

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	PUBLIC DOCUMENT
TELEBRANDS CORP.,)	
a corporation,)	
)	
TV SAVINGS, LLC,)	
a limited liability company, and)	Docket No. 9313
)	
AJIT KHUBANI,)	
individually and as president of)	
Telebrands Corp. and sole member)	
of TV Savings, LLC.)	
_____)	

**RESPONDENTS' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Court's May 6, 2004 Order on Post Trial Briefs, Respondents Telebrands Corp., TV Savings, LLC and Ajit Khubani submit these Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. The Complaint in this matter issued on September 30, 2003. (CX-1; Complaint date found at www.ftc.gov_____).
2. Respondents filed their Answer on October 23, 2003 (Answer, available at www.ftc.gov_____).
3. An initial Scheduling Order was issued by Chief Administrative Law Judge Stephen J. McGuire on November 5, 2003. (Available at www.ftc.gov_____). The Scheduling Order was subsequently revised on March 12, 2004 by stipulation of the parties. (Available on www.ftc.gov_____).
4. Trial commenced in this matter pursuant to 16 C.F.R. § 3.41 on May 4, 2004.
5. The last day in which testimony was received was May 6, 2004. The parties subsequently submitted a Third Joint Stipulation on May 14, 2004. (JX-11).
6. The parties filed and served Proposed Findings of Fact and Conclusions of Law on June 2, 2004. The parties filed and served Reply Findings of Fact and Conclusions of Law on June 15, 2004.
7. The parties submitted oral closing argument in this matter on June 17, 2004.

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

A. THE RESPONDENTS

8. Respondent Telebrands Corporation (“Telebrands”) is a New Jersey Corporation with its principal place of business at 79 Two Bridges Road, Fairfield, New Jersey 07004. (JX-1, ¶ 2).

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

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

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

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

B. TELEBRANDS AND ITS BUSINESS

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

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

1. The Direct Response Advertising Industry

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

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

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

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

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

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

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

a.m., and during the early morning weekend day part, which is typically 6:00 a.m. to 8:00 or 9:00 a.m. (Khubani Tr. 513-514).

2. Telebrands' Marketing Practices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

weeks of December 24, 2001 (CX-86 p. T011328) and January 14, 2002 (CX-88 p. T011309). It was also listed as an Ongoing Direct Response Spot in the Greensheets for January 21, 2002 through March 4, 2002. (CX-89 p. T011295; CX-90 p. T011415; CX-91 p. T011402; CX-92 p. T011388; CX-93 p. T011373; CX-94 p. T011358; CX-95 p. T011512). Finally, the IGIA Electro-Gym, another ab belt device, was listed as one of the Top Direct Response Spots in the Jordan Whitney Report for December 31/ through February 11, 2002 (CX-87 p. T011315; CX-88 p. T011301; CX-89 p. T011296; CX-92 p. T011382); and was listed as an Ongoing Direct Response Spot in the Jordan Whitney Report for the weeks of January 28, 2002 through March 4, 2002 (CX90 p. T011416; CX-91 p. T011403; CX-92 p. T011389; CX-93 p. T011407; CX-94 p. T011352; CX-95 p. T011506).

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

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

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

49. He was also aware of two other products called AbGymnic and Absolute Abs, but was not certain whether he was aware of those products prior to December 2001. (Khubani Tr.

465). Mr. Khubani also saw additional products, the ElectroFlex, the ElectroTone and the Omron Sports Massager at a housewares show in Chicago in January 2002. (Khubani Tr. 466).

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

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

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

D. TELEBRANDS DECIDES TO ENTER THE EMS AB PRODUCT MARKET

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

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

1. Telebrands Contacts the Manufacturer

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

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

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

58. Mr. Khubani asked the manufacturer if the Ab Force product had the same current output as AbTronic and Fast Abs, and was informed by the manufacturer that it did. (Khubani Tr. 266). Mr. Khubani testified that he posed the question of technical comparability to the manufacturer because he wanted to make sure that his advertisements were truthful in saying that the Ab Force used the same technology as ab belts which sold “for as much as \$120” (the AbTronic sold for \$120). (Khubani Tr. 267).

2. The “Ab Force” Name

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

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

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

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

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

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

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

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

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

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

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

benefits touted by competitors for their products as another point of reference. (Khubani Tr. 487).

E. THE TEST ADVERTISEMENTS

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

1. The Radio Test Advertisement

70. Mr. Khubani testified that the language contained in the first part of the test radio advertisement (“They’re the latest fitness craze to sweep the country, but they’re expensive, selling for up to \$120 each.”) was created to present a point of reference to other EMS ab products being sold on the market at the time. (Khubani Tr. 479). He testified that he wanted to make the price point a reference to other products because a comparison of the Ab Force to other products presented the idea of a significant savings. (Khubani Tr. 487).

71. Mr. Khubani also included other language (“Have you seen those fantastic electronic ab belt commercials on TV? They’re amazing, promising to get our abs into great shape fast without exercise.”) in order to serve as a reference point to consumers by providing a description of other EMS ab products on the market. (Khubani Tr. 487 - 488).

