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12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA

14 _____)
FEDERAL TRADE COMMISSION,)
15)
16 Plaintiff,)
17 v.)Docket No. CV-S-020649-PMP-RJJ
18)
HUDSON BERKLEY CORPORATION, d/b/a)
HUDSON BERKELEY, INC.,)
19 MATTHIAS GRANIC,)
BISMARCK LABS CORPORATION, d/b/a)
20 BLC BISMARCK LABS CORPORATION,)
TMI TRICOM MARKETING, INC.,)
21 CCI CAD CAM INDUSTRIES LTD., INC.,)
BERND EBERT, and OLIVER BRAUN,)
22 Defendants.)
23 _____)

24 **FIRST AMENDED COMPLAINT**
25 **FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF**

26 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”) through its

1 undersigned attorneys, alleges as follows:

2 1. Plaintiff FTC brings this action under Section 13(b) of the Federal Trade Commission
3 Act (“FTC Act”), 15 U.S.C. § 53(b), to secure a permanent injunction, consumer redress,
4 disgorgement, and other equitable relief against Defendants for engaging in deceptive acts or
5 practices in connection with the advertising, marketing, and sale of the AbTronic Electronic
6 Fitness System (“the AbTronic”), in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C.
7 §§ 45(a) and 52.

8 JURISDICTION AND VENUE

9 2. This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C. §§
10 45(a), 52, and 53(b) and 28 U.S.C. §§ 1331, 1337(a), and 1345.

11 3. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b), (c),
12 and (d).

13 THE PARTIES

14 4. Plaintiff, the Federal Trade Commission, is an independent agency of the United States
15 Government created by statute. 15 U.S.C. §§ 41-58. The Commission enforces Section 5(a) of
16 the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or
17 affecting commerce. The Commission also enforces Section 12 of the FTC Act, 15 U.S.C. § 52,
18 which prohibits false advertisements for food, drugs, devices, services, or cosmetics in or
19 affecting commerce. The Commission may initiate federal district court proceedings to enjoin
20 violations of the FTC Act and to secure such equitable relief, including consumer redress, as may
21 be appropriate in each case. 15 U.S.C. § 53(b).

22 5. Defendant Hudson Berkley Corporation is a Nevada corporation with its registered
23 office located at 723 South Casino Center Boulevard, 2nd Floor, Las Vegas, Nevada 89101-6716.
24 Hudson Berkley Corporation also has done business as Hudson Berkeley, Inc. At times relevant
25 to the complaint, acting individually or in concert with others, Hudson Berkley has advertised,
26 marketed, distributed, and/or sold the AbTronic to consumers throughout the United States.

1 Hudson Berkley transacts or has transacted business in this district.

2 6. Defendant Matthias Granic is a director and the president, secretary, and treasurer of
3 Hudson Berkley Corporation. At times relevant to the complaint, acting individually or in concert
4 with others, he had the authority to formulate, direct, or control the policies, acts, or practices of
5 Hudson Berkley Corporation, including the various acts or practices alleged in this complaint.

6 Granic transacts or has transacted business in this district.

7 7. Defendant Bismarck Labs Corporation (“BLC”) is a California corporation located at
8 401 West Radio Rd. # A-4, Palm Springs, California 92262 and/or at 68-565 Senora Rd.,
9 Cathedral City, California 92234. BLC also has done business as TMI Tricom Marketing, Inc.
10 and CCI CAD CAM Industries, Inc. At times relevant to the complaint, acting individually or in
11 concert with others, BLC has been involved in the acts or practices alleged, including but not
12 limited to, direct participation and control over the funding and production of the infomercial
13 advertisement at issue herein. BLC transacts or has transacted business in this district.

14 8. Defendant TMI Tricom Marketing, Inc. (“TMI”) is a Delaware corporation with its
15 registered office located at Three Christina Centre, 201 North Walnut Street, Wilmington,
16 Delaware 19801, and other offices located at 1013 Centre Rd. # 301, Wilmington, Delaware
17 19805, and 1047 Diana Circle, Palm Springs, California 92262. TMI also has done business as
18 BLC and CAD CAM Industries, Inc. At times relevant to the complaint, acting individually or in
19 concert with others, TMI has been involved in the acts or practices alleged, including but not
20 limited to, direct participation and control over the funding and production of the infomercial
21 advertisement at issue herein. TMI owns or has owned the rights to advertise, market, distribute
22 and/or sell the AbTronic to consumers throughout the United States, and has transferred those
23 rights, or a portion thereof, to Defendant CCI CAD CAM Industries, Inc. TMI transacts or has
24 transacted business in this district.

25 9. Defendant CCI CAD CAM Industries Ltd., Inc. (“CCI”), also known as CAD CAM
26 Industries Ltd., Cad Cam Industries, Ltd., Cad Cam Industries, Inc., Cad Cam Industries Ltd.,

1 Inc., CCI Cad Cam Industries Ltd., Inc., CCI Cad Cam Industries, Inc., and Cad Cam Industries
2 (HK) Limited, is a Hong Kong corporation with a mailing address of GPO 5264, Central, Hong
3 Kong. CCI operates or has operated a factory located at the following address: Tung Lok, Long
4 Gang, Shen Zhen, China. CCI also has done business as BLC and TMI. At times relevant to the
5 complaint, acting individually or in concert with others, CCI has advertised, marketed,
6 distributed, and/or sold the AbTronic to consumers throughout the United States. CCI has
7 registered or attempted to register the U.S. trademark for the AbTronic name, manufactures the
8 AbTronic devices, and has registered the Internet domain name www.abtronic.net through which
9 the AbTronic can be ordered. CCI has transferred a portion of the rights to advertise, market,
10 distribute and/or sell the AbTronic to Defendants Hudson Berkley, TMI, and/or BLC. CCI
11 transacts or has transacted business in this district.

