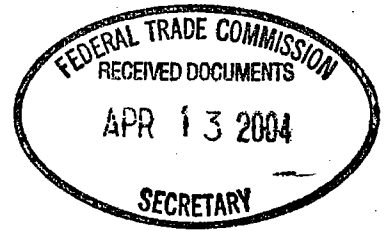


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

TELEBRANDS CORP.,)
TV SAVINGS, LLC, and)
AJIT KHUBANI,)
Respondents.)
)

Docket No. 9313

**ORDER DENYING RESPONDENTS'
MOTION FOR SUMMARY DECISION**

I. PROCEDURAL BACKGROUND

On March 24, 2004, Respondents filed a Motion for Summary Decision and a Memorandum in support thereof ("Motion for Summary Decision") and a Separate Statement of Material Facts as to Which There is No Genuine Issue ("Respondents' Statement of Facts"). On April 5, 2004, Complaint Counsel filed its Opposition to Respondents' Motion for Summary Decision ("Opposition"), and its Response to Respondents' Statement of Material Facts ("Complaint Counsel's Statement of Facts"). Complaint Counsel filed a separate Motion for Summary Decision which is addressed in a separate Order. For the reasons set forth below, Respondent's motion for summary decision is **DENIED**.

II. POSITIONS OF THE PARTIES

A. Summary of Arguments Raised by the Parties

Respondents contend that there is no evidence that the Ab Force advertising conveys the claims that the Ab Force would cause loss of weight, inches, or fat; build well-developed abs; and be an effective alternative to exercise, as alleged in the Complaint. Motion for Summary Decision at 11-14. Respondents argue that because the advertising, standing alone, cannot reasonably be read to contain the claims alleged, that Complaint Counsel must establish its case through extrinsic evidence but that because the expert opinion relied on by Complaint Counsel is not based on reliable and relevant facts or data, Complaint Counsel will be unable to do so. Motion for Summary Decision at 14-36.

Complaint Counsel argues that the product name, visual images, and oral representations convey the claims alleged in the Complaint without the need for extrinsic evidence. Opposition at 1-2. Complaint Counsel contends that it is not required to provide customer survey evidence but asserts that it will and that the consumer survey evidence, along with other evidence, will demonstrate that the advertisements made the alleged claims. Opposition at 2.

B. No Undisputed Facts

Based upon a review of the pleadings, the parties do not agree that any material facts are undisputed. In advance of trial, the parties are encouraged to stipulate to facts that are not disputed and submit those facts as joint stipulations prior to or at the final prehearing conference.

III. SUMMARY DECISION STANDARD

Commission Rule of Practice 3.24(a)(2) provides that summary decision “shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law.” 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, “a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial.” 16 C.F.R. § 3.24(a)(3). These provisions are virtually identical to the provisions governing summary judgment in the federal courts under Rule 56 of the Federal Rules of Civil Procedure; the Commission applies its summary decision rule consistent with case law construing Fed. R. Civ. P. 56. *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972); *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party must “do more than simply show there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. The nonmoving party may not rest on mere allegations or denials of its pleading but must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). *See also Liberty Lobby*, 477 U.S. at 256. The inferences to be drawn from the underlying facts must be viewed in

the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587. Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *State of New York v. Amfar Asphalt Corp.*, 1986 WL 27582, *2 (E.D.N.Y. 1986); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984).

IV. A GENUINE DISPUTE OF MATERIAL FACTS EXISTS

The Complaint in this proceeding alleges that Respondents violated sections 5 and 12 of the Federal Trade Commission Act (“FTC Act”) in connection with their marketing of the Ab Force, an electronic muscle stimulation (“EMS”) device within the meaning of Sections 12 and 15 of the FTC Act. The Complaint alleges, *inter alia*, that Respondents “represented, expressly or by implication, . . . that: a) Ab Force causes loss of weight, inches, or fat; b) Ab Force causes well-defined abdominal muscles; and c) use of Ab Force is an effective alternative to regular exercise.” Complaint ¶ 19. The Complaint further alleges that these claims are “false and misleading” and constitute “unfair or deceptive acts or practices.” Complaint ¶¶ 20, 23. Respondents deny these allegations. Answer ¶¶ 19, 20, 23.