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

2. The Print Advertisement

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

74. The print advertisement contains two points of reference to other products on the market. The first is the statement “Electronic ab belts are the latest craze that are sweeping the country. These are the same type of ab belts that you’ve seen nationally advertised, similar to those sold on television by other for as much as \$100 and more, but during this nationwide promotion, you can own the amazing Ab Force electronic ab belt for the unbelievable price of \$10.” (CX-34). Mr. Khubani testified that this was a point of reference to other EMS ab products available on the market at that time. (Khubani Tr. 488).

75. The second point of reference is found in the statement, “How can we afford to sell amazing Ab Force electronic ab belts for the unbelievable price of \$10?” (CX-34). Mr. Khubani testified this was also a point of reference to other EMS ab belts, with an emphasis on price. (Khubani Tr. 488).

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

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

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

78. There were significant differences between the test radio ad and the print ad with regard to the points of reference to other EMS ab products.

79. First, the language in the beginning of the radio ad (“Have you seen those fantastic electronic ab belt commercials on TV? They’re amazing, promising to get our abs into

great shape fast without exercise.”) does not appear in any other advertisement for the Ab Force (compare CX-1H and JX-2; JX-3; JX-4; JX-5). Nor does it appear in the print advertisement, which was drafted the same day by Mr. Khubani. (compare CX-1H and CX-34).

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

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

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

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

4. The Test Television Spots

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

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

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

87. In late December 2001, Telebrands and Concepts TV Productions, Inc. created two test television commercials for the Ab Force product. One spot was a 60-second commercial later given the production code AB-B-60. (JX-1, ¶¶ 22- 23). A second spot was a 120-second commercial later given the production code AB-B-120. (JX-1, (Khubani Tr. 22 - 23).

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

89. Mr. Khubani provided Ms. Liantonio with the radio script and print ad, (Khubani Tr. 482), but Ms. Liantonio did not see the Ab Force product prior to the shoot. (JX-6, Liantonio Dep. 32 -33). Ms. Liantonio had also not seen any commercials for other EMS ab products before drafting the script, but was aware of their existence in the marketplace. (JX-6, Liantonio Dep. 30-32). In addition, Ms. Liantonio was not provided with any information about the Ab Force product, nor did Ms. Liantonio see an Ab Force product prior to drafting a script. (JX-6; Liantonio Dep. 30-32).

90. In speaking with Mr. Khubani about the script for the television ads, Ms. Liantonio was told that the Ab Force product was going to be the least expensive of its type on

the market, and that Telebrands would compete with others in the marketplace based on price. (JX-6, Liantonio Dep. 54 - 57). Mr. Khubani informed Ms. Liantonio that the script should not contain any claims other than price. (JX-6, Liantonio Dep. 56 – 57; Khubani Tr. 490 - 491).

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

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

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

94. Also prior to the shoot, Ms. Liantonio drafted a script for the Ab Force television spots. (JX-6, Liantonio Dep. 35 – 36; RX-34). The opening of the draft script made numerous exercise claims: “Do you wish you could get into shape fast without exercise? Wouldn’t you

love to have a flatter tummy without painful sit-ups? There are millions of Americans just like you who have discovered the power of those amazing Electronic Ab Belts advertised on television.” (RX-34).

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

96. When Ms. Liantonio showed Mr. Khubani the script, Mr. Khubani saw that Ms. Liantonio had made “all the claims I didn’t want to make—you know, flatter tummy, without painful sit-ups and so on...” (Khubani Tr. 490). Mr. Khubani testified that when he saw the script he “knew I had to rewrite the script.” (Khubani Tr. 490). He testified that he did not want to make those or similar claims because “we didn’t possess substantiation to make those claims.” (Khubani Tr. 490).

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

98. The new script completely eliminated Ms. Liantonio’s opening. (JX-2; CX-1B).¹

99. Instead, the new drafts opened with statements similar to those found in the print advertisements, but without any reference to exercise found in the radio advertisement, which was the very first draft of any advertising Mr. Khubani had produced for the Ab Force.

¹ The Transcript of the AB-B-60 test commercial was attached to the Complaint as Exhibit B, and was admitted as Exhibit CX-1B. Respondents note, however, that the Transcript is mislabeled as being a transcript of AB-E-60. CX-1B is actually a Transcript of the test commercial (AB-B-60), and not a transcript of the 60-second rollout commercial (AB-E-60) widely disseminated by Telebrands and used by Complaint Counsel’s expert, Michael B. Mazis, Ph.D., in his copy test.

(Khubani Tr. 486 - 489). These scripts, however, contain statements that are different than those found in the radio script or the print ad. (compare JX-2; CX1-B; JX-3; CX-34; and CX-1H).

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

101. Mr. Khubani intended to do two things with this language. First, he intended that this opening would serve as a point of reference for consumers by providing a description of the other EMS ab products on the market at the time, and would appeal to consumers by touting the price savings as the primary benefit of the Ab Force. (Khubani Tr. 486 - 489).