12 10. Defendant Bernd Ebert is a California resident, a director and president, chief
13 executive officer, and chief financial officer of BLC, the managing director of TMI, and the
14 president of CCI. At times relevant to the complaint, acting individually or in concert with
15 others, he has formulated, directed, or controlled the policies, acts, or practices of BLC, TMI,
16 and CCI, including the acts or practices alleged in this complaint. Ebert negotiated and formed an
17 agreement with a Las Vegas-based production company to produce the infomercial at issue in
18 this complaint, traveled to Las Vegas to participate in the production and editing of the
19 infomercial at issue herein, and entered into an agreement with Defendant Hudson Berkley to
20 market, distribute, and/or sell the AbTronic devices in the United States. Ebert transacts or has
21 transacted business in this district.

22 11. Defendant Oliver Braun is a California resident, and at times relevant to the
23 complaint, was an owner, president, officer, and/or managing agent of TMI and a director of
24 CCI. At times relevant to the complaint, acting individually or in concert with others, he has
25 formulated, directed, or controlled the policies, acts, or practices of TMI, and CCI, including the
26 acts or practices alleged in this complaint. Braun transacts or has transacted business in this

1 district.

2 12. Defendants Braun, Ebert, BLC, TMI, and CCI have operated a common business
3 enterprise while engaging in the deceptive acts and practices alleged below and are therefore
4 jointly and severally liable for said acts and practices.

5
6 COMMERCE

7 13. The acts and practices of Defendants Hudson Berkley, Matthias Granic, BLC, TMI,
8 CCI, Ebert and Braun (“Defendants”) alleged in this complaint have been in or affecting
9 commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15
10 U.S.C. § 44.

11
12 DEFENDANTS’ COURSE OF CONDUCT

13 14. Since at least April 2001, Defendants have manufactured, labeled, advertised, offered
14 for sale, sold, and/or distributed the AbTronic. The AbTronic is an electronic muscle stimulation
15 (“EMS”) device composed of one longer and two shorter elasticized belts, a flexible rectangular
16 pad, and a matchbook-sized, plastic electronic unit that snaps into the pad and is powered by a
17 penny-sized three-volt battery. The elastic belts hold the electronic unit pad in place over the
18 targeted area of the body, which, according to the advertisements, can be the abdominal area,
19 chest, arms, legs, thighs, or buttocks. When activated over the body’s mid-section, the
20 AbTronic device purportedly sends gentle electronic impulses through the skin to the abdominal
21 muscles, causing them to contract just as if the user were performing exercises like sit-ups and
22 crunches.

23 15. Defendants have advertised and/or sold the AbTronic through a variety of media,
24 including a 30-minute commercial (“infomercial”), a two-minute television commercial, and an
25 Internet website, www.abtronic.net. See Ex. 1 (copy of 30-minute infomercial), Ex. 2
26 (transcript of 30-minute infomercial), Ex. 3 (copy of two-minute commercial), Ex. 4 (transcript

1 of two-minute commercial), Ex. 5 (still images from infomercial and commercial), and Ex. 6
2 (copy of web pages from www.abtronic.net).

3 16. Consumers have been able to purchase the AbTronic for \$119.80, plus shipping and
4 handling, by calling a toll-free telephone number, placing an order on the Internet at
5 www.abtronic.net, or mailing in an order form. Consumers also have been able to purchase the
6 AbTronic at retail outlets such as Kohl's Department Store and Walgreen Co. Consumers who
7 order the AbTronic receive the AbTronic device and several so-called "extras": an instruction
8 manual, a weight-loss plan, an extra battery, an "Extra Strength Slim Down Gel," and a travel
9 case. The "Extra Strength Slim Down Gel" gel purportedly contains caffeine, ground ivy, retinol,
10 and seaweed.

11
12 **Defendants' Ads and Claims for the AbTronic**

13 17. Defendants first aired the 30-minute infomercial for the AbTronic in April 2001.
14 Beginning in January 2002, Defendants began airing a two-minute commercial. Through
15 February 2002, the infomercial and commercial had aired more than two thousand (2,000) times.
16 Since at least December 2001, the AbTronic infomercial had been among the ten most frequently
17 aired infomercials in the United States and was ranked sixth as recently as the end of February
18 2002. Defendants had spent over eighteen million dollars (\$18,000,000) on television advertising
19 through February 22, 2002.

20 18. The AbTronic infomercial features two hosts – Todd Jensen and Julie Shipley, the
21 latter described as having "placed third in the Fitness America Nationals" two years in a row.
22 Throughout the infomercial, Jensen and Shipley make various claims about the purported benefits
23 of the device. The hosts' claims are reinforced by testimonials from purported AbTronic users
24 and from two purported experts – Idrise Ward-El, a professional body builder, and Dr. Julio
25 Garcia, described as a board certified plastic surgeon who, according to the abtronic.net website,
26 "tested the AbTronic System." The infomercial also includes: (1) "before-and-after" images of

1 flabby torsos becoming thin, lean, and sculpted; (2) computer-generated animations that purport
2 to illustrate how the AbTronic functions; and (3) frequent images of male and female models
3 with exceptional abdominal definition dressed in revealing bathing suits.

