims. (Mazis, Tr. 136).

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182. Mazis admitted that his opinion that the only ab belts in the ab belt category would be ones that looked the same and made the same claims "is a theory, this is a model" and that he had conducted no quantitative testing of this theory. (Mazis, Tr. 136-37).

183. Mazis was never provided with advertisements or products, nor did he review advertisements or retail packaging, for any other EMS ab product. (Mazis, Tr. 123-24, 134).

184. Mazis testified that he did not know how many consumers would have been exposed to the ads for AbTronic, Ab Energizer, or Fast Abs. (Mazis, Tr. 128, 182-83). Indeed, Mazis had no opinion about the likelihood that somebody who saw the Ab Force commercials would also have seen one of the ads for AbTronic, Ab Energizer, or Fast Abs, because he had "no information on that." (Mazis, Tr. 172).

185. Mazis testified that, through the process of selective attention, people who have an interest in certain product categories such as those relating to losing weight or exercise, e.g., the target audience, will pay attention to commercials for such products. (Mazis, Tr. 172-73). Thus, based on his knowledge of consumer behavior and how people watch television, if there is a propensity for people to watch one ab belt infomercial, there is a propensity for those same people to selectively attend to other such advertising. (Mazis, Tr. 173).

186. Mazis relied on his "assumption that there's a lot of exposure to a lot of these different products," because these infomercials ran "on weekends, late nights and so on, when there aren't a lot of programming choices out there." (Mazis, Tr. 172-73). This assumption, however, ignores his own testimony that spot advertising may not necessarily run at the same time or on the same stations to which infomercials are limited. (Mazis, Tr. 131-32).

187. Even if there was significant overlap between the Ab Force ad viewership and the viewership for AbTronic, Ab Energizer, and Fast Abs infomercials, Mazis admitted that it was not certain that the viewers who were exposed to the ads would

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have necessarily retained or even comprehended the ads. (Mazis, Tr. 172). He testified that retention would depend on "a lot of factors that go into that," none of which he described or demonstrated applied in this case. (Mazis, Tr. 172).

188. Mazis admitted that he had seen no empirical data about the ability of viewers to remember what they saw in the infomercials for AbTronic, Ab Energizer, and Fast Abs. (Mazis, Tr. 184). He conceded that his opinions "about the take-away from those ads are just based on my facial analysis of those ads." (Mazis, Tr. 184).

189. Mazis did not know what messages were being conveyed by advertisements or packaging for other EMS ab products. (Mazis, Tr. 167-71). Mazis did not know what messages were being conveyed by word-of-mouth communication. (Mazis, Tr. 169-70). Mazis did not know what other print or radio advertisements were being disseminated. (Mazis, Tr. 181-82). Indeed, Mazis admitted that when he referred to category beliefs, he was referring only to "ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer, and Fast Abs]." (Mazis, Tr. 171-72).

190. Despite having no reliable information regarding how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired, Mazis stood by his belief that "many consumers would have been exposed to these ads." (Mazis, Tr. 166).

191. Because Mazis failed to test the theory that consumers necessarily formed or retained categorization beliefs about EMS ab products prior to viewing the Ab Force ads, or whether they even saw any of the ads for AbTronic, Ab Energizer, or Fast Abs prior to seeing the Ab Force ads, Mazis's opinion that there was categorization by consumers is merely speculation, not evidence of the association. (Jacoby, Tr. 347-51).

192. Mazis's assumption that consumers who saw the Ab Force ad also likely saw the ads for AbTronic, Ab Energizer, and Fast Abs is mere speculation that was untested in this matter. (Jacoby, Tr. 367). Mazis's opinion that consumers actually

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developed categorization beliefs is mere untested speculation. (Jacoby, Tr. 347-51).

b. The Copy Test

193. Mazis conducted a consumer survey in which he designed a copy test of an Ab Force television spot. (Mazis, Tr. 67).

194. 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).

195. 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, P 22).

196. 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. (Mazis, Tr. 151-52). Showing consumers the ad and getting their immediate response is the more valid means of measuring the way consumers perceive the ad. (Mazis, Tr. 151-52).

197. Mazis designed the study, and the contractor for the study, U.S. Research, collected the data. (Mazis, Tr. 67).

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

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i. The Universe for the Copy Test Was Properly Defined

199. 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, P 24).

200. 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).

201. Copy test interviews were conducted in December, 2003 and January, 2004. (CX 58, P 25).

202. 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).

203. Interviewers used a screening questionnaire ("screener") designed by Mazis to determine whether potential respondents were qualified to participate in the study. (Mazis, Tr. 68; CX 58, P 26; CX 58, Ex. C).

204. Age and sex quotas for copy test survey participants were based upon the results of a 1996 survey of consumers who were trying to lose weight and which was published in the October 13, 1999 issue of the Journal of the American Medical Association. (Mazis, Tr. 71-72; CX 58, P 23).

205. The survey called for a survey universe of sixty percent females, forty percent males with twenty percent 18-29 years of age, forty five percent 30-49 years of age, and thirty five percent 50 years of age and older. (Mazis, Tr. 71-72; CX 58, P 23).

206. The screener asked both "inclusion" questions and "exclusion" questions. (Mazis, Tr. 73-76; see CX 58, P 26). These questions 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).

207. The questionnaire screened out people who worked for an advertising agency, a public relations firm, or a marketing

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research firm because they would have specialized knowledge of research technique. (Mazis, Tr. 75; CX 58, Ex. E).

208. Likewise, the questionnaire 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 because such people would have specialized knowledge about fitness, 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; CX 58, Ex. E).

209. In order to qualify for the study, potential survey participants had to have purchased in the past twelve months a product or used a service to help them lose weight, tone muscles, or massage the body. (CX 58 at 26; Mazis, Tr. 73-74). 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). Jacoby opined that this particular question was appropriate. (Jacoby, Tr. 353-54).

210. In addition, potential respondents, in the past twelve months, had to have purchased a product by calling a toll-free number that was included in a television ad, program, or infomercial. (CX 58, P 26; Mazis, Tr. 74-75). Consumers who never bought products by calling toll free numbers in response to television ads, programs, or infomercials would be unlikely purchasers of the Ab Force. (Mazis, Tr. 75).

211. The screening questionnaire did not ask about prior purchases of ab belts. (Mazis, Tr. 152).

212. The screening questionnaire did not ask about whether people had been exposed to advertising for ab belts. (Mazis, Tr. 153-54).

213. The screening questionnaire also included "masking" questions regarding working for companies that sell personal computers or prescription drugs 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; CX 58, Ex. E).

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ii. The Control Advertisement

214. Survey respondents who qualified to participate in the study were randomly assigned to either a test group or a control group. (CX 58, PP 12, 27). The test group (consisting of 182 survey respondents) watched a version of the Ab Force ad (CX 104) that Respondents aired most often (AB-E-60). (Mazis, Tr. 79; CX 58, PP 12, 27). The control group (consisting of 220 survey respondents) saw an advertisement created by Mazis (CX 105) that was a "cleansed" (60 second) version of one of the 120 second rollout commercials for Ab Force. (Mazis, Tr. 83; CX 58, P 28).

215. "Use of a control group is an attempt to essentially remove preexisting beliefs as a possible cause of the results we see." (Mazis, Tr. 157).

216. A "cleansed" or control ad may have allegedly misleading elements removed and/or a statement correcting the alleged deception. (CX 58, P 28).

217. In the control ad, the mention of ads for other electronic abdominal belts advertised on television was removed, the stock images of a woman in a bikini and a man performing a crunch were removed, and some, but not all, images of models wearing the Ab Force were removed. (CX 105).

218. The control ad did not eliminate the elements which Mazis indicated were direct effects that convey the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. (See F. 158-62).

219. The control ad includes three images of the female and male model with well-defined abs, wearing the Ab Force and sports clothing, and experiencing muscle contractions. (CX 105).

220. In the control ad, the name Ab Force is stated verbally six times. (CX 105).

221. The results for the control ad "are relatively high numbers for a control ad" which Mazis attributes to preexisting beliefs about ab belts. (Mazis, Tr. 108).

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iii. The Questions Were Unbiased and Appropriate

222. The control ad included the following statement at the end of the commercial: "Ab Force for a relaxing massage" which appeared on the screen and was read by an announcer. (Mazis, Tr. 88-89; CX 58, P 28).

223. 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).

224. Approximately one half of the survey respondents were administered questionnaire version Version 1A and the other half Version 1B. (Mazis, Tr. 92). 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, P 29).

225. 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. (Mazis, Tr. 91-92). 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, P 30).

226. Survey participants were assigned to the test group or the control group at random. (Mazis, Tr. 90).

227. Each survey participant saw the test ad or the control ad twice before the questionnaire was administered. (CX 58, P 31; Mazis, Tr. 92).

228. Survey participants were asked to identify the brand name of the product that was advertised in the commercial they had just seen. (CX 58, P 31). The eighty one survey participants who were unable to identify the sponsor were not asked any of the subsequent questions and were eliminated from the study. (Mazis, Tr. 93, 147-48; CX 58, P 31).