102. Second, Mr. Khubani testified that because sales of products of this cost and type are typically “impulse purchases,” he intended the language to create excitement in consumers. (Khubani Tr. 491 - 492). This effort to create a desire on the part of consumers to purchase the product because “everyone else wants one” is called a bandwagon effect. (Khubani Tr. 492).

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

104. A “bandwagon effect” is a frequently observed phenomenon in advertising used to generate interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby Tr. 373). Dr. Jacoby testified that as a result of the bandwagon effect, it was not necessary that consumers actually saw any ab belt infomercials

in order to create consumer desire for the product, in this case, the Ab Force. (Jacoby Tr. 374 - 375).

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

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

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

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

5. Test Advertising Performance

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

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

111. The total number of orders placed through the test commercials was approximately 1.4% of the total number of orders placed for the Ab Force during the entire campaign. (Khubani Tr. 493 – 494; JX-1 ¶ 26 – 28; RX-61).

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

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

F. TELEBRANDS ROLLOUT OF THE PRODUCT

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

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

1. Telebrands Revises Radio and Television Advertising Prior to Rollout

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

117. Specifically, the television scripts were revised to change the phrase “latest fitness craze” to “latest craze.” (Khubani Tr. 495; compare JX-2 with JX-4; JX-3 with JX-5). This language is similar to that found in the print advertisement, and does not contain a reference to fitness or exercise. (compare CX-34 and JX-4). Mr. Khubani testified that both were intended as points of reference. (Khubani Tr. 485 - 496).

118. The phrase “just as powerful and effective” was changed to “uses the same powerful technology as.” (compare JX-2 with JX-4; JX-3 with JX-5). Mr. Khubani testified that both were references to the fact that Ab Force used the same technology as other EMS ab products on the market. (Khubani Tr. 497).

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

120. In addition, the radio advertisement was revised to remove the entire opening statement about other ab belts “promising to get our abs into great shape fast without exercise.” (compare CX-1H and RX-49).

2. Telebrands Prepares User’s Manuals Referencing Massage

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

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

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

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

3. Telebrands Creates a Services Agreement Referencing Massage

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

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

4. Telebrands Creates Internet and E-mail Ads

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

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

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

5. Performance Of The Rollout Ads

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

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

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

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

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

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

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

136. In addition to AbTronic, Ab Energizer and Fast Abs, several other EMS ab products were marketed on television, either through commercial spots or on live television

shopping networks. These products included the IGIA Mini Wireless Massage, the Accusage, the Electrosage, the Electro-Gym, the Cyber-Tone, Slendertone Flex and others.

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

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

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

140. There is also substantial evidence that Mr. Khubani intended to make every effort to avoid making any of the claims asserted in this action. When presented by the producer of the television spots with a draft script containing claims that the Ab Force would result in “flatter

tummies” and was a replacement for exercise, Mr. Khubani discarded the script and rewrote it, removing those references.

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

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

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

III. FINDINGS OF FACT CONCERNING EXPERT TESTIMONY

A. THE PARTIES’ EXPERT WITNESSES

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

1. Michael B. Mazis, Ph.D.

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

146. Dr. Mazis' *curriculum vitae*, including his publications and an identification of cases in which he has testified were provided as attachments to his Expert Report (CX-58, Exh. A. thereto).

2. Jacob Jacoby, Ph.D.

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

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

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

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

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

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

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

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

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

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

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

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

B. THE FACIAL ANALYSIS OFFERED BY DR. MAZIS

159. At the trial in this matter, Dr. Mazis offered a facial analysis of the four Ab Force television commercial at issue, which were shown to Dr. Mazis in Court. (Mazis, Tr. 47 - 67).

160. Dr. Mazis offered the opinion that certain visual and verbal elements in the Ab Force ads would have two effects on consumers. The first is, as Dr. Mazis described it, an “indirect effect.” (Mazis, Tr. 66 - 67). Specifically, Dr. Mazis concluded that elements of the Ab Force ad would cause consumers to make an association between the Ab Force product and the ads for AbTronic, Ab Energizer and Fast Abs, thus causing consumers to believe (1) that the Ab Force caused well-developed abs and (2) a loss of inches around the waist. (Mazis, Tr. 66 - 67).

161. The second effect is what Dr. Mazis called a “direct effect.” Dr. Mazis concluded that even if consumers had never seen any other ab belt advertisement, elements within the four corners of the Ab Force ads would convey to consumers the idea that the Ab Force causes weight loss and was a substitute for exercise. (Mazis, Tr. 61 – 62, 66 - 67).

1. Indirect Effects

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

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

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

164. Another claim Dr. Mazis testified consumers may perceive as a result of this association is a claim of weight loss. He stated that while this claim is not made on the face of the Ab Force ads, consumers familiar with ads for AbTronic, Ab Energizer and Fast Abs could perceive a weight loss claim based on their familiarity with those other ads: "Again, it doesn't say anything explicitly about losing weight, but because of the association with previous ab belt ads, that other ab belt companies—their infomercials made those claims, people may perceive that those characteristics also associate with Ab Force." (Mazis, Tr. 61 - 62)(emphasis added).