4 19. The AbTronic television advertisements, website, and packaging convey five core
5 messages: (1) use of the AbTronic causes inch and fat loss and eliminates cellulite; (2) use of the
6 AbTronic causes users to get well-defined abdominal muscles, e.g., “six-pack abs” or
7 “washboard abs”; (3) use of the AbTronic (a) for ten minutes on the abdominal area is the
8 equivalent of performing 600 sit-ups, (b) on the abdominal area is superior or equivalent to
9 abdominal exercises, such as sit-ups and crunches, and (c) on the legs is superior to thigh
10 exercises, such as squats and leg lifts; (4) a scientific study proves that use of the AbTronic
11 increases abdominal strength better than exercise alone; and (5) the use of the AbTronic is safe,
12 and is safe to use over the chest.

13 **(1) Lose Inches, Fat, and Cellulite Claims**

14 20. The AbTronic advertisements and packaging include the following representations,
15 among others, about how the AbTronic causes the loss of inches, fat, and cellulite:

16 A. The following representations occur three times in the infomercial:

17 **ON SCREEN: Computer-generated image of a male torso with a**
18 **protruding abdomen wearing the AbTronic device. The abdomen**
19 **recedes and reveals defined abdominal muscles.** Ex. 5 at 1-7.

20 MALE ANNOUNCER: . . . [W]atch as your ab muscles contract
21 as if you’re doing a sit-up. . . . Ten minutes on the AbTronic is the
22 equivalent of 600 sit-ups. That’s why we guarantee you’ll lose two inches
23 off your midsection in less than a month or your money back. Ex. 2 at
24 14, 27, 39. The MALE ANNOUNCER repeats this claim in the
25 commercial. Ex. 4 at 3.

23 B. TODD JENSEN (co-host of infomercial): It’s absolutely great for people
24 who want to lose inches and weight around the midsection. In a matter of
25 days, you’re going to see how AbTronic firms and tightens your muscles
26 and makes your stomach flatter. Ex. 2 at 6.

25 C. TODD JENSEN: You can go about your normal business while AbTronic
26 slims, trims and firms your upper abs, your lower abs and/or your love
handles with no sweat. Ex. 2 at 8.

1 D. Numerous consumer testimonials include the following representations,
2 among others, about how the AbTronic causes the loss of inches and fat:

3
4 1. STEVE McKIERNAN: ... It's crystal clear that there's something
5 healthy going on in your body when you're wearing the AbTronic. Ex. 2
6 at 5.

7 **ON SCREEN:**

8 **A "before" photograph depicts a side view of a bulging male
9 torso. The "after" photograph depicts a side view of a flat male
10 torso. Ex. 5 at 8-9.**

11 2. **ON SCREEN: "Anita Vaccaro"
12 "Hotel Beverage Dept."
13 "Lost 3 inches"**

14 **A "before" photograph depicts a side view of a female torso.
15 The "after" photograph depicts a side view of a female torso with a
16 flatter abdomen.**

17 ANITA VACCARO: After three weeks of using the AbTronic
18 System, I noticed fantastic results. I have lost three inches in my waist
19 and two inches in my hip area and I was just very happy with it. Ex. 2 at
20 6; Ex. 6 at 7.

21 3. **ON SCREEN: "Lisa Lundy"
22 "Real Estate Sales"
23 "Lost 5 inches"**

24 **A "before" photograph depicts a side view of a female torso.
25 The "after" photograph depicts a side view of a female torso with a
26 flatter abdomen.**

**The message, "Results vary based on use and muscle
response," later appears for a short time at the bottom of the screen
in faint lettering, significantly smaller than the "Lost 5 inches"
statement. Ex. 5 at 10.**

LISA LUNDY: I got into a car accident about three months ago
and was unable to go work out at the gym. Since then, I have found the
AbTronic System. I've used the AbTronic System now for about two and
a half months. I've lost five inches on my waist and another three inches
on my hips. Ex. 2 at 6.

**This testimonial also appears on the www.abtronic.net website. Ex. 6
at 7.**

4. **ON SCREEN: "K.T. Roberge"
"Homemaker"**

1 [Same message and display characteristics described in
2 ¶ 20.D.3 appear at Ex. 2 at 19.]

3 K.T. ROBERGE: When I first started using the AbTronic System,
4 I was skeptical at first, thinking it's just too easy, strapping it on, nothing
5 to plug in, and it just contracts your muscles. But for three weeks, I have
6 used it now and I've lost two inches in my waist. Ex. 2 at 19.

7 5. ON SCREEN: "Alice Roussos"
8 "Interior Designer"
9 "Lost 2 inches"

10 A "before" photograph depicts a front view of a female torso.
11 The "after" photograph depicts the same torso with less flab in the
12 "love handle" area.

13 ALICE ROUSSOS: What I noticed most after using the AbTronic
14 System was a clearer definition in the muscle tone. The muscles show
15 much better, and after only three weeks, I've lost two inches already. Ex.
16 2 at 31-32.