229. Mazis testified that the failure of eighty one participants to recall the name of the product indicated to him that those

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participants were not paying attention to the ad, which he considered a good reason not to include them in the final result. (Mazis, Tr. 147).

230. Eliminating inattentive participants from the survey, although not required, was not unreasonable because inattentive survey respondents may have been unlikely to give meaningful responses to the ensuing questions. (See Mazis, Tr. 94).

231. The remaining participants were then asked an open-ended question: "what did the commercial say, show, or imply about Ab Force?" (CX 58, P 32).

232. Open-ended questions are questions in which there are no defined answer categories. (Mazis, Tr. 95) ("People just give the answer in their own words, and the interviewer records that response verbatim.")

233. Question 4 asked respondents whether the commercial said, showed, or implied that Ab Force improves users' appearance, fitness, or health. (CX 58, P 33). Participants 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, P 33). This is a "filter" question designed to reduce guessing to subsequent questions. (CX 58, P 33).

234. Only participants who answered question 4 in the affirmative were asked the ensuing close-ended questions. (CX 58, P 33; Mazis, Tr. 95).

235. The purpose of the filtering question was to eliminate participants who might be prone to guess in answering subsequent closed-ended questions. (Mazis, Tr. 95; CX 58, P 33). If participants did not see a fitness, health, or appearance claim in the commercial, their answers to the more specific questions would not be very reliable. (Mazis, Tr. 95).

236. Question 5 began with participants 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 the Ab Force commercial. (Mazis, Tr. 95-96).

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237. 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, P 34; Mazis, Tr. 96).

238. 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 34; Mazis, Tr. 97-98).

239. The three other statements (regarding stomach ulcers, nausea, and blood pressure) were included to mask the intent of the study. (CX 58, P 34). Mazis explained that these were included to assure that participants were paying attention and not just saying yes to every question. (Mazis, Tr. 97).

240. After each statement was read to participants, 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, P 34).

241. Question 6 asks "does or doesn't the Ab Force commercial say, show, or imply that the Ab Force gives users a massage?" (Mazis, Tr. 98). Mazis explained that this question was included in anticipation of Respondents' claim that their ads conveyed a massage claim. (Mazis, Tr. 98).

242. 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).

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243. Question 7 asks whether, in the last thirty days, respondents had seen, read, or heard a news story or stories featuring an abdominal device. (Mazis, Tr. 100).

244. Question 7 was added just before the study was about to go into the field and was prompted by recent news accounts on television discussing an FTC action regarding companies making weight loss claims with depictions of ab belts. (Mazis, Tr. 99).

245. 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, P 36).

246. Forty-one 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, P 41; Mazis, Tr. 100).

247. These survey participants were removed out of prudence to avoid potential bias due to the recent news stories. (Mazis, Tr. 154-56).

248. 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 had been filled out properly and for possible mistakes in the way the interview was administered. (Mazis, Tr. 101).

249. 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, P 40).

250. 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, PP 40-41).

251. As a result of the validation process, 171 survey respondents were eliminated from the database. (CX 58, P 41). Most of the people were removed because they said that they hadn't purchased a product from an 800 number. (Mazis, Tr. 101).

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252. After validation, Mazis removed the questionnaires of the forty one people 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, P 41; Mazis, Tr. 100, 154-56).

253. Mazis also did not include the eighty one 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, P 41).

254. Therefore, 389 questionnaires were included in the data tabulations. (CX 58, P 41).

iv. Results

255. Copy test results were reported in total percentages, and then in terms of statistical significance. (CX 58).

256. Under 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, P 38; CX 58, Ex. F; Mazis, Tr. 104). Two independent coders, who were unaware of the study's purpose, coded the responses to the open-ended question. (Mazis, Tr. 102).

257. The responses to this open-ended question reveal that 22.3% of survey respondents in the test ad group and 11.9% of the survey respondents in the control group indicated that the advertisement communicated that using Ab Force results in well-defined abdominal muscles, in loss of weight or inches around the waist, or in an improved physique. (CX 58, P 42; Mazis, Tr. 104-05).

258. 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). 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). That result was statistically significant at the .01 level. (Mazis, Tr. 107).

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

260. For the statement that using Ab Force removes fat deposits, 22.9% of the test group and 19.0% of the control group responded affirmatively. (Mazis, Tr. 107). The net difference between the test group and the control group of 3.9% was not statistically significant. (Mazis, Tr. 107).

261. To the statement that using Ab Force results in well-defined abdominal muscles, 65.4% of the test group and 48.1% of the control group responded affirmatively. (Mazis, Tr. 106). The net difference between the test group and the control group for the well-defined muscles statement was 17.3%. (Mazis, Tr. 106). That result was significant to the .001 level. (Mazis, Tr. 106).

262. 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). The net difference between the test group and the control group for the lose inches around the waist statement was 10.5%. (Mazis, Tr. 107). That result was statistically significant at the .05 level. (Mazis, Tr. 107).

263. The following chart summarizes the affirmative responses to each of the five key closed-ended statements posed in Question 5:

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Using Ab Force . . .	TEST AD	CONTROL AD
Results in well-defined abdominal muscles	117 (65.4%)	101 (48.1%)
Causes users to lose inches around the waist	104 (58.1%)	89 (42.4%)
Causes users to lose weight	77 (43.0%)	59 (28.1%)
Is an effective alternative to exercise	70 (39.1%)	60 (28.6%)
Removes fat deposits	41 (22.9%)	40 (19.0%)
Lowers blood pressure	9 (5.0%)	6 (2.9%)
Relieves nausea	2 (1.1%)	4 (1.9%)
Relieves pain from stomach ulcers	0 (0%)	9 (4.3%)

(CX 58, P 47).

264. If the maximum percent of participants who responded affirmatively to the control questions is subtracted from the percent responding affirmatively to the tested ad, then the claims at issue were found by 60.4% (well-defined abdominal muscles); 53.1% (lose inches around the waist); 38% (lose weight); 34.1% (alternative to exercise) and 17.9% (removes fat deposits). (See F. 258-63, 267-69).

265. The level of affirmative responses for the control ad was 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, P 45).

266. Mazis 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, P 45).

267. None of the test group and only 4.3% of the control group answered yes to the statement about stomach ulcers. (CX 58, Ex. H at 12).

268. To the statement about relieving nausea, only 1.1% of the test ad participants and 1.9% of the control ad participants answered yes. (CX 58, Ex. H at 15).

269. 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, Ex. H at 17).

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C. The Ab Force Does Not Cause Loss of Weight, Inches, or Fat; Does Not Cause Well-Defined Abdominal Muscles; and Is Not an Effective Alternative to Regular Exercise

270. Use of the Ab Force does not cause loss of weight, inches, or fat. (JX 6, P 16)

271. Use of the Ab Force does not cause well-defined abdominal muscles. (JX 6, P 17)

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

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

D. Claims That Use of the Ab Force Causes Loss of Weight, Inches, or Fat; Causes Well-Defined Abdominal Muscles; and Is an Effective Alternative to Regular Exercise Are Material to Consumers

274. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise relate to the central purpose of the Ab Force and are material to consumers. (See F. 97, 102-109).

275. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise involve appearance, fitness, or health claims and are material to consumers. (See CX 58).

III. ANALYSIS AND CONCLUSIONS OF LAW**A. Preliminary Issues****1. Jurisdiction**

The Complaint charges Respondents with violating Sections 5 and 12 of the FTC Act. 15 U.S.C. § § 45, 52. Section 5(a)(2) of

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the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *American Fin. Services Assoc. v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985); *Koch v. FTC*, 206 F.2d 311, 315 (6th Cir. 1953)). The Ab Force ab belt, an EMS device which uses electronic stimulation of the muscles, is a device within the meaning of Section 15 of the FTC Act which defines "device" as including "an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . intended to affect the structure or any function of the body of man." 15 U.S.C. § 55(d). Respondents engaged in a nationwide advertising campaign to offer for sale and sell the Ab Force. F. 41-53. Respondents were engaged in and affected commerce, as "commerce" is defined in Section 4 of the FTC Act. 15 U.S.C. § 44. Respondents do not dispute that the acts and practices of Respondents challenged in the Complaint have been and are now in or affecting commerce, as "commerce" is defined in the FTC Act, or that the Federal Trade Commission has jurisdiction in this proceeding. RRPFF at 157, 159. Accordingly, the Commission has jurisdiction over Respondents and the subject matter of this proceeding.

2. Burden of Proof

Under Commission Rule of Practice 3.51(c)(1), "an initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1). The Commission made amendments to its Rules of Practice, effective May 18, 2001. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622 (April 3, 2001). Through these amendments, the Commission removed the requirement of Rule 3.51(c)(3) that the initial decision of an Administrative Law Judge ("ALJ") be supported by "substantial" evidence. 66 Fed. Reg. at 17,626. The Administrative Procedure Act, however, requires that an ALJ may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable,

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probative, and substantial evidence." Administrative Procedure Act ("APA") 5 U.S.C. § 556(d). According to Black's Law Dictionary, "probative evidence" means having the effect of proof; tending to prove, or actually proving an issue. "Substantial evidence" is defined in Black's Law Dictionary as such evidence that a reasonable mind might accept as adequate to support a conclusion. At the adjudicative level of these proceedings, any difference between "probative" evidence and "substantial" evidence is not dispositive under these standards. Therefore, all findings and conclusions in this Initial Decision are supported by reliable, probative, and substantial evidence.