165. In making his facial analysis, Dr. Mazis identified four "key elements" in the Ab Force ads that he considered as likely to have an impact on consumers. (Mazis, Tr. 59 - 60). Three of these elements he identified were elements that would, in his estimation, cause consumers to make an association between the Ab Force product and the advertisements for AbTronic, Ab Energizer and Fast Abs and conclude that the Ab Force product caused well-defined abdominals and loss of inches. (Mazis, Tr. 59 - 62).

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

cause people to think about their preconceptions about ab belts, what he described as “category beliefs.” (Mazis, Tr. 59).

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

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

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

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

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

that the only television advertisements relevant to consumers' categorization beliefs were the infomercials for AbTronic, Ab Energizer and Fast Abs. (Jacoby Tr. 347 - 348).

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

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

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

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

products could cause weight loss; and (4) that these products “are an alternative to exercise.” (Mazis, Tr. 47 - 48).

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

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

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

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

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

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

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

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

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

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

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

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

184. The evidence presented at trial establishes that Dr. Mazis was provided with and considered a limited number of materials in reaching the opinions he offered in this case. Specifically, Dr. Mazis reviewed and considered (1) the Complaint in this matter, and exhibits, (2) transcripts and videotapes of the infomercials for AbTronic, Ab Energizer and Fast Abs, and (3) infomercial ranking reports for the AbTronic, Ab Energizer and Fast Abs products. (Mazis,

Tr. 120 – 121; CX-58, ¶ 9). Dr. Mazis indicated that he reviewed the complaints previously issued by the Commission against the marketers of AbTronic, Ab Energizer and Fast Abs, and it is clear that Complaint Counsel provided information concerning advertising for AbTronic, Ab Energizer and Fast Abs to Dr. Mazis. (Mazis, Tr. 120 – 121).

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

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

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

188. Similarly, Dr. Mazis offered no opinion whatsoever on the issue of whether any of the advertisements for other EMS ab belt products that were admitted into evidence would not be considered by consumers in the same category as “ab belts.”

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

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

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

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

193. Because Dr. Mazis’ categorization theory and indirect effects analysis required him to look beyond the four corners of the Ab Force advertising, the fact that he was limited in

his review in this manner is sufficient, standing alone, to render his facial analysis not meaningfully probative of any issue in this matter.

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

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

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

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

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

198. However, as Dr. Jacoby noted, it was conjecture on Dr. Mazis’ part to assume that consumers would discriminate among thousands and thousands of retail packages in stores to review the packaging and develop beliefs about EMS ab products. (Jacoby Tr. 348). Consumers may not even notice them. (Jacoby Tr. 348). As Dr. Jacoby testified, while Dr. Mazis is correct that consumers may develop preconceptions about ab belt products through word-of-mouth communication or retail packaging, his opinion that these elements had shaped consumer perceptions was another matter entirely. (Jacoby Tr. 349).

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

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

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

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

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

202. No evidence was offered identifying how many times an AbTronic infomercial aired compared to an AbTronic two-minute commercial.

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

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

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

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

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

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

209. Dr. Mazis testified that he was not familiar with the unidentified reports, or what “the underlying methodology was and so on.” (Mazis, Tr. 120). He further testified that “they were relied on by the FTC in its complaints against those three companies [the AbTronic, Ab

Energizer and Fast Abs advertisers], so I assume that the data were reliable, but that's—that's all the information I have on those—on that service.” (Mazis, Tr. 120).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

factors that go into that,” none of which he described or demonstrated applied in this case. (Mazis, Tr. 172).

228. Finally, he admitted that he had seen no empirical data about the ability of viewers to remember what they saw in the infomercials for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 184). He conceded that his opinions “about the take-away from those ads are just based on my facial analysis of those ads.” (Mazis, Tr. 184). However, unlike consumers who just “surf in and out” of those infomercials, Dr. Mazis reached his facial analysis after identifying the claims alleged in the Complaint and seeing the infomercials several times. (Mazis, Tr. 141 - 142, 184). As Dr. Jacoby testified, the fact that Dr. Mazis reviewed the Complaint and the allegations therein had the effect of biasing Dr. Mazis’ facial analysis. (Jacoby Tr. 343 - 344).

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

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

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

i. Information provided by advertisers and shippers

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

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

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

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

235. Complaint Counsel has offered no evidence demonstrating the number of times the infomercial for the AbTronic product aired, or the amount of advertising dollars spent on AbTronic. Complaint Counsel has instead produced evidence regarding the approximate number of AbTronic products shipped. (JX-11, ¶ 4 - 5). This evidence was offered by the stipulated testimony of Jon Nokes, an officer of Smart Inventions, Inc. TV Products Fulfillment and Smart

Living Inc. (JX-11, ¶ 1). However, none of these companies had any involvement in the direct response marketing of the AbTronic product, nor did they have any involvement in the preparation or airing of the television commercial for the Ab Force. (JX-11, ¶2).