17 6. ON SCREEN: "John Trad"
18 "Sales Manager"
19 [Same message and display characteristics described in
20 ¶ 20.D.3 appear at Ex. 2 at 32.]

21 JOHN TRAD: Well, I've been using the AbTronic System for
22 three weeks. I've lost three inches in my waist. I feel great. I don't have
23 love handles like I did before and I enjoy it. Ex. 2 at 32.

24 7. ON SCREEN: "Charles Magruder"
25 "Stock Broker,"
26 "Lost 3 inches"

A "before" photograph depicts a front view of a male torso.
The "after" photograph depicts the same torso but flatter in the
midsection.

CHARLES MAGRUDER: I concentrated the AbTronic System on
my stomach and after about two and a half months, I noticed about a
three-inch reduction in my waistline. It was very noticeable. Ex. 2 at 32.

8. ON SCREEN: "Kathy Horn"
"Tanning Salon Owner"

A "before" photograph depicts a side view of a female torso.
The "after" photograph depicts the same torso but flatter in the
midsection.

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. I can wear lower pants, which I usually have a problem
wearing pants like that after having a child, and it's worked wonders. Ex.
2 at 32-33.

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9. **ON SCREEN: “Jay Horn”
“Police Officer”**

JAY HORN: I've had a bad problem with this -- love handles on the side. Everybody has them, I think. And using the AbTronic System has really taken off inches off my sides, and even my wife has seen it and noticed it, and I like that. Ex. 2 at 35.

10. **ON SCREEN: “Carmen”
“New York”**

CARMEN: I got some friends with some beer bellies, they never want to exercise, this is the trick for them. Ex. 2 at 26.

E. Through a testimonial from a medical doctor, Defendants further tout the AbTronic’s supposed ability to eliminate inches and fat:

**ON SCREEN: “Dr. Julio Garcia”
“Board Certified Plastic Surgeon”**

DR. JULIO GARCIA: Many people can go on a very strict diet regimen and lose a lot of body fat, yet the muscle tone underneath shows no definitions. We've all gone to the beach, seen young women and men with those six-pack type of washboard abs. They're really very sexy and people really want those. 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.

ON SCREEN: Computer animation of electric current leaving the AbTronic belt and causing muscles on a torso to contract.

DR. JULIO GARCIA: So, with systems like the AbTronic where we can stimulate these muscles and you do both things, both the system of losing some weight, losing those inches, and then firming and toning the muscles underneath, that muscle definition will, therefore, show through much better and give you a better cosmetic improvement. Ex. 2 at 10-11.

F. Defendants reinforce the advertisements’ inch and fat loss claims through their claims about the AbTronic Firming and Toning Gel:

1. Three times during the infomercial the MALE ANNOUNCER describes the AbTronic gel as “a special AbTronic slim down firming gel to give you maximum results quickly.” Simultaneously, a graphic on the screen states, “Slim Down Firming Gel.” Ex. 2

1 at 15-16, 29, 40.

- 2 2. In the two-minute commercial, the MALE ANNOUNCER refers to
3 “the AbTronic slim down firming gel with extra strength formula.”
4 An accompanying graphic states, “Extra Strength Slim Down Gel.”
5 Ex. 4 at 5.

6 G. Even though the AbTronic Instruction Manual - which consumers see
7 only after buying the device and opening the box - acknowledges that the
8 AbTronic will not “eliminate cellulite,” Ex. 8 at 15, the AbTronic
9 advertisements include but are not limited to the following representations
10 about how the AbTronic eliminates cellulite:

- 11 1. **ON SCREEN: Images of females with well-toned bodies, clad
12 in bikinis, and wearing the AbTronic device around thigh
13 area.**

14 JULIE SHIPLEY: And, ladies, listen to this. AbTronic can
15 even get rid of that cellulite and flabbiness around your thighs
16 Ex. 2 at 10.

- 17 2. TODD JENSEN: AbTronic gives you a choice of six different
18 training modes . . . [including] . . . the fat blaster cellulite mode.
19 Ex. 2 at 33.

- 20 3. JULIE SHIPLEY: I also use the cellulite buster on the back of my
21 legs. It's a low intensity mode that's continuously on and it works
22 wonders. Ex. 2 at 34.

- 23 4. Abtronic.net website: “Remember the AbTronic can also be used
24 on your buns and thighs, and is an EXCELLENT form of cellulite
25 control!” Ex. 6 at 10.

26 H. The AbTronic Instruction Manual and packaging for the AbTronic Firming
and Toning Gel include but are not limited to the following representations
that reinforce the advertisements’ claims about how the AbTronic causes
the loss of inches, fat, and cellulite:

1. In describing the six program modes on the AbTronic device, the
manual refers to mode 6 as “Fat Blaster.” Ex. 8 at 4 (AbTronic
Instruction Manual).

1 B. TODD JENSEN: . . . You stay with this for 10 minutes and it's
2 comparable to 600 sit-ups at a time. And you do that enough times, and
3 you're going to have that six-pack of abs sooner than you think. Ex. 2 at
4 19.

5 C. MALE ANNOUNCER: Now, with one touch of a button, you can get that
6 six-pack you always wanted, guaranteed. Ex. 4 at 3.