The parties' burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the APA, and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), "counsel 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). Under the APA, "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). See also *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings). The preponderance of the evidence standard has been used in false advertising cases. See, e.g., *In re Peacock Buick, Inc.*, 86 F.T.C. 1532; 1975 FTC LEXIS 4, *46-48 (1975).

For these reasons, Complaint Counsel's case in this proceeding shall be adjudicated under the preponderance of evidence standard.

B. Analytical Framework

The FTC Act makes it unlawful to engage in unfair or deceptive practices or to induce consumers to purchase certain products through advertising that is misleading in a material respect. 15 U.S.C. §§ 45, 52, 55. An "advertisement is deceptive under the Act if it is likely to mislead consumers, acting

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reasonably under the circumstances, in a material respect." *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); see also *Pantron*, 33 F.3d at 1095; *In re Thompson Medical*, 104 F.T.C 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). "In implementing this standard, the Commission examines the overall net impression of an ad and engages in a three-part inquiry: (1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers." *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); accord *Kraft*, 970 F.2d at 314.

The Complaint alleges that the Ab Force advertisements made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise; that these claims are false and misleading; and that these claims are material to consumers. Complaint PP 19-23.

1. Whether the Claims at Issue Are Conveyed in the Ad

To prove its case, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would likely interpret the message of the advertisement to have conveyed the alleged claims. See *In re Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000). Claims may be either express claims or implied claims. *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992); *Thompson Medical*, 104 F.T.C. at 788.

An advertisement may convey numerous representations, and the same advertising elements may be amenable to more than one reasonable interpretation. *Kraft*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7. Thus, the representation(s) alleged in the Complaint need not be the only reasonable interpretation(s) of the challenged advertising; an advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Kraft*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7, 818; *In re Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984).

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Moreover, evidence that consumers have actually been misled is not necessary; the likelihood of deception is the standard by which the advertising is judged. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687, 687 n.9 (3d Cir. 1982); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984).

In determining whether the asserted claims were made, the advertising, itself, is reviewed in a facial analysis. If it can be determined with confidence from the facial analysis that the claims appear in the advertising, then resort to extrinsic evidence of those claims is unnecessary. *Novartis*, 127 F.T.C. at 680; *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789. If, however, the claims are not self-evident or reasonably apparent on the face of the advertising, then extrinsic evidence that the advertising made the asserted claims will be considered. *Novartis*, 127 F.T.C. at 680; *Stouffer*, 118 F.T.C. at 798-99; *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789; *Bristol-Myers*, 102 F.T.C. at 319.

a. Facial Analysis**i. Express Claims**

Express claims directly state the representation at issue. *Kraft*, 114 F.T.C. at 120; *Thompson Medical*, 104 F.T.C. at 788. In this case, the Ab Force advertisements expressly claim that the Ab Force is technologically comparable to other ab belts and that the Ab Force is significantly less expensive than other ab belts. F. 65. These price savings and comparable technology claims were made by oral and written statements that were reinforced by visual images in the advertisements. F. 82, 99. The alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are not, however, expressly made in the Ab Force advertisements. F. 66. Indeed, the purpose of the Ab Force is never expressly identified in any of the advertisements. F. 97, 102. Therefore, to determine whether the claims alleged in the Complaint were made in the advertisements, an analysis of whether the alleged claims are implied must be undertaken.

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ii. Implied Claims -- from Four Corners

Implied claims are any claims that are not express. Kraft, 114 F.T.C. at 120. Implied claims range on a continuum from claims that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.* (quoting Thompson Medical, 104 F.T.C. at 789); accord Novartis, 127 F.T.C. at 680. Implied claims will only be found where it may be determined with confidence, after examining all of the constituent elements of the advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad. Kraft, 970 F.2d at 318-20; Thompson Medical, 104 F.T.C. at 320.

An advertisement will only be found to contain implied claims where the "language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances." Kraft, 114 F.T.C. at 121; Thompson Medical, 104 F.T.C. at 789. However, "if, based on [an] initial review of the evidence from the advertisement itself, we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable." Kraft, 114 F.T.C. at 121 (citing Thompson Medical, 104 F.T.C. at 789; Bristol-Myers, 102 F.T.C. at 319).

Such facial interpretation must be based upon the overall net impression of the advertisement, taken as a whole. Kraft, 970 F.2d at 314, 319. The determination must be made based on the "net impression created by the interaction of different elements in a given ad, not [based on] the elements by themselves." Thompson Medical, 104 F.T.C. at 793 n.17. A facial analysis does not involve the effect of individual words, phrases, or visual images. See Thompson Medical, 104 F.T.C. at 793, n.17. In this

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case, the product name, visual images, and statements all contribute to the overall net impression of the advertisements, taken as a whole.

A product name may play a role in implying a claim. E.g., *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 609 (1946) (addressing order where name "Alpacuna" implied that the product contained vicuna); *Thompson Medical*, 104 F.T.C. at 793 (name "Aspercreme" implied that product contains aspirin). Upon a facial review of the challenged Ab Force advertisements, the Court determines that the name Ab Force conveys the impression that the device works on the abdominal muscles -- either because it applies force to the abs or because it makes the abs more forceful. See F. 162. As Khubani admitted, the name Ab Force was selected because "the product was designed to work primarily on the abdominal area." F. 69. That Khubani also claims he chose the name because of the play on "Air Force" does not preclude other interpretations. See *Kraft*, 114 F.T.C. at 120; *Thompson Medical*, 104 F.T.C. at 789. While the name Ab Force, alone, would not be sufficient to imply a claim, in combination with the visual images and words used, it contributes to the overall net impression that use of the Ab Force confers health, weight loss, exercise, or fitness benefits.

Visual images are effective in conveying claims and may also be used to determine implied claims. See, e.g., *Kraft*, 114 F.T.C. at 322; see also F. 160. The visual images in the Ab Force television commercials consist of shots of the spokesperson, over a dozen shots of three models, and stock footage. F. 73-85. The three models are wearing exercise clothing and each model is thin, with well-defined abs. F. 74-75. Each model has an abdomen that is bare, except for wearing the Ab Force. F. 75. During the ads, each model can be seen experiencing abdominal muscle contractions. F. 76. Stock footage includes, inter alia, a close-up image of a bikini-clad woman showing off her thin waist and well-defined abdominal muscles. F. 83. The longer ads also include a close-up of a bare-chested, thin, well-muscled man performing a crunch on an exercise bench. F. 83. In this stock footage, the models are not wearing the Ab Force. F. 83. These visual images strongly convey the impression that the Ab Force is

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designed to provide health, weight loss, fitness, or exercise benefits.

Statements contained in advertisements may also be used to determine implied claims. See, e.g., Kraft, 114 F.T.C. at 322. The statements in the challenged Ab Force advertisements are both oral and written on the screen. F. 86-102. The test radio ad opened by referring to other ab belt infomercials, stating that they "promise to get our abs into great shape fast -- without exercise." F. 86. When asked whether he intended to change the meaning in the rollout radio ad (which did not include the "no exercise" language), Khubani said that he did not. F. 87-88. The test television and radio ads make statements that refer to the "latest fitness craze." F. 89. Although the rollout television ads only refer to the "latest craze," Khubani testified that the message was still the same. F. 89. Khubani testified that the word "fitness" was taken out during a "final review and legal review." F. 90. In addition, the phrases "powerful technology" and "just as powerful and effective" conspicuously imply that the Ab Force does something "powerful" and "effective" to the abdominal muscles. See F. 91-92. These phrases -- "abs into great shape fast -- without exercise," "latest fitness craze," "latest craze," "powerful technology," and "powerful and effective" -- strongly and clearly imply that the Ab Force is, inter alia, a fitness or exercise device, and convey the impression that the Ab Force is designed to provide health, weight loss, fitness, or exercise benefits.

Respondents seemingly argue that the Ab Force advertisements made massage claims as well as price savings and comparable technology claims. See RPFF at 24-25. Although the phrase "relaxing massage" is briefly flashed on the screen, it is too brief and non-specific to put consumers on notice that the device is intended merely or exclusively for massage. The "relaxing massage" phrase is displayed in connection with a discussion of the ten intensity levels in the short rollout ad and in the context of the belt's comfort in the long rollout ad. F. 100-01. If the consumer noticed the phrase, it would be reasonable to conclude that "relaxing massage" was but one of the ten available power settings of the device or that the Ab Force included a relaxing, comfortable setting. Indeed, other EMS devices

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explicitly advertise that some available settings provide a massage, while other EMS device ads combine claims of massage with claims of weight loss, fitness, or muscle development. F. 137-46. Thus, the single, momentary phrase "relaxing massage" does not offset or counter the numerous oral and printed statements, in combination with the name and visual images, which contribute to the overall net impression that use of the Ab Force causes loss of inches, weight and fat; causes well-defined abs; and is an effective alternative to regular exercise.