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

ii. Jordan Whitney Greensheets

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

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

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

240. Mr. Towers testified that the JW Greensheets contain three rankings. (Towers Tr. 287). One ranking contained in each JW Greensheet is a Top 50 ranking of infomercials. The second is a ranking of Top 40 direct response spots. And the third is a Top 20 ranking of infomercial products. (Towers Tr. 287; CX-62; CX-72 through CX-95).

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

242. That description, in each JW Greensheet, states as follows: “These are the top infomercials based on confidential media budgets and Jordan Whitney’s monitoring of national

cable and selected broadcast markets for the week ending,” followed by a date. (CX-62; CX-72 through CX-95).

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

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

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

246. That description, in each JW Greensheet, states, in part, as follows: “Rankings are based on media expenditures and Jordan Whitney’s monitoring of national cable and selected broadcast stations.” (CX-62; CX-72 through CX-95).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

264. Mr. Khubani testified that the JW Greensheets were unreliable for several reasons. Mr. Khubani stated that the confidential media budgets that were provided by Telebrands to Jordan Whitney were never verified by the publisher and there is no established

rule concerning how they must be formulated. (Khubani Tr. 526-527). In fact, an advertiser can take actions to determine whether the infomercial or commercial that it is running is ranked high or low. (Khubani Tr. 527-528). The size of the budget reported to Jordan Whitney can be inflated or deflated depending on whether the advertiser chooses to report various costs as part of the budget. (Khubani Tr. 529-530). And, in fact, there have been times when Telebrands was paying more to run media for one product than another and the product receiving the lower media expenditure was ranked higher in the Greensheets than the product receiving the higher expenditure. (Khubani Tr. 533-534).

iii. Infomercial Monitoring Service reports

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

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

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

268. The number of “detections” is at great variance with the number of airings for the Ab Energizer and Fast Abs infomercials identified in JX-6, ¶¶ 10, 14. Specifically, the document states 1,693 “detections” for the Ab Energizer infomercial, (CX-126), while Gary Hewitt and Douglas Gravink indicated that the infomercial aired “over 20,000 times.” (JX-6, ¶14). The

document also states that there were 1,272 “detections” for the Fast Abs infomercial as of February 22, 2002, (CX-126), while John W. Kirby, Jr. indicated that the infomercial aired 8,227 times. (JX-6, ¶ 10).

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

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

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

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

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

Greensheets. The Infomercial Monitoring Service provides no information concerning the methodology by which the IMS rankings are compiled and Complaint Counsel has failed to call any witness to explain the IMS ranking system.

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

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

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

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

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

consumers saw the Ab Force ads, there was a “transference” of those beliefs over to Ab Force. (Mazis, Tr. 61, 167).

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

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

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

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

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

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

283. Dr. Jacoby testified that in order to form categories about certain things, in this case EMS ab products, the consumer must have prior experience with exemplars from that category. (Jacoby Tr. 344 - 345). He testified that Dr. Mazis, in conducting his research, had failed to confirm that consumers were exposed to or recalled the exemplars (e.g. the ads for AbTronic, Ab Energizer and Fast Abs) that may have led to the formation of category beliefs. (Jacoby Tr. 345).

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

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

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

which they had received information in order to ensure that they had the relevant category available in memory. (CX-57, p. 38).

287. As Dr. Jacoby testified, although there were many and different ways in which Dr. Mazis could confirm that consumers had a category in mind, he took no such steps. (Jacoby Tr. 345). For example, Dr. Mazis could have shown surveyed consumers one or more of the ads for AbTronic, Ab Energizer and Fast Abs before showing them and testing them on the Ab Force commercial, or by asking questions to determine whether they had seen such commercials prior to participating in the survey. (RX-40, ¶ 23). Dr. Jacoby testified that Dr. Mazis also could have used questioning after other portions of a survey had been conducted to test consumers' preconceptions. (Jacoby Tr. 349 - 351).

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

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

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

a mere reference to “other ab belts” or the physical appearance of the product or other elements may not be sufficient to trigger any category beliefs that consumers may have. (Jacoby Tr. 367).

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

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

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

2. Direct Effects

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

295. These “direct effects” would shape consumers’ perceptions regardless of whether they had ever seen an ab belt ad before. (Mazis, Tr. 66). He testified that consumers could “make inferences because there’s certain implied claims in the ads, because of seeing the models and seeing the pulsating effect of the vibrations of the—of the ab belt, and these people look very fit, very trim, and it has the name Ab Force.” (Mazis, Tr. 66).

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

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

298. Although he did not explain how these images affected perceptions, Dr. Mazis did acknowledge in his testimony that he had agreed that there was a legitimate reason to use people with relatively little fat: so viewers “could see the product vibrating more or something...” (Mazis, Tr. 149 - 150). Indeed, Dr. Mazis agreed that in viewing the advertisement for the Ab Force, he could see the product causing the muscles to twitch on the models used in the ads. (Mazis, Tr. 150). This testimony corroborates Mr. Khubani’s testimony that the only way to

visually illustrate the product working was to demonstrate the product on slim models. (Khubani Tr. 518).