7 D. **ON SCREEN: Image of bare male torso without an AbTronic unit
8 and with highly developed and defined abdominal muscles,
9 accompanied by two bikini-clad female torsos with exposed, flat
10 abdominal areas.** Ex. 5 at 15.

11 TODD JENSEN: You are going to have abs that you won't believe.
12 Ex. 2 at 9.

13 E. DR. JULIO GARCIA: Well, you can lose all the weight in the world that
14 you want, but unless you have good muscle tone underneath, you're not
15 going to have a washboard abdomen. . . . So, with systems like the
16 AbTronic where we can stimulate these muscles and you do both things,
17 both the system of losing some weight, losing those inches, and then
18 firming and toning the muscles underneath, that muscle definition will,
19 therefore, show through much better and give you a better cosmetic
20 improvement. Ex. 2 at 10-11.

21 F. **ON SCREEN: "Dr. Ann Lewis"
22 "Oral Surgeon"**

23 **A "before" photograph depicts a side view of a female torso
24 with a relatively flat midsection. The "after" photograph depicts the
25 same torso with a concave midsection.**

26 DR. ANN LEWIS: After using the AbTronic System for about
two months, I noticed that my abdominals were more cut. They have
more definition, which is what I was looking for. Ex. 2 at 32.

(3) Superior or Equivalent to Sit-Ups and Other Exercises Claims

22. The AbTronic advertisements include the following representations, among others,
about how use of the AbTronic (a) for ten minutes on the abdominal area is the equivalent of
performing 600 sit-ups, (b) on the abdominal area is superior or equivalent to abdominal
exercises, such as sit-ups and crunches, and (c) on the legs is superior to thigh exercises, such
as squats and leg lifts:

A. **ON SCREEN: Images of female torso with well-defined abdominal
muscles and of a male torso with well-defined, bulky abdominal
muscles.**

1 MALE ANNOUNCER: You'll see how the AbTronic System gives
2 you the results of 600 sit-ups in just 10 minutes without any effort. Ex. 2
3 at 3-4.

4 B. The following representations occur three times in the infomercial:

5 **ON SCREEN: Computer-generated image of a male torso with a**
6 **protruding abdomen wearing the AbTronic device. The abdomen**
7 **recedes and reveals defined abdominal muscles.** Ex. 5 at 1-7.

8 MALE ANNOUNCER: . . . [W]atch as your ab muscles contract
9 as if you're doing a sit-up. . . . Ten minutes on the AbTronic is the
10 equivalent of 600 sit-ups. That's why we guarantee you'll lose two inches
11 off your midsection in less than a month or your money back. Ex. 2 at
12 14, 27, 39.

13 **The MALE ANNOUNCER repeats this claim in the commercial.** Ex.
14 4 at 3.

15 C. JULIE SHIPLEY: It's like doing the equivalent of 600 sit-ups in 10
16 minutes. Ex. 2 at 4.

17 D. **ON SCREEN: "10 minutes = 600 situps"**
18 Ex. 5 at 16.

19 JULIE SHIPLEY: You only need to use the AbTronic Fitness
20 System for 10 minutes two to three times a day to put yourself in bathing
21 suit shape. Remember, 10 minutes with the AbTronic and you're doing
22 600 sit-ups. Ex. 2 at 11.

23 E. TODD JENSEN: I like the short, quick contraction that duplicates a sit-
24 up. You stay with this for 10 minutes and it's comparable to doing 600
25 sit-ups at a time. And you do that enough times, and you're going to have
26 that six-pack of abs sooner than you think. Ex. 2 at 19.

F. TODD JENSEN: AbTronic gives you a choice of six different training
modes. . . . The karate chop and woodpecker modes are the best for ab
work because of the steady contractions, comparable to doing 600 sit-ups
in 10 minutes. But remember, the AbTronic is doing all the work for you.
Ex. 2 at 33.

G. TODD JENSEN: "AbTronic gives you a choice of six different training
modes . . . [including] . . . the crunch craze program. . . ." Ex. 2 at 33.

H. **ON SCREEN: Computer animation of electric current leaving the**
AbTronic belt and causing muscles on a torso to contract.

TODD JENSEN: AbTronic works by little electronic impulses that
send a signal through the skin to the motor point of the muscle, triggering
the muscle to contract. So, there's no more guessing at how to do a
proper crunch. AbTronic does it for you the correct way every time. Ex.
2 at 9.

1 I. **ON SCREEN: “Alice Melesio-Incle”**
2 **“Certified Fitness Trainer”**

3 ALICE MELESIO-INCLE: As a personal trainer, I teach my
4 clients to be able to contract their muscles -- the abdominal muscles and
5 do crunches properly, but when they go home, they don't remember how
6 to be able to do the proper contraction to make the exercise work for
7 them. What I found with the AbTronic System is that it's a no-brainer.
8 Ex. 2 at 9.

9 **ON SCREEN: “It does the work for you”**
10 **[Same message and display characteristics described in**
11 **¶ 20.D.3 appear at Ex. 2 at 9.]**

12 J. TODD JENSEN: . . . [W]e asked champion bodybuilder, Idrise Ward-El,
13 to test the AbTronic Fitness System in preparation for competition.