Respondents argue that the Ab Force advertisements did not make the challenged claims as a matter of law. Motion for Summary Decision at 2. Complaint Counsel contends that the claims were made as a matter of law, or at least that there is a genuine dispute of material fact regarding whether Respondents made the representations challenged in the Complaint. Opposition at 2. Upon review, the claims made in the advertisements are either in dispute or are not sufficiently developed to render a decision on the pertinent issues of law and fact. Additional facts are necessary to determine whether Respondents’ advertising of the Ab Force made the claims alleged in the Complaint.

An advertisement is misleading under the FTC Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992). In implementing this standard, the Commission examines the overall net impressions of an advertisement and engages in a three-part inquiry: what claims are conveyed in the advertisement; are those claims false or misleading; and are those claims material to prospective consumers. *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *Kraft*, 970 F.2d at 314.

Respondents contend in their motion for summary decision that the first prong of this test is not met as a matter of law; that there is no competent, reliable, or admissible evidence that consumers understood that the alleged claims were being made; and that the expert report of Dr. Michael Mazis, which is described as providing a facial analysis of the advertising and a mall intercept survey, is based upon unreliable facts or data. Motion for Summary Decision at 1-6.

Complaint Counsel contends that the Ab Force advertisements claimed that Ab Force would cause loss of weight, inches, or fat; build well-developed abs; and be an effective alternative to exercise through: the images of trim models with well-developed abs wearing the product around their mid-sections; the circumstances surrounding the advertisement; the depiction of the product; and the name "Ab Force." Opposition at 1-11. Complaint Counsel asserts that extrinsic evidence demonstrates that the advertisements conveyed the challenged claims and that criticism of Dr. Mazis's report, at most, would impact the weight to be given to the report.

"In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence." *Kraft*, 970 F.2d at 318 (citing *In re Thompson Medical Co., Inc.*, 104 F.T.C. 786, 788-89 (1984); *In re Cliffdale Assocs. Inc.*, 103 F.T.C. 110, 165-66 (1984); FTC Policy Statement, 103 F.T.C. 174, 176 (1983)).

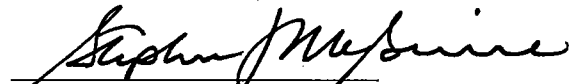
The advertisements at issue do not expressly state that Ab Force will cause loss of weight, inches, or fat; build well-developed abs; and be an effective alternative to exercise. Whether the advertisements may be reasonably interpreted as making such statements is a genuine issue of fact. "The general rule is that when the meaning or effect of words or acts is fairly disputed, the question is for the trier of the facts, to be decided after hearing all material evidence." *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414, 431 (2nd Cir. 1974) (citations omitted). Viewing the evidence in the light most favorable to the non-moving party, as required, it is clear that there are significant factual disputes regarding whether the Ab Force advertisements conveyed the asserted claims. Among the outstanding factual questions posed by this case include the meaning of the name Ab Force; the impact of the visual images used in the advertisements; the impact of phrases such as "latest fitness craze"; the effect of references to other ab belts; and whether consumers perceived the advertisements as making the advertising claims alleged.

An analysis of whether Respondents made the false claims alleged in the Complaint requires the evidence to be fully developed at trial. Whether or not the advertisements conveyed the claims alleged clearly raises genuine issues of material facts. Such factual disputes preclude granting summary decision as a matter of law.

V. CONCLUSION AND ORDER

As described above, the genuine issues of fact raised by the pleadings can only be properly determined through an evidentiary hearing.¹ Accordingly, Respondents, having failed to demonstrate entitlement to decision as a matter of law, its motion for summary decision is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

April 13, 2004

¹ Both parties objected to the consideration of each other's expert opinions in Complaint Counsel's Motion for Summary Decision and related pleadings. Although the issue is not raised by the parties with regard to Respondents' Motion, the contested expert reports and opinions would not be dispositive of any issue necessary for the determination of Respondents' Motion for Summary Decision.