If there is an intended purpose or effect of using the Ab Force other than losing inches, weight, and fat; building well-defined abs; or being an effective alternative to regular exercise, that purpose or effect was never identified in any of the Ab Force advertisements. See F. 97, 102. Indeed, the only evidence of the purpose for which the Ab Force is intended is the statements in the instruction manual that consumers received after purchasing the product. F. 103-09. In this case there are no words, phrases, or visual images that effectively counter the implication that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. See F. 65-109. Such an absence of any identified purpose may be considered in determining an ad's claims. *Thompson Medical*, 104 F.T.C. at 648 (noting "the absence of any elements giving a contrary impression, such as express disclosures").

The overall net impression of the product name, visual images, and statements in the four corners of the challenged Ab Force advertisements is conspicuous, self-evident, and reasonably clear so that the Court may conclude with confidence that the advertisements convey the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. This conclusion is based solely upon an assessment of the interaction of all of the constituent elements, or the net impression created by the advertisements, without reference to ads for other ab belts or the need for extrinsic evidence. An analysis of the surrounding circumstances behind the development of the challenged ads contributes to this facial analysis.

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iii. Implied Claims -- from Surrounding Circumstances

The "circumstances surrounding" advertising, including the advertiser's intent, may be considered in false advertising cases. *Thompson Medical*, 104 F.T.C. at 789; *Novartis*, 127 F.T.C. at 683. "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*, 127 F.T.C. at 683. In this case, Respondents' intent to make the alleged claims is demonstrated from an examination of Respondents' prior experience marketing another ab belt, the Ab Pulse, and from the process of drafting the Ab Force advertisements. In addition, although the existence of advertising for other ab belts is appropriate to consider as part of the surrounding circumstances, the impact on consumers of the advertising for other ab belts is not clear and cannot be determined on a facial analysis.

The record shows that Khubani decided to enter the ab belt market after noticing a mention of the AbTronic in industry market reports and after determining that ab belts, including AbTronic, Ab Energizer, and Fast Abs, were "one of the hottest categories to ever hit the industry." F. 63. The Ab Pulse was a "massaging ab belt" marketed by Telebrands. F. 110. The Ab Pulse was similar in appearance to the Ab Force and the advertisements for the Ab Pulse were strikingly similar to the advertisements for the Ab Force in making claims of cost savings. F. 111. The Ab Pulse television commercial differed from the Ab Force commercials by distinguishing it from other ab belts by: stating "don't confuse the Ab Pulse with an electronic ab belt that you've seen on infomercials;" by showing a graphic of a red X superimposed on an ab belt displayed alongside the on-screen legend "infomercial ab belts;" and by making a soothing or comfort claim. F. 112. The Ab Pulse was offered for sale for about a month, did not receive high call volume, and, based on sales results, was considered by Khubani to be a marketing failure. F. 113. Thus, Respondents' first attempt to enter the market by selling a "massaging ab belt" and differentiating it from other electronic ab belts proved unsuccessful. The Ab Pulse campaign, however, provided Respondents with valuable

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experience in the ab belt market and affected the development of its subsequent advertising.

Khubani wrote the scripts for the radio and print ads for the Ab Force on December 18, 2001. F. 54. The radio ad included an express statement that other ab belts "promise to get our abs into great shape fast without exercise." F. 86. On December 22, 2001, the day the commercials were shot, Liantonio provided Khubani with a script which began with the statements: "do you wish you could get into shape fast without exercise? Wouldn't you love to have a flatter tummy without painful sit-ups?" F. 58. Khubani rewrote Liantonio's scripts, deleting these express claims, and creating two new scripts (AB-B-60 and AB-B-120) that were used to shoot the test ads. F. 59. Parts of the Ab Force scripts are identical to parts of the Ab Pulse scripts. F. 111. Khubani testified that he did not want to make the express claims in Liantonio's scripts because "we didn't possess substantiation to make those claims." F. 60. While Khubani clearly did not want to make health, weight loss, fitness, and exercise claims expressly, given his desire to enter "one of the hottest categories to ever hit the industry" and his inability to successfully market a "massaging ab belt," the evidence shows that Khubani intended to imply those same claims. Merely removing false express claims will not protect an advertisement where the same claims are implied. Thompson Medical, 104 F.T.C. at 792 ("We note to begin with that none of the Aspercreme ads includes an express representation that Aspercreme contains aspirin. On the contrary, like much advertising we find deceptive, the ads are drafted with an artful choice of words to make what Thompson thought were literally correct statements.").

The record here demonstrates Khubani's desire to enter the ab belt market and recounts his initial failure to successfully market the Ab Pulse, a product whose only stated purpose was as a "massaging ab belt." F. 110. Given the commercial success of the "infomercial ab belts" and despite knowing that he did not have substantiation to expressly make the type of health, weight loss, fitness, and exercise claims contained in those ads, Khubani nevertheless created commercials for the Ab Force which relied on the name, visual images, and statements to implicitly make

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those very same false and misleading claims. F. 60, 65-102, 114-36. The absence of an expressly identified purpose of using the Ab Force required consumers to rely on these implied claims. Thus, Khubani's intent seems clear. While Khubani may have removed the express health, weight loss, fitness, and exercise claims, perhaps in an effort to avoid liability, he clearly intended to make those same claims by implication.

Complaint Counsel argues that in this case, the Ab Force advertisements invite scrutiny of the surrounding circumstances by explicitly referring to other Ab Belt infomercials. CCB at 28. Each of the Ab Force commercials made some comparison of the Ab Force's power and effectiveness to the other ab belts advertised on television. F. 91. Complaint Counsel asserts that the express references in the Ab Force ads to infomercials for competing ab belts, along with the claims of comparability to those products, invite consumers to think of those infomercials while viewing the Ab Force ads. CCB at 28. While such express references to other ab belt infomercials must be considered in the analysis of the surrounding circumstances, it is not clear from such an analysis what effect this inclusion has on consumer beliefs.

Respondents assert that the reference to other ab belts infomercials was part of a compare and save marketing strategy and was meant only to serve as a point of reference for the comparison. RB at 22-23. Khubani testified that there were a number of other products in this category and that his marketing strategy was to offer the same technology at a cost savings. F. 39, 65, 93. In addition, Khubani testified that the language is designed as hype to build excitement about the product. F. 94-96. While there clearly are express price saving and comparable technology messages in the advertisements, this, by itself, does not insulate Respondents from liability. See *Kraft*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7. Respondents will be liable for deceptive advertising even if other, non-false, messages are conveyed. See *Kraft*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7.

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The impact on consumers of the express reference in Ab Force ads to other ab belt infomercials is inconclusive. Complaint Counsel has not met its burden of demonstrating whether references to other ab belt infomercials effected the claims conveyed by the ads. Thus, the Court cannot conclude with confidence that references to other ab belt infomercials would lead consumers to take away the alleged claims. Where the impact of a statement is not conspicuous, self-evident, or reasonably clear on the face of the ad, and cannot be determined with confidence from the face of the ad, extrinsic evidence is required to determine the impact of that statement. See *Kraft*, 970 F.2d at 318; *Thompson Medical*, 104 F.T.C. at 320. However, as explained in Section II(B)(2)(1)(ii), *supra*, the extrinsic evidence also does not support the theory that claims are implied in the Ab Force ads merely by the reference to other ab belt infomercials.

Despite this conclusion, it is clear from the other evidence of the surrounding circumstances, including the Ab Pulse campaign and the development of the Ab Force campaign, when combined with the product name, visual images, and statements, that the ads make the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. Although an examination of the extrinsic evidence is not necessary for disposition of this case, that evidence likewise supports the Court's conclusions.

b. Extrinsic Evidence

When extrinsic evidence is used to determine the meaning of an ad, the evidence may consist of expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation. *Cliffdale*, 103 F.T.C. at 166; see also *Thompson Medical*, 104 F.T.C. at 790. The opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted may be considered "if such opinions are adequately supported." *Kraft*, 114 F.T.C. at 122. However, where the opinions voiced by experts are not adequately supported, those opinions will be given little weight. *Thompson Medical*, 104 F.T.C. at 790. "To be adequately supported [those] opinions that describe empirical research or analyses [must be] based on

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generally recognized marketing principles or other objective manifestations of professional expertise. Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue." *Id.* at 790 n.11.