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

300. Dr. Jacoby, on the other hand, testified that the words “ab” and “force” may have several meanings that consumers would take away, but he could not identify any particular meaning that consumers would take away. (Jacoby Tr. 405 - 406).

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

C. THE COPY TEST

1. Description of the Copy Test

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

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

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

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

a. The Screening Questionnaire

306. The copy test employed a screening questionnaire, which is typically used to identify qualified respondents to participate in the actual test. (Mazis, Tr. 68). The screening questionnaire criteria were designed to identify people who would be potential purchasers of the Ab Force product. (Mazis, Tr. 68). Dr. Mazis testified that he designed the screening questionnaire to capture respondents who would have some propensity to buy the product and to eliminate people who would not be typical consumers of the Ab Force product. (Mazis, Tr. 68).

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

308. During the screening process, interviewers from U.S. Research approached individuals in the various malls and asked them if they would participate in a survey. (Mazis, Tr.

72). Individuals that agreed were then subjected to 11 questions, lettered from A to K on the screening questionnaire. (Mazis, Tr. 72 – 77; CX-58, Exhibit C thereto).

b. The Main Questionnaire

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

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

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

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

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

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

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

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

c. Results of the Study

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

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

- 65.4% of the test group respondents believed the ad implied that the Ab Force causes well-defined abdominal muscles, compared to 48.1 % in the control group. (Mazis, Tr. 106; CX-58, ¶ 47).
- 58% of the test group respondents believed the ad implied that the Ab Force causes loss of inches around the waist, compared to 42.4% in the control group. (Mazis, Tr. 106; CX-58, ¶ 47).

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

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

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

a. The survey universe was overly broad

320. Dr. Jacoby agreed with Dr. Mazis that it was important to make sure that the study included only those people who would be potential purchasers of the Ab Force product. (Jacoby Tr. 352). He elaborated on Dr. Mazis’ statement, explaining that the perceptions of consumers who would not be prospective purchasers would be irrelevant. (Jacoby Tr. 352).

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

322. Dr. Jacoby disagreed, however, that the second criterion -- that participants had, in the past 12 months, purchased a product by calling a toll-free number that was included in a TV ad, program or infomercial -- was useful in defining the appropriate universe. (Jacoby Tr. 354; CX-58, Exh. C thereto, Question D). As Dr. Jacoby explained, referencing participants:

“You could have purchased any number of things. You could have purchased a real estate course. You could have purchased perfume. You could have purchased flowers, you know, 1-800-FLOWERS...”

(Jacoby Tr. 354).

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

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

b. The main questionnaire employed leading questions

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

326. Dr. Jacoby testified that these closed-ended questions were leading questions because they were framed only in the affirmative (e.g., “Using Ab Force causes users to lose inches around the waist.”)(Jacoby Tr. 389). He testified that there was substantial scientific

literature on “acquiescence response,” also called “yea-saying,” that demonstrated a tendency for people to agree rather than disagree with statements posed to them. (Jacoby Tr. 389 - 390).

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

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

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

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

330. When asked whether he typically makes any effort to screen for preexisting beliefs in a study of this type, Dr. Mazis answered that he did:

That’s why we use a control group. That’s the point of the control group. That’s why it was included....The use of the control group is an attempt to essentially remove preexisting beliefs as a possible cause of the results we see.

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

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

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

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

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

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

“It didn’t really—I didn’t feel it was relevant, and—because there’s a lot of ways people could be influenced, and the assumption is that those people would be randomly distributed across the two groups, the test and control group. So it didn’t seem necessary to me.”

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

346. Dr. Jacoby testified that this approach failed to control at all for pre-existing beliefs held by consumers. (Jacoby Tr. 376 - 379). Dr. Jacoby testified that reliance on “random assignment” was unfounded, and that there was absolutely no basis for the opinion that random assignment would evenly divide those with preexisting beliefs into the test and control groups. (Jacoby Tr. 378 - 379).

347. There are significant problems with Dr. Mazis’ theory that consumers who held preconceptions would be assigned equally to control and test groups. First, if Dr. Mazis was correct, then random assignment would have ensured that the test and control groups would have been of equal size. (Jacoby Tr. 379 - 380). Instead, there was an uneven split between the test and control group participant numbers (179 participants in the test group, 210 participants in the control group), resulting in an assignment of 46% of the study participants in the test group and 54% in the control group. (Jacoby Tr. 379 - 381).

348. More significantly, Dr. Mazis proceeded from the false assumption that the impact of preconceptions could be mitigated by random assignment, comparing it to age or

gender. (Mazis, Tr. 90). However, as Dr. Jacoby explained, while all participants share age and gender characteristics, it cannot be presumed that all participants would have held preconceptions regarding ab belts. (Jacoby Tr. 378 - 379). Dr. Jacoby explained that it was easily possible that a larger percentage of test group participants held negative preconceptions about EMS ab products than the control group. (Jacoby Tr. 379). The effect of such a disproportion between the test and control groups would tend to skew the results in favor of detection of the asserted claims. (Jacoby Tr. 378 - 381).