14 **ON SCREEN: “Idrise Ward-El”**
15 **“Professional Bodybuilder”**

16 IDRIS WARD-EL: When I first used the AbTronic System, it
17 looked small and I didn't have any idea what it would feel like. When I did
18 use it, I had a very strong contraction, a lot stronger than doing sit-ups.
19 Even after 100 sit-ups, you don't get the kind of contraction you get here,
20 because normally, when doing sit-ups you get tired first. Then it starts to
21 work. Doing the first AbTronic Systems, the first contraction feels like
22 you've done already 100, 150 sit-ups. Ex. 2 at 20.

23 K. **ON SCREEN: “Marilyn Jones”**
24 **“Stuntwoman”**

25 MARILYN JONES: Besides using it on my abs, I've also put it on
26 my thighs and the AbTronic System is fantastic for the thighs. It really
gives you a fantastic workout, better than anything. In fact, it's better
than squats and leg lifts. Ex. 2 at 34.

27 23. The AbTronic Instructional Manual reinforces the claims from the advertisements set
28 forth in Paragraph 22, above:

- 29 A. A photograph depicts a female torso with the AbTronic device around her
30 stomach area. The caption below the photograph states, “Tightens and
31 flattens the abs similar to sit ups. Attacking spread and giving definition.”
32 Ex. 8 at 10.
- 33 B. A photograph depicts a female torso with the AbTronic device around her
34 lower abdominal area, near her pelvis. The caption below the photograph
35 states, “Similar as laying [sic] down, lifting legs slowly and than [sic]
36 lowering them. Exercises lower abs.” Ex. 8 at 10.
- 37 C. A photograph depicts a female torso with the AbTronic device around her
38 lower back. The caption below the photograph states, “Helps with

1 posture. Similar effect as Horizontal lifts.” Ex. 8 at 11.

2 D. In describing the six program modes on the AbTronic device, the manual
3 refers to mode 4 as “Crunch Craze.” Ex. 8 at 4.

4 **(4) Claim of Scientific Support for Superiority of AbTronic to Exercise**

5 24. Through the following representations, the AbTronic infomercial claims that a
6 scientific study proves that use of the AbTronic increases abdominal strength better than exercise
7 alone:

8 **ON SCREEN: Image of the title page of a manuscript with the following
9 identifying information:**

10 **“Comparison of the Effects of Electrical Stimulation &
11 Exercise on Abdominal Musculature”
12 “(Univ. of Maryland)”
13 “Reprint of Journal Ortho. Sports Phys. Ther.”
14 (one line illegible)**

“Confidential”

15 JULIE SHIPLEY: Seven doctors from the University of Maryland did a
16 four-week study on abdominal strength of 31 healthy volunteers.

17 TODD JENSEN: That study shows that exercise combined with
18 electronic muscle stimulation increased the subject's strength by 47 percent.
19 Electronic stimulation, by itself, with no additional exercise, increased abdominal
20 muscle strength by 41 percent. Exercise alone only accounted for a 6 percent
21 increase.

JULIE SHIPLEY: Their conclusion was that electronic stimulation was
22 much better than exercise alone.

TODD JENSEN: That proves that you get better results by use of the
23 AbTronic Fitness System whether you use it as a supplement to your normal
24 workout or just by itself. Ex. 2 at 21-22.

25 **(5) Safety Claims**

26 25. The AbTronic advertisements include the following representations, among others,
about how the Abtronic is safe to use, and is safe to use over the chest:

A. JULIE SHIPLEY: AbTronic is really safe and easy to use. You apply a
little AbTronic gel on the back, wrap the belt around your stomach and

1 turn it on. Ex. 2 at 7.

2 B. JULIE SHIPLEY: And, ladies, listen to this. AbTronic can even get rid of
3 that cellulite and flabbiness around your thighs and you can also use it on
4 your chest. Ex. 2 at 10.

5 C. Image from AbTronic infomercial and commercial of AbTronic device
6 being used over the chest. Ex. 5 at 17.

7 D. On three separate occasions, the MALE ANNOUNCER states during the
8 infomercial, "AbTronic is very safe and simple to use." Ex. 2 at 13, 27,
9 38.

10 26. At two points in the thirty-minute infomercial a disclaimer states, "Do not use during
11 pregnancy or with a pacemaker, cardiac condition, epilepsy, multiple sclerosis." Ex. 2 at 13, 37.

12 When the disclaimer appears, it appears briefly in small lettering at the bottom of the screen, is
13 not clear or prominent, and is not in close proximity to the claims about the AbTronic's
14 purported safety.

15 27. The AbTronic Instruction Manual reinforces the claims from the advertisements set
16 forth in Paragraph 25, above, that use of the AbTronic is safe and the AbTronic is safe to use
17 over the chest:

18 A. ... [A] half hour daily is usually all it takes to help improve figure
19 problems, especially . . . bust-lines . . . Ex. 8 at 2.

20 B. Under the section entitled "Belt Placement," a photograph depicts a female
21 torso with the AbTronic device on her chest. Below the photograph is the
22 word, "Chest". Ex. 8 at 10.

23 C. Under the section entitled "Exercise Points - Women," the manual reads:
24 BREASTS - For improved breast contours. Ex. 8 at 7.

25 D. Under the section entitled "Exercise Points - Men," the manual reads:
26 CHEST - A similar action as pushing the fist into the palm of
another, exercises the pectorals.

E. A separate paper insert that accompanies the manual states, "With your
new original AbTronic you can rest assured that you own the best and
safest system for your body and health." Ex. 9 at 1 (emphasis in original;
insert entitled "IMPORTANT! NEWS MUST READ !!!").