Complaint Counsel's expert, Dr. Michael Mazis, is qualified in this matter 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. F. 147-51. Mazis testified that in this case the implied claims are established through direct effects from the four corners of the advertisements; through indirect effects of prior exposure to ab belts through other advertising, word-of-mouth, or retail packaging; and as evidenced by a copy test which he conducted. F. 157-69. Respondents' expert, Dr. Jacob Jacoby, is qualified in this matter to testify as an expert witness in consumer behavior and consumer psychology, as well as consumer comprehension and miscomprehension of advertising. F. 152-56. Jacoby severely criticized Mazis's conclusions and methods. F. 152. After a review of the expert testimony, the Court concludes that Mazis's conclusions are entitled to varying degrees of weight, as explained below.

i. Direct Effects

A type of evidence that will be considered, if offered, is the opinion of expert witnesses as to how an advertisement might reasonably be interpreted. *Thompson Medical*, 104 F.T.C. at 790; *Kraft*, 114 F.T.C. at 122. Respondents argue that Mazis's analysis of the direct and indirect effects is no more than his own personal opinion and is not the proper subject of expert testimony. RB at 49. It is clear, however, that experts may testify based on their experience in their given field, including their knowledge of consumer perceptions, to claims that consumers might take away. See *Thompson Medical*, 104 F.T.C. at 790; see generally *Fed. R. Evid.* 702. Thus, Mazis's testimony regarding direct effects is valuable not as an expression of his personal opinion, but rather as expert opinion regarding his knowledge and experience of

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consumer perceptions and claims that consumers would take away from the four corners of the advertising at issue.

Mazis testified that there are direct effects within the four corners of the ad that cause consumers to make inferences about the Ab Force and to take away from its ads certain implied claims. F. 158-62. Mazis stated "that even if you had never heard of an ab belt before, . . . you could see the ad and you could make inferences because there's certain implied claims in the ads." F. 158-59. Mazis identified as direct effects the appearance of trim, fit models and the depiction of the Ab Force belt itself shown visibly pulsating the abdominal muscles of the models. F. 161. According to Mazis, another influence that is within the four corners of the Ab Force ads is the name Ab Force. F. 162. 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 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." F. 162.

Mazis's testimony regarding consumer perceptions of the challenged advertising is relevant in determining the claims directly conveyed by the four corners of the ads. Mazis's expert testimony regarding consumer perceptions thus supports the conclusion that the Ab Force advertising made the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. However, as noted earlier, Mazis's opinion is not necessary to reach that determination.

ii. Indirect Effects

Mazis uses the term "indirect effects" to refer to the effects on consumers of previous exposure to ab belts through either infomercials, word-of-mouth, or retail packaging for other ab belts. F. 163. Mazis opines that it is through these indirect effects that the Ab Force television spots make implied claims that using Ab Force will result in well-defined abs and loss of inches around the waist. F. 164. Mazis also opined that consumers may perceive claims that use of the Ab Force results in weight loss and that the

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Ab Force is an effective substitute for regular exercise because consumers associate them with ab belt category beliefs. F. 164, 167.

Mazis's opinion is based on the psychological and consumer behavior theory of "categorization." F. 169. Categorization theory is generally accepted in the field of consumer behavior. F. 170. A leading proponent of the theory, Mita Suján, asserted in a well-known peer-reviewed article that 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. . . . If 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." F. 171.

Complaint Counsel argues that consumers, upon hearing the reference in the Ab Force commercials to "those other ab belt infomercials" would infer that the claims made in those other infomercials would apply to the Ab Force. CCB at 7-12. Mazis testified that four key elements in the Ab Force commercials would have an impact on consumers that would cause them to categorize the Ab Force specifically with the AbTronic, Ab Energizer, and Fast Abs products. F. 178. These four elements are: (1) references in Ab Force ads to the other ab belts, (2) the visual images of models with well-defined 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. F. 178.

Mazis considered only a limited number of materials and conducted no empirical research to support his opinions regarding the indirect effects of the Ab Force advertisements. F. 165, 168, 183, 188-92. Mazis's conclusions regarding indirect effects must be viewed in light of his limited analysis. Mazis reviewed and considered the Complaint and exhibits in this matter; transcripts and videotapes of the infomercials for AbTronic, Ab Energizer, and Fast Abs; and infomercial ranking reports for the AbTronic, Ab Energizer, and Fast Abs products. F. 165. Mazis did not know and could not determine what messages were being conveyed by

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advertisements or packaging for other EMS ab products, by word-of-mouth communication, or what other print or radio advertisements were being disseminated. F. 166, 189. Indeed, Mazis admitted that when he referred to category beliefs, he was referring only to "ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer, and Fast Abs]." F. 189. Mazis provided no evidence that those Ab Force ad viewers who happened to see the ads for AbTronic, Ab Energizer, and Fast Abs would retain or even comprehend that information. F. 184-88. Despite having no reliable information regarding exactly how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired, Mazis stood by his belief that "many consumers would have been exposed to these ads." F. 166. This is not credible testimony supported by reliable evidence.

Respondents' marketing expert, Jacoby, testified that he was familiar with the categorization theory and with Sujian's article. F. 173. Jacoby, however, did not agree with Mazis's application of the theory to this case. F. 173. In particular, Jacoby argued that categorization theory, as presented by Sujian, relies on consumers having a preexisting category of beliefs. F. 175. Respondents argue that consumers might not have an ab belt category of beliefs and that even if they have such a category, it might be formed based upon devices other than the AbTronic, Ab Energizer, or Fast Abs. RB at 31-48.

Upon review of the record, there is no empirical evidence to determine what beliefs consumers would include in an ab belt category. Indeed, there is no reliable, demonstrated showing regarding whether consumers have an ab belt category of beliefs and, if so, what products would fall into the category. This would likely depend on a number of factors: when, what channels, and how often advertisements for other ab belts or EMS devices aired; whether the consumers had seen advertisements for other ab belts or EMS devices; whether the consumers remembered the claims from the other advertising; how similar the products were in appearance; and how similar the advertisements were in terms of claims, visual images, and statements. These indirect effects, if any, cannot be determined without more evidence than was

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provided by Complaint Counsel in this case. Thus, to the extent that Mazis relied upon categorization theory to support his conclusions, such analysis fails as a matter of proof.

iii. Copy Test -- Methodology

The reliability of the copy test designed and introduced by Mazis in this proceeding is examined next. In doing so, the Court notes that courts are not limited only to looking at a survey of prior purchasers asking why they purchased a product. See *FTC v. Figgie Int'l, Inc.*, 994 F. 2d 595, 605 (9th Cir. 1993); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F. 2d 1312, 1316 (8th Cir. 1991). "The most convincing extrinsic evidence is a survey 'of what consumers thought upon reading the advertisement in questions,' but the Commission also relies on other forms of extrinsic evidence including consumer testimony, expert opinion, and copy tests of ads." *Kraft*, 970 F.2d at 318 (quoting *Thompson Medical*, 104 F.T.C. at 788-89). To constitute reliable and probative evidence, copy tests must be methodologically sound. *Stouffer*, 118 F.T.C. at 799; *Thompson Medical*, 104 F.T.C. at 790. The standard used to determine whether copy tests are methodologically sound is whether they "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; accord *Stouffer*, 118 F.T.C. at 799. In evaluating survey evidence, the Commission does not require that surveys be perfect methodologically, but that they be "reasonably reliable and probative." *Stouffer*, 118 F.T.C. at 799.

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. F. 194. The copy test designed by Mazis and implemented by U.S. Research, although flawed in certain respects, confirms that the Ab Force television commercials made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. As explained below, (1) the universe of participants was reasonably reliable and probative; (2) appropriate questions were

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asked; (3) the control ad, although flawed, does not adversely impact the copy test results; and (4) the failure to control for preexisting beliefs was not critical.

First, the universe for participants in the copy test was limited to people who, in the last twelve months, had purchased a product or used a service for weight loss, muscle toning, or massage, and also in the last twelve months had purchased a product by responding to a direct response television ad. F. 209-10. Age and sex quotas were based upon a survey report in the Journal of the American Medical Association of persons trying to lose weight. F. 204. Respondents object to the survey population, arguing that it is overly broad because the purchase of any item via response to a direct response television ad was not sufficiently tailored to limit the universe to potential purchasers of the Ab Force. RB at 53-54. Respondents argue that "appropriate criteria should have excluded those respondents who had not purchased a product to help them lose weight, tone muscles, or massage their bodies from a toll-free number." RB at 55. Respondents do not, apparently, object to the age and sex quotas or exclusion of people who had not purchased a product or used a service for weight loss, muscle toning, or massage. See RB at 53. Complaint Counsel argues that for a claim take away survey, the universe of participants should be relatively broad and it would have been unnecessarily narrow to have excluded from the universe those people who had demonstrated an interest in weight loss, muscle toning, or massage and who had made purchases via direct response television of products other than in those three categories. CCRB at 29-30. While the universe for participants in the copy test could have been more narrowly tailored, as designed it is nevertheless reasonably reliable and probative. See Stouffer, 118 F.T.C. at 799.

Second, appropriate, unbiased questions were asked in the copy test. F. 231-54. The evidence shows that the copy test questionnaire proceeded from general, open-ended questions to more narrow, close-ended questions; used a filter question to ensure that responses to follow-up, close-ended questions would not be based upon random guessing; that such a tunneling approach is the best way to ask questions on a copy test; that the

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close-ended questions rotated the order in which the questions were read, thereby controlling for order bias, or yea-saying; and that all three possible answers to each question were read and shown to the participants before each question was asked. F. 231-54. As designed and implemented, Complaint Counsel has demonstrated that appropriate questions were asked in a manner that was proper, minimized bias, and produced reliable results. See Stouffer, 118 F.T.C. at 804-06.