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

350. What is known, however, is that Dr. Mazis made an effort to identify from the results those participants who had seen, read or heard a news story about ab belts within the 30 days prior to the study, and to exclude those participants who held negative views of ab belts as a result. (Mazis, Tr. 154 - 155).

351. Specifically, Dr. Mazis asked participants whether, in the 30 days prior to the survey, they had “[s]een, read, or heard a news story about or featuring an abdominal belt device.” (CX-58, Exh. D thereto, Main Questionnaire, Q.7). Survey respondents who answered

the question by stating they had seen, read or heard a news story within the past 30 days were asked in Question 8, “[a]s best you can remember, what did the news story or stories say about ab belts?” (Mazis, Tr. 155; CX-58, Exh. D thereto, Main Questionnaire, Q.8). Those who held negative views about ab belts based on those news stories were excluded from the survey. (CX-58, ¶ 41).

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

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

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

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

356. Neither Dr. Mazis’ screening questionnaire nor Questions 7 and 8 on the main questionnaire identified any survey respondents who had seen there or any other similar news stories because they were not published within 30 days of the study. (Mazis, Tr. 160). Consequently, participants who sometime prior to 30 days before the study saw, read or heard these news stories about Ab Force, or other news ab belts in general, would have been included in the survey.

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

358. Dr. Mazis’ admitted failure to adequately control for preexisting beliefs on the part of study participants raises serious doubts as to his claim that the study results show that a significant number of test group participants perceived misleading claims in the Ab Force advertising as opposed to perceiving those claims based on previously held conceptions about ab

belts generally or the Ab Force in particular. Consequently, the results of the survey are not reliable.

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

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

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

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

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

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

361. Dr. Mazis said that the failure of 81 participants to fail to recall the name of the product indicated to him that those participants were not paying attention to the ad, which he

considered a good reason not to include them in the final result. (Mazis, Tr.147). Consequently he removed from consideration 81 respondents. (Mazis, Tr. 147 – 148).

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

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

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

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

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

367. Dr. Jacoby provided the Court with a simple example to explain how exclusion of these purportedly inattentive respondents skewed the results. He addressed a hypothetical in

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

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

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

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

open-ended questions would have been substantially lower than the 10.4% difference reported. (Jacoby Tr. 392).

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

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

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

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

374. However, there is significant concern that this "relatively high" number may also be the result of leading questions employed by Dr. Mazis in the study main questionnaire. (Jacoby Tr. 389 - 392).

D. SUMMARY OF FINDINGS REGARDING EXTRINSIC EVIDENCE

1. Facial Analysis

375. Dr. Mazis offered no facial analysis with regard to the test radio advertisement for the Ab Force product.

376. Dr. Mazis offered no facial analysis with regard to the final radio advertisement for the Ab Force product.

377. Dr. Mazis offered no facial analysis with regard to the print advertisement for the Ab Force product.

378. Dr. Mazis offered no facial analysis with regard to the internet advertisement for the Ab Force product.

379. Dr. Mazis' facial analysis extends only to the four television commercials for the Ab Force product.

380. The facial analysis offered by Dr. Mazis is not adequately supported by the evidence in the record for several reasons.

381. First, to the extent that Dr. Mazis offers the opinion that consumers would likely make an association between the Ab Force and between AbTronic, Ab Energizer and Fast Abs, that opinion is not adequately supported by the evidence.

382. Dr. Mazis' belief that consumers would have formed category beliefs about EMS ab belts is unpersuasive. He was unaware of many details regarding the broadcast of the AbTronic, Ab Energizer and Fast Abs advertisements. For example, he did not know whether those advertisements were broadcast locally or nationally, or at what time of the day they were broadcast. More importantly, he was unaware how many consumers likely saw those advertisements. Instead, his facial analysis rests on the assumption that Complaint Counsel was correct in telling him that these three advertisements were the most frequently aired during the relevant time.

383. Dr. Mazis also assumed that consumers would retain whatever information was provided through these advertisements and would, as a matter of course, form category beliefs

about ab belts. Dr. Jacoby provided persuasive testimony, based on scientific research, that consumers would not necessarily retain or comprehend information conveyed in those commercials.

384. Dr. Mazis' opinion that consumers who saw the Ab Force would have had category beliefs about ab belts is also unpersuasive. Even if consumers formed category beliefs about EMS ab belts based on having seen ads for AbTronic, Ab Energizer and Fast Abs, Dr. Mazis offered no persuasive rationale supporting the finding that those consumers would have seen the Ab Force ad, or, conversely, that consumers who saw the Ab Force ads would have had previously formed category beliefs about ab belts. There is no adequate evidence to support the factual finding that such a nexus exists on the basis of a facial review of the ads at issue. The Court finds that such an association can only be demonstrated through extrinsic evidence.

385. Second, the Court is not persuaded by Dr. Mazis' opinion that (1) the name "Ab Force" and (2) the use of attractive models in the Ab Force television advertising is sufficient to find that the ads claim that the Ab Force causes loss of inches or well-developed abdominals.