28. Although the AbTronic pre-sale promotions tout the AbTronic's safety when used

1 over the chest, the AbTronic Instruction Manual – which consumers are able to read only after
2 purchase – warns users against using the device over the chest, stating, “DO NOT apply current
3 through the chest (transthoracic) as introduction of electrical current through the heart may
4 cause arrhythmias.” Ex. 8 at 20. The Manual further warns against use of the device by people
5 with certain medical conditions, stating, inter alia, “**AbTronic** is contraindicated for persons with
6 cardiac demand pacemakers”; “**AbTronic** should not be used on persons with cancer”; “Safety
7 not determined for use during pregnancy”; and “**AbTronic** must not be used over swollen,
8 infected or inflamed areas or skin eruptions, e.g. Phlebitis, Thrombophlebitis, Phlebothrombosis,
9 Varicose Veins etc. [because e]mboli in the calf or elsewhere can dislodge and cause pulmonary
10 embolism or stroke.” Id.

11 **Defendants’ Purported 30-Day Money-Back Guarantee**

12 29. The AbTronic advertisements include, but are not limited to, the following statements
13 and depictions about a 30-day unconditional money-back guarantee:

14 A. The following representations occur three times in the infomercial:

15 **ON SCREEN: 30 day money back GUARANTEE**

16 * * * *

17 MALE ANNOUNCER: And you also get an unconditional money back
18 guarantee. If you’re not satisfied, just return it for a refund of the purchase
19 price....Ex. 2 at 17, 30, and 42.

20 B. The two-minute commercial similarly represents:

21 **ON SCREEN: 30 day Money back GUARANTEE**

22 * * * *

23 MALE ANNOUNCER: You also get ... an unconditional money back
24 guarantee Ex. 4 at 7.

25 30. Defendants have provided a non-toll-free, customer service telephone number in the
26 packaging materials for consumers who wish to return the product and receive a refund. The

1 so-called “customer service” telephone number often has been continuously busy or customers
2 have been placed on hold for extended periods of time. After waiting on hold, customers have
3 been disconnected, or in other instances, have had to place numerous long distance toll calls in
4 connection with their attempts to obtain refunds.

5 **Defendants’ Delivery Practices**

6 31. Telephone operators who have taken orders for the AbTronic have stated that the
7 product will be delivered in seven days, seven to ten business days, thirty days, or six to eight
8 weeks. Some consumers have paid an additional fee of up to fifteen dollars or have agreed to
9 pay for the AbTronic in full (as opposed to in installment payments) in order to receive expedited
10 delivery within seven to ten days. On numerous occasions, however, Defendants have failed to
11 ship the product for delivery within the promised time periods. In some instances, consumers
12 never received the product. Furthermore, Defendants have not advised these consumers of the
13 delay or offered them an opportunity to cancel the order or receive a refund, nor, having failed to
14 do the foregoing, deemed the orders canceled and provided a prompt refund.

15
16 **DEFENDANTS’ VIOLATIONS OF SECTIONS 5(a) AND 12 OF THE FTC ACT**

17 32. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or deceptive acts or
18 practices in or affecting commerce. Section 12(a) of the FTC Act, 15 U.S.C. § 52(a), prohibits
19 the dissemination of any false advertisement in or affecting commerce for the purpose of
20 inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or
21 cosmetics. The AbTronic EMS device is a “device,” and the AbTronic Firming and Toning Gel
22 is a “drug” or “cosmetic,” for purposes of Sections 12 and 15 of the FTC Act, 15 U.S.C.
23 §§ 52(d) and 55. As set forth below, Defendants have engaged and are continuing to engage in
24 unlawful practices in connection with the marketing and sale of the AbTronic EMS device and
25 gel (collectively, the AbTronic).

1 **COUNT ONE**
2 **FALSE CLAIMS - LOSS OF INCHES, FAT, AND CELLULITE**

3 33. Through the means described in Paragraphs 19 and 20, above, Defendants have
4 represented, expressly or by implication, that use of the AbTronic causes inch and fat loss and
5 eliminates cellulite.

6 34. In truth and in fact, use of the AbTronic device does not cause inch or fat loss or
7 eliminate cellulite. Therefore, Defendants' representations set forth in Paragraph 33, above,
8 constitute a deceptive practice, and the making of false advertisements, in or affecting
9 commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C.
10 §§ 45(a) and 52.

11 **COUNT TWO**
12 **FALSE CLAIMS - WELL-DEFINED ABDOMINAL MUSCLES**

13 35. Through the means described in Paragraph 19 and 21, above, Defendants have
14 represented, expressly or by implication, that the AbTronic causes users to get well-defined
15 abdominal muscles, e.g., "six-pack abs" or "washboard abs."

16 36. In truth and in fact, the AbTronic does not cause users to get well-defined abdominal
17 muscles, e.g., "six-pack abs" or "washboard abs." Therefore, Defendants' representations set
18 forth in Paragraph 35, above, constitute a deceptive practice, and the making of false
19 advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal
20 Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

21 **COUNT THREE**
22 **FALSE CLAIMS - SUPERIORITY OR EQUIVALENCE TO EXERCISE**

23 37. Through the means described in Paragraphs 19, 22, and 23, above, Defendants have
24 represented, expressly or implication, that use of the AbTronic (a) for ten minutes on the
25 abdominal area is the equivalent of performing 600 sit-ups, (b) on the abdominal area is superior
26 or equivalent to abdominal exercises, such as sit-ups and crunches, and (c) on the legs is
superior to thigh exercises, such as squats and leg lifts.