Third, although a control of some kind is necessary for close-ended questions, the control may take the form of a control ad or a control question. *Thompson Medical*, 118 F.T.C. at 808-09. Moreover, "there is nothing in Commission precedent that requires the use of a control ad for open-ended questions." *Id.* at 808. The record shows that Mazis utilized both methods, a control ad and three control questions, in his copy test. F. 214-30, 239. The parties focused on the impact of the control ad.

The copy test utilized a control ad to compare to the test ad. F. 214-30. The test ad was a 60 second Ab Force spot that was the most frequently aired of the four commercials produced for Respondents. F. 214. The control ad was created by Mazis and consisted of a 120 second Ab Force ad that he pared down to 60 seconds by eliminating all references to other ab belts and ab belt infomercials, eliminating the stock images and eliminating some, but not all, images of models wearing the Ab Force. F. 214, 217. The control ad, however, was ineffective because it did not eliminate the very elements which Mazis, himself, indicated were direct effects that convey the health, weight loss, fitness, and exercise benefits of using the Ab Force. F. 218. Specifically, the control ad includes three images of the female and male model with well-defined abs, wearing the Ab Force, and experiencing muscle contractions. F. 219. In addition, in the control ad, the name Ab Force is stated six times. F. 220. Study participants who saw the control advertisement took away the same claims as those who saw the test advertisement, albeit in smaller numbers. F. 255-69. Mazis admits that the results for the control ad "are relatively high numbers for a control ad" and attributes these numbers to preexisting beliefs about ab belts. F. 221. The higher numbers, however, could also result from the direct effects which remained

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in the control ad. Regardless of the cause, the flaws in the control ad inflate the control ad numbers thereby reducing the net take away results. See F. 266-69.

Fourth, a central issue in this case has been the impact of consumers' preexisting beliefs. Respondents argue that the copy test failed to adequately control for the influence of any preexisting beliefs held by study participants; that a reliable survey must control for background "noise," including preexisting beliefs; that Mazis admitted his controls were ineffective, but improperly dismissed the failure to control as not relevant; that Mazis nevertheless decided to control for one source of preexisting beliefs while not controlling for others; and that the "relatively high" number of control participants who detected misleading claims confirms that the effect of background noise on the results was substantial. RB at 57-65. Complaint Counsel responds that Mazis properly controlled for preexisting beliefs of the survey participants. CCRB at 32-36.

The extent of advertisers' liability under the FTC Act for preexisting beliefs has been discussed in case law only in the context of whether copy tests should control for preexisting beliefs. E.g., *Stouffer*, 118 F.T.C. at 809-11; *Kraft*, 114 F.T.C. at 131. For example, in *Kraft*, the Commission rejected as unreliable a copy test which failed "to correct for preexisting or inherent survey bias" where there was a suggestion that the response rate may have been attributable to consumers' prior exposure to other *Kraft* ads. *Kraft*, 114 F.T.C. at 131 n.19. Discussing this section of *Kraft*, the Commission in *Stouffer* stated that "the [*Kraft*] case does not hold that consumer surveys must invariably control for preexisting beliefs. Instead, *Kraft* teaches that the failure of a consumer survey to control for preexisting beliefs about the alleged advertising claim introduces a potential for bias, and indeed that this may be a critical defect." *Stouffer*, 118 F.T.C. at 810 (emphasis in original). The footnote to this section of *Stouffer* states: "indeed, it is established that respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs." *Id.* at 810 n.31 (citing *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978)). The Commission in *Stouffer*, based on this analysis of *Kraft*, refused to reject a copy

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test which failed to control for preexisting beliefs that the sodium content of Lean Cuisine entrees was low where the evidence indicated that, to the extent consumers had a preexisting belief regarding the entrees, it was that the sodium content was high, not low. *Id.* at 810-11 ("there must be evidence of preexisting bias to find that failure to control for such bias is a critical defect.").

Complaint Counsel relies heavily on the above-quoted footnote 31 in *Stouffer* which cites the *Simeon* case. In *Simeon*, the Ninth Circuit stated "that the belief [that injections have been determined by a proper government agency to be safe and effective] is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive." *Simeon*, 579 F.2d at 1146 (citing *cf. Brite Mfg. Co. v. FTC*, 347 F.2d 477 (D.C. Cir. 1965)). In *Brite*, the D.C. Circuit held that the Commission properly took official notice of specific consumer preferences where the respondents made no attempt to rebut those perceptions during the hearing, stating that the FTC was "entitled to rely on established general facts within the area of its expertise, subject, of course, to [respondent's] right to rebut." *Brite*, 347 F.2d at 478. Neither of these cases supports the assertion in *Stouffer* that "respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs." *Stouffer*, 118 F.T.C. at 810 n.31.

While *Kraft* stands for the proposition that a copy test may be rejected for failure to control for preexisting beliefs (even where those beliefs were created by the respondent itself) and *Stouffer* stands for the proposition that a copy test will not be rejected for failure to control for a preexisting belief where there is no evidence that such a belief effected the results, neither case stands for the legal theory that advertisers may be found liable for capitalizing on preexisting consumer beliefs. This issue was addressed in the Lanham Act case of *Johnson & Johnson * Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294 (2d Cir. 1992). In *J&J*Merck*, the Second Circuit states that "J&J*Merck argues that [the advertisement] purposefully taps into a preexisting body of public misinformation [that the ingestion of aluminum causes Alzheimer's disease] in order to communicate the false and

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misleading message that aluminum-based antacids are harmful. The gravamen of J&J*Merck's claim is that advertisers may be liable for the knowing exploitation of public misperception." *Id.* at 297. The Second Circuit did not "reject nor embrace" this "novel theory of Lanham Act liability." *Id.* In this case, in addition to the weak legal support, there is no factual support for imposition of liability based upon capitalizing on preexisting consumer beliefs.

The factual record in this case does not support imposing liability on Respondents based upon the preexisting beliefs of consumers because there is insufficient empirical evidence of the existence, extent, or impact of those preexisting beliefs. See F. 157-269. However, the case law does not require rejecting the entirety of the conclusions reached in the copy test merely for failure to account for preexisting beliefs. The copy test is valid even though, as explained above, the control advertisement was flawed. Therefore, despite flaws in Mazis's control ad, the copy test is sufficiently methodologically sound as to be reasonably reliable and probative of the issues before the Court.

iv. Copy Test -- Results

Mazis's copy test results were reported in total percentages, and then in terms of statistical significance. F. 255. Respondents assert that the net difference between the numbers of test and control group participants who perceived misleading claims is the appropriate measure to be examined; and that Mazis's improper decision to drop eighty one study participants substantially affects the results reported. RB at 65-69. Complaint Counsel argues that Mazis properly excluded from the survey analysis eighty one respondents who could not remember the name of the product after viewing the ab force spots twice. CCRB at 36-39. Because a primary goal of copy testing is to define a universe of likely purchasers of the tested product, it is not unreasonable to conclude that people who could not recall the product name should not be a part of the survey universe. Unlike other screening criteria that were a part of a separate screening questionnaire, it was not possible to screen these people out until they had actually viewed the commercial. In addition, even when

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the results of the copy test are viewed in terms of net difference, as Respondents prefer, the results support the conclusion that the ads, in fact, made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

In so holding, the Court notes that there is no absolute minimum number of copy test respondents who must report taking away a specific message from an advertisement before that message is deemed communicated. The Commission's opinion in Thompson Medical provides a level of close-ended responses deemed sufficient to show that a claim was communicated by an advertisement. There, the Commission relied on percentages, after the control question responses had been deducted, of sixteen to eighteen percent 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]." Thompson Medical, 104 F.T.C. at 805-06 (22.2% minus 6.3% or 4.8%). Other FTC cases suggest that the Commission would be justified in considering levels of ten percent net take away sufficient. For example, in Firestone, 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." Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973); see also Stouffer, 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").

Moreover, numerous decisions in Lanham Act cases support the proposition that a result of between ten percent and fifteen percent is sufficient to support an allegation of trademark infringement. E.g., 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 Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 279 n.23 (7th Cir. 1976) (referring to prior case showing 11%); Goya Foods, Inc. v. Condal Distribs., Inc., 732 F. Supp. 453, 456-

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57 (S.D.N.Y. 1990) (9%); compare *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 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.").

The copy test results, despite the previously noted flaws, support the conclusion that the Ab Force ads conveyed the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. To the open-ended question, "what does the Ab Force commercial say, show, or imply about Ab Force?" over twenty two percent (22.3%) of the test ad respondents and nearly twelve percent (11.9%) of the control ad respondents said that the advertisement claimed that using the Ab Force results in well-defined abdominal muscles, in loss of weight, or inches, or in an improved physique. F. 257. As discussed above, results of open-ended questions may be reliable without subtracting the results from a control ad or control question. *Stouffer*, 118 F.T.C. at 808.

As to a claim about weight loss, 43.0% of the test ad respondents and 28.1% of the control ad respondents agreed that the ad they saw communicated that the Ab Force "causes users to lose weight." F. 258, 263. Over half (58.1%) of the test ad respondents and over two-fifths (42.4%) of the control ad respondents perceived a claim that the Ab Force "causes users to lose inches around the waist" F. 259, 263. As to whether "using Ab Force removes fat deposits," approximately one-fifth of each group of respondents (22.9% test, 19.0% control) agreed that the commercial they saw made the claim. F. 260, 263. As to claims about fitness and exercise, nearly two-thirds (65.4%) of the test ad respondents and almost half (48.1%) of the control ad respondents agreed that the ad they saw communicated that "using the Ab Force results in well-defined abdominal muscles." F. 261, 263. Nearly forty percent (39.1%) of the test ad respondents and more than a quarter (28.6%) of the control ad respondents agreed with the claim that "using Ab Force is an effective alternative to regular exercise." F. 262, 263.

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The copy test also included close-ended control questions regarding whether the ads conveyed claims regarding stomach ulcers, nausea, or lower blood pressure. F. 239. The results of these control questions showed a maximum result of five percent. F. 263, 267-69. When using a control question, the percentage of participants who responded affirmatively to the control question is deducted from the percentage of participants who responded affirmatively to the tested claim. *Stouffer*, 118 F.T.C. at 806. Here, if the maximum percent of participants who responded affirmatively to the control questions is subtracted from the percent responding affirmatively to the tested ad, then the claims at issue were found by 60.4% (well-defined abdominal muscles); 53.1% (lose inches around the waist); 38% (lose weight); 34.1% (alternative to exercise) and 17.9% (removes fat deposits). F. 264.

Thus, both the open-ended and close-ended questions contained in the copy test demonstrate that a significant number of participants took away from the test ad the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

2. Whether the Claims at Issue Are False or Misleading

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 *Pantron*, 33 F.3d at 1095. There are "two theories on which the government can . . . rely in section 12 cases involving objective product claims:" (1) the "falsity" theory under which the government must "'carry the burden of proving that the express or implied message conveyed by the ad is false'" or (2) the "so-called 'reasonable basis' theory" under which "the government must 'show that the advertiser lacked a reasonable basis for asserting that the message was true.'" *Id.* at 1096 (quoting *Thompson Medical*, 104 F.T.C. at 818-19).

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Under either the falsity theory or the reasonable basis theory, Complaint Counsel has established that the alleged claims are false or misleading. The parties stipulated that use of the Ab Force does not cause loss of weight, inches, or fat; does not cause well-defined abdominal muscles; and is not an effective alternative to regular exercise. F. 270-72; RRPFF at 154. The parties further stipulated that Respondents did not possess and rely upon substantiation for the alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. F. 273; RRPFF at 154. Therefore, any claims that the use of the Ab Force causes consumers to lose weight, fat, and inches; causes well-defined abdominal muscles; and is a substitute for regular exercise are patently false and misleading.

3. Whether the Claims at Issue Are Material to Consumers

A "material claim is one that 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'" *Novartis Corp.*, 223 F.3d at 786 (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165); see *Kraft*, 970 F.2d at 322. The Commission may apply a presumption of materiality to 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 areas with which reasonable consumers would be concerned. *Novartis*, 223 F.3d at 786; *Kraft*, 970 F.2d at 322-23; *Thompson Medical*, 104 F.T.C. at 816-17. In *Novartis*, the D.C. Circuit affirmed the Commission's application of a presumption of materiality based on its finding that the implied claim was intentional and involved both a health matter and the product's purpose and efficacy. *Novartis*, 223 F.3d at 786-87.

The claims implied by the Ab Force advertising were material. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise directly involve the purpose and effects of using the product. F. 274-75. Such claims involve information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. If

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unsubstantiated or false, these claims would likely mislead reasonable consumers considering such a purchase. Moreover, there is evidence that Respondent intended to make the implied health, weight loss, fitness, and exercise claims which further supports the finding of materiality. See Section II(B)(1)(e), *supra*. Therefore, based on the record as developed at trial, the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are found to be material to consumers.

C. Remedy

1. Joint and Individual Liability

Corporate respondents acting in concert to further a common enterprise are each 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) (treating all defendants as single economic entity where there was common control); *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir. 1964) (treating all defendants as single economic entity where there was common control); *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); *Zale Corp. and Corrigan-Republic, Inc. v. FTC*, 473 F.2d 1317, 1320 (5th Cir. 1973) (sharing office space and offices). Respondent Ajit Khubani is the president, chief executive officer, chairman of the board, and sole owner of Telebrands. F. 10. Khubani is also the sole member of TV Savings. F. 10. Telebrands and TV Savings share office space. F. 8. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, or practices of Telebrands and TV Savings. F. 14. Khubani was appointed by Telebrands as the "Program Manager" pursuant to the Service Agreement dated January 22, 2002 between Telebrands and TV Savings and was also TV Savings' representative under the Service Agreement. F. 15. Together, Respondents have operated as a common enterprise to label,

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advertise, offer for sale, sell, and distribute the Ab Force device. Thus, the evidence establishes that Respondents Telebrands, TV Savings, and Khubani were acting in concert to further a common enterprise and that they jointly and collectively violated Sections 5 and 12 of the FTC Act.

To obtain a cease and desist order against an individual, Complaint Counsel must 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 Educ. Soc'y*, 302 U.S. 112, 119-20 (1937); *National Housewares, Inc.*, 90 F.T.C. 572, 598 (1977). As stated above, the evidence shows that individually or in concert with his officers and employees, Respondent Khubani had authority to and did control the policies, acts, or practices of Respondents Telebrands and TV Savings. F. 14. As the program manager appointed by Telebrands and as TV Savings' representative under the Service Agreement, Khubani represents both entities with regard to the responsibilities and duties of each under the Service Agreement. F. 15. Khubani was ultimately responsible for overseeing the marketing and creative design of the challenged Ab Force advertising and promotional campaign; 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 advertising of the Ab Force product; set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. F. 16. Therefore, Respondent Khubani is found to be individually and jointly liable with TV Savings and Telebrands for violations of Sections 5 and 12 of the FTC Act. Having addressed the issue of liability, the Court next considers the appropriateness of the relief proposed in the Complaint.

2. Fencing In Provisions

Included in the relief sought in the Complaint is a request to impose broad "fencing in" relief including, among other provisions, a performance bond and substantiation prior to advertising "any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program."

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Complaint at 16-17 (proposed order); CCPFF at 118. As explained below, portions of the relief contemplated by the proposed remedy are overly broad and unsupported by law. For instance, Complaint Counsel seeks the imposition of a performance bond as part of the proposed remedy. Complaint at 16-17 (proposed Order). However, Complaint Counsel has not cited, nor has the Court found, any case law which would support the imposition of such a bond as a remedy in a litigated Part III matter. The fact that the Commission has previously accepted consent orders with a performance bond in Part III matters does not provide sufficient legal foundation to impose such a bond in this case. "The circumstances surrounding . . . negotiated [consent agreements] are so different that they cannot be persuasively cited in a litigation context." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n.12 (1961). Accordingly, no performance bond will be ordered.

Rather, the Order entered by the Court restricts Respondents from making any representations regarding the production, promotion, sale, and distribution of Ab Force and any other EMS device, or any device, product, service, or program pertaining to the efficacy of or pertaining to health, weight loss, fitness, and exercise, unless Respondents can substantiate such representations by competent and scientific evidence. Order, Section IV, *infra*.

In so ordering, the Court notes that "'the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.' Having been caught violating the Act, respondents 'must expect some fencing in.'" *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) and *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957)); see also *Jacob Siegel*, 327 U.S. at 611-12. The Supreme Court held in *Jacob Siegel* that the remedy selected must have a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel*, 327 U.S. at 613; see also *Colgate-Palmolive*, 380 U.S. at 394. The Supreme Court has cautioned, however, that an order must be sufficiently clear and precise to be understood by the violator and "as specific as the circumstances will permit." *Colgate-Palmolive*, 380 U.S. at 392-

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93; see also *American Home*, 695 F.2d at 705. Moreover, the "propriety of a broad order depends upon the specific circumstances of the case." *Colgate-Palmolive*, 380 U.S. at 394.

In determining whether a broad fencing in order bears a "reasonable relationship" to a violation of the Act, factors to be considered include: the deliberateness and seriousness of the violation; the degree of transferability of the violation to other products; and any history of prior violations. *Kraft*, 970 F.2d at 326; *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *American Home*, 695 F.2d at 706. "The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor." *Sears*, 676 F.2d at 392; see also *Kraft*, 970 F.2d at 327.

A violation is serious and deliberate where it involves "an expensive, nationwide campaign with highly effective results." *Kraft*, 970 F.2d at 326. The Ab Force advertising campaign constitutes a serious violation because the deceptive claims were disseminated in numerous ads and through multiple media (television, print, radio, internet, and email). F. 47, 49-51, 61. Respondents spent over four million dollars to disseminate the challenged ads nationwide. F. 52. The Ab Force television spots appeared more than ten thousand times on cable, satellite, and broadcast television outlets in major national markets. F. 44-51. Respondents sold approximately 747,000 units of the Ab Force and gross sales, including accessories, exceeded nineteen million dollars. F. 41-42. The duration, number of executions, and multi-million dollar cost of the campaign, as well as the total sales and revenues, all constitute significant evidence of the effectiveness of the advertisements and, thus, the seriousness of the violations. Moreover, the evidence regarding Respondents' intent (see Section III(B)(1)(a)(iii), *supra*) as well as the fact that Khubani is a sophisticated and experienced marketer (see F. 12-13, 22) establish that the claims were made deliberately and purposefully.