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COUNT SIX
FAILURE TO DISCLOSE SAFETY RISKS

43. Through the means described in Paragraphs 19, 25, and 27, above, Defendants have represented, expressly or by implication, that use of the AbTronic is safe.

44. Defendants have failed to disclose or to disclose adequately in their pre-sale promotional materials that the AbTronic is not safe for all users. In fact, the AbTronic should not be used by people with implanted cardiac pacemakers; it poses health risks for use over or near cancerous lesions, and swollen, infected or inflamed areas or skin eruptions, e.g., phlebitis, thrombophlebitis, and varicose veins; and the AbTronic's safety has not been established for pregnant women. These facts would be material to consumers in their purchase of the AbTronic.

45. In light of the representation made in Paragraph 43, Defendants' failure to disclose or to disclose adequately the material information about the health risks stated in Paragraph 44 was, and is, a deceptive practice, and constitutes false advertising of a device, in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act. 15 U.S.C. §§ 45(a) and 52.

COUNT SEVEN
FALSE CLAIMS – FAILURE TO MAKE A PROMPT REFUND

46. Through the means described in Paragraph 29, above, Defendants have represented, expressly or by implication, that Defendants provide timely refunds to consumers who request refunds pursuant to Defendants' unconditional money back guarantee.

47. In truth and in fact, in many instances, Defendants have not provided timely refunds to consumers who have requested refunds pursuant to Defendants' unconditional money back guarantee. Therefore, the making of the representation set forth in Paragraph 46 constitutes a deceptive practice in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. § 45(a).

COUNT EIGHT

1 **VIOLATION OF THE MAIL ORDER RULE**

2 48. The Mail Or Telephone Order Merchandise Rule (“Mail Order Rule”) was
3 promulgated by the FTC on October 22, 1975, under the FTC Act, 15 U.S.C. § 41 et seq. On
4 September 21, 1993, the Mail Order Rule was amended under Section 18 of the FTC Act, 15
5 U.S.C. § 57a, and the amendments took effect March 1, 1994. The Mail Order Rule applies to
6 orders placed by mail, telephone, facsimile transmission, or the Internet.

7 49. At all times material hereto, Defendants have engaged in the sale of merchandise
8 ordered by mail, telephone, or the Internet, in commerce.

9 50. In numerous instances, after having solicited orders for the merchandise and
10 received “properly completed orders,” as that term is defined in Section 435.2(d) of the Mail
11 Order Rule, 16 C.F.R. § 435.2(d), and having been unable to ship the merchandise to the buyer
12 within the Mail Order Rule’s applicable time, as set forth in Section 435.1(a)(1) of the Mail Order
13 Rule (“applicable time”), 16 C.F.R. § 435.1(a)(1), Defendants:

- 14 A. Violated Section 435.1(b)(1) of the Mail Order Rule, 16 C.F.R. § 435.1(b)(1), by
15 failing, within the applicable time, to offer to the buyer, clearly and conspicuously
16 and without prior demand, an option either to consent to the delay in shipping or
17 to cancel the order and receive a prompt refund; and
- 18 B. Having failed within the applicable time to ship the merchandise or to offer the
19 buyer the option to either consent to a delay or to cancel the buyer’s order and
20 receive a prompt refund, violated Section 435.1(c)(5) of the Mail Order Rule, 16
21 C.F.R § 435.1(c)(5), by failing to deem the order canceled and to make a prompt
22 refund to the buyer, as “prompt refund” is defined in Section 435.2(f) of the Mail
23 Order Rule, 16 C.F.R. § 435.2(f).

24 51. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of
25 the Mail Order Rule constitute unfair or deceptive acts or practices in or affecting commerce, in
26 violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

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CONSUMER INJURY

52. As a result of Defendants' unlawful acts and practices, consumers throughout the United States have suffered and continue to suffer substantial monetary loss and possible injury to their health. Defendants also have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

53. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of the FTC Act. The Court, in the exercise of its equitable jurisdiction, may award other ancillary relief, including consumer redress, disgorgement, and restitution, to prevent and remedy injury caused by Defendants' law violations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Federal Trade Commission, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that this Court:

1. Permanently enjoin Defendants from violating Sections 5(a) and 12 of the FTC Act and the Mail Order Rule, as alleged herein, including committing violations in connection with the advertising, offering for sale, or other promotion of food, drugs, dietary supplements, devices, cosmetics, or other products, services or programs;
2. Award Plaintiff all temporary and preliminary injunctive and ancillary relief that may be necessary to avert the likelihood of consumer injury during the pendency of this action, and to preserve the possibility of effective and final relief;
3. Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of Sections 5(a) and 12 of the FTC Act and the

1 Mail Order Rule, including, but not limited to, rescission of contracts and restitution, other forms
2 of redress, and the disgorgement of ill-gotten gains; and

3 4. Award Plaintiff the costs of bringing this action, as well as such additional equitable
4 relief as the Court may determine just and proper.

5
6 Dated: November 5, 2002

Respectfully submitted,

7
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