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A violation is transferrable where other products could be sold utilizing similar techniques. *Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Sears*, 676 F.2d at 392. The Ab Force advertisements failed to expressly identify the purpose or effects of using the Ab Force but rather strongly implied that use of the Ab Force product would confer health, weight loss, fitness, or exercise benefits. See F. 65-146. The health, weight loss, fitness, or exercise benefits of using a device, product, service, or program cannot readily be determined by consumers from an advertisement and therefore consumers must rely on the representations of the advertiser. Implying these unseen benefits is an advertising practice that is readily transferrable to advertising for other devices, products, services, or programs. Moreover, the fact that Respondents have the ability to provide the financing necessary to perform media management services, credit card processing, customer response services, customs clearance, accounting, and bookkeeping, and act as an importer of record (F. 6); the fact that Respondents have the financial means to spend millions of dollars on effective, nationwide advertising (F. 41-52); and the fact that Respondents have promoted and sold hundreds of products (F. 22) is sufficient for the Court to determine, under the Kraft rationale, that Respondents' advertising techniques and practices are readily transferrable to other products.

Complaint Counsel argues that Respondents have a history of prior violations based on "four previous actions" taken by the FTC against Telebrands. CCRB at 46. This argument is based upon three consent agreements between Telebrands and the FTC and an additional modification of one of the consent agreements. CCRB at 46. Complaint Counsel failed to enter any of these consent agreements into evidence. See RRPFF at 155-56. Moreover, it is the Court's understanding that none of the consent agreements involved any finding of liability on the part of any of the respondents (see RRB at 46) and therefore they cannot be utilized to form the basis for imposing a broad fencing in order in this case. However, a defendant need not have a history of prior violations in order for a broad fencing in order to be imposed. See, e.g., *Kraft*, 970 F.2d at 327.

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Here, a broad fencing in order is appropriate under the standards in Kraft and Sears given the deliberateness and seriousness of the violations and the ease with which the unlawful conduct can be transferred to other products. Therefore, the fencing in relief in Section IV of the Order extends the prohibitions of the Order beyond the Ab Force device and other EMS devices to any device, product, service, or program promoting the efficacy of, or pertaining to health, weight loss, fitness, or exercise benefits. Courts have repeatedly approved orders that cover multiple products, despite the fact that the violations found involved only a single product. *Sears*, 676 F.2d at 392; see also *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563-64 (2d Cir. 1984); *American Home*, 695 F.2d at 704-05. Indeed, the Supreme Court has enforced a Commission order which applied to all products produced by the respondents. *Colgate-Palmolive*, 380 U.S. at 394.

The Court, looking to the circumstances as a whole, has determined that a fencing in order is required and bears a reasonable relationship to Respondents' violations of the Act found to exist. As such, it is necessary to "close all roads to the prohibited goal, so that (the FTC's) order may not be by-passed with impunity." *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *Ruberoid*, 347 U.S. at 473). The accompanying Order is narrowly tailored and reasonably related to the violation of law found to exist.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Pursuant to Section 5 and 12 of the FTC Act, 15 U.S.C. § § 45, 52, the Commission has jurisdiction over the subject matter of this proceeding and over Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani.
2. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, and practices of Telebrands and TV Savings.
3. The Ab Force ab belt, an EMS device which uses electronic stimulation of the muscles, is a device within the meaning of Section 15 of the FTC Act which defines "device" as including

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"an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . intended to affect the structure or any function of the body of man." 15 U.S.C. § 55(d).

4. By engaging in a nationwide advertising campaign to offer for sale and sell the Ab Force device, Respondents were engaged in and affected commerce, as "commerce" is defined in Section 4 of the FTC Act. 15 U.S.C. § 44.

5. Pursuant to Rule 3.51(c)(3) and 5 U.S.C. § 556(d), the findings of fact and conclusions of law in this Initial Decision are supported by reliable, probative, and substantial evidence.

6. The issues in this case are adjudicated under the preponderance of evidence standard.

7. Employing a facial analysis of the Ab Force advertising, there are no express statements which support the claims that using the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

8. The overall net impression of the product name, visual images, and statements in the four corners of the Ab Force advertising in addition to the surrounding circumstances, is conspicuous, self-evident, and reasonably clear so that the Court can conclude with confidence that the advertisements convey the claims that the use of the Ab Force by consumers causes loss of weight, inches, and fat; causes well-defined abs; and is an effective alternative to regular exercise.

9. Mazis's expert testimony regarding consumer perceptions supports the conclusion that the Ab Force advertising made the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise.

10. There is no empirical evidence to support what beliefs consumers would include in an ab belt category. Thus, to the extent Complaint Counsel relies upon categorization theory or indirect effects to support the allegations, such analysis fails as a matter of proof.

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11. Despite flaws in the control ad methodology, the copy test conducted by Complaint Counsel's expert is otherwise valid and is sufficiently sound so as to be reasonably reliable and probative of the issues before the Court.

12. The copy test results support the conclusion that the Ab Force ads convey the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

13. The claims asserting that use of the Ab Force causes consumers to lose weight, fat, and inches; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are false or misleading pursuant to Section 12 of the FTC Act. 15 U.S.C. § 52.

14. The claims asserting that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are material to consumers.

15. Corporate respondents acting in concert to further a common enterprise are each liable for the acts and practices of the others in furtherance of the enterprise.

16. Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force device. As such, they jointly and collectively violated Sections 5 and 12 of the FTC Act.

17. Respondent Ajit Khubani is individually liable for violations of Sections 5 and 12 of the FTC Act.

18. Complaint Counsel has met its burden of proof in establishing Respondents' liability for the violations of the FTC Act charged in the Complaint.

19. "Fencing in" relief is appropriate where, after examining circumstances of the case as a whole, it bears a "reasonable relationship" to a violation of the FTC Act.

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20. Complaint Counsel has not demonstrated that imposition of a performance bond is an appropriate fencing in remedy in a litigated Part III matter.

21. Previous consent agreements entered into with named respondents to a proceeding do not constitute a "history of prior violations" and thus cannot form the basis for imposing broad fencing in relief, particularly where there is no evidence that any of the consent agreements involved a finding of liability against Respondents.

22. Relief designed to remedy Respondents' unlawful activities and to require Respondents to cease and desist from certain activities is appropriate.

23. The Order entered is necessary and appropriate to remedy the violations of law found to exist.

ORDER:

ORDER

I.

IT IS ORDERED that, for purposes of this Order, the following definitions shall apply:

A. "Commerce" shall mean commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. "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 have 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.

C. "Electronic muscle stimulation device" or "EMS device" shall mean any appliance or machine, or any

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accessories thereof, used to stimulate the muscles of the human body with electricity.

D. "Device" shall mean any "device" as that term is defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

E. 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.

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 the Ab Force 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;

C. use of any such device for any period of time is an effective alternative to regular exercise; or

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.

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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 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;
- C. use of any such device for any period of time is an effective alternative to regular exercise; or
- 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.

IV.

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 device, product, service, or program promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits shall not make any representation, in any manner, expressly or by implication, about weight, inch, or fat loss; muscle definition; exercise benefits; 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.

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V.

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.

VI.

IT IS FURTHER ORDERED that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall, for five 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

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statement acknowledging receipt of the Order. Respondents shall deliver this Order to current personnel within thirty days after the date of service of this Order, and to future personnel within thirty 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 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 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 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 Khubani'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.

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X.

IT IS FURTHER ORDERED that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall, within sixty 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.

IT IS FURTHER ORDERED that this Order will terminate twenty years from the date of its issuance, or twenty 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 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 not 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.

Complaint

IN THE MATTER OF

BJ'S WHOLESALE CLUB, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4148; File No. 0423160

Complaint, September 20, 2005--Decision, September 20, 2005

This consent order, among other things, requires Respondent BJ's Wholesale Club, Inc. -- a membership club with approximately 8 million current members that operates approximately 150 warehouse stores in 16 Eastern states -- to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information it collects from or about consumers. The consent order also requires the respondent, for twenty years, to secure biennial assessments and reports to ensure that its security program provides protections that meet or exceed the protections required by the order, and is sufficiently effective to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected.

Participants

For the Commission: *Alain Sheer, Jessica L. Rich, Joel Winston and Louis Silversin.*

For the Respondent: *David Medine and James W. Pendergast, Wilmer Cutler Pickering Hale and Dorr LLP*

COMPLAINT

The Federal Trade Commission, having reason to believe that BJ's Wholesale Club, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent BJ's Wholesale Club, Inc. is a Delaware corporation with its principal office or place of business at One Mercer Road, Natick, Massachusetts 01760.