386. The use of attractive models and spokespersons is common in advertising. One need not be an expert to understand that the use of attractive people in advertising is preferable to the use of unattractive people. In this case, the Court is persuaded that the models used were also shown with bare abdominal areas and slender figures for the purpose of demonstrating the functionality of the Ab Force product, which is intended to cause involuntary muscle contractions.

387. The Court is not persuaded by Dr. Mazis' opinion that the name "Ab Force" alone is sufficient to convey claims of loss of inches and substitution for exercise. Dr. Mazis provided no rationale for his opinion that the name "Ab Force" conveys to consumers the belief that the

product acts as a force on consumer's abs, making them look great. The Court agrees with Dr. Jacoby that the name could mean many things to different people, and, in the absence of extrinsic evidence, cannot find that the name alone or in conjunction with visual elements conveys the claims asserted.

38. Third, at the time he made his facial analysis, Dr. Mazis was unaware that there were other EMS ab products being advertised, many with different claims than those being asserted in this case.

389. Dr. Mazis formed his facial analysis after being retained by the Federal Trade Commission and, more importantly, after reviewing the allegations of the Complaint. This raises doubts that cannot be overlooked as to the objectivity of the facial analysis.

390. Looking at each of the advertisement as a whole, the Court finds that the advertisements make prominent and express claims of technological similarity to other EMS ab belts, lower price, and, in the case of the rollout television commercials relaxing massage. None of these claims are challenged by Complaint Counsel as deceptive or misleading.

391. Viewing the advertisements as a whole, and in the absence of extrinsic evidence to the contrary, the Court is not convinced that consumers viewing those advertisements would likely believe that these specific elements make the alleged implied claims.

2. The Copy Test

392. Dr. Mazis' copy test purported to evaluate consumer perceptions about the 60-second rollout advertisement (AB-E-60). None of the other televisions commercials for the Ab Force were tested.

393. Dr. Mazis' copy test did not test consumer perceptions regarding the radio advertisements, print advertisement, or internet advertisement for the Ab Force product.

Consequently, the Court finds that no extrinsic evidence was presented at trial concerning the perceptions consumers were likely to have about this advertising.

394. The Court finds that the copy test suffers from several serious methodological flaws and therefore does not support Dr. Mazis' opinion that the 60-second rollout ad for the Ab Force contains claims of loss of weight, fat or inches; that the Ab Force causes well-developed abdominals; or that the Ab Force is an alternative to exercise.

395. The Court shares Dr. Jacoby's concern that the universe criteria selected by Dr. Mazis was overly-broad. Specifically, the criterion that participants must have purchased a product by calling a toll-free number shown in a television program, ad, or infomercial within the year prior to the survey may have captured respondents who would not likely purchase the Ab Force. By potentially broadening the universe to include irrelevant participants through the use of this criterion raises doubts as to the reliability of the results obtained and the opinions based on those results.

396. The Court also shares Dr. Jacoby's concern that the questions used in the main questionnaire were misleading. By providing statements only in the affirmative and then asking participants if they agree with the statement, the risk that responses were the result of yea-saying is significant. Consequently, there is doubt that the results accurately reflect consumers' perceptions, and cannot be seen as reliable.

397. A serious flaw in the survey is Dr. Mazis' decision not to attempt to control for preexisting beliefs. Despite testifying that consumers may have had preexisting beliefs about EMS ab belts, and that such beliefs may have had a significant impact on the survey responses, Dr. Mazis affirmatively stated that he did not attempt to control for those beliefs. His testimony that such controls are not necessary because respondents with preexisting beliefs would be

evenly divided into test and control groups by random assignment is not grounded in any rationale basis. The Court agrees with Dr. Jacoby that additional screening should have been conducted to eliminate as many participants with preexisting beliefs as possible.

398. The Court is further troubled by the fact that Dr. Mazis, although having testified that screening for preexisting beliefs was not necessary, actually screened for preexisting beliefs created by news accounts published within 30 days prior to the survey. If Dr. Mazis believed that random assignment would have divided those with preexisting beliefs into the test and control groups, then a question remains as to why he did not take this same approach with those exposed to news accounts within a month of the survey. Equally troubling is the fact that Dr. Mazis limited his screening of preexisting beliefs just to news stories seen, heard or read within that time period. There was evidence that the Commission issued a press release about this very case two months before the copy test was conducted, and that the story was disseminated on the UPI wire as well as elsewhere. Dr. Mazis' limited screening questions (Questions 7 and 8 of the main questionnaire) did not, as he admitted, identify any participants who may have been aware of those stories or this case. Nor would those screening questions have identified anyone who had seen other EMS ab product ads, purchased an ab belt, or otherwise formed preexisting beliefs about ab belts in general or the Ab Force specifically. This failure renders the copy test unreliable.

399. Finally, the Court shares Dr. Jacoby's puzzlement as to why 81 respondents who were deemed "inattentive" by Dr. Mazis were dropped from the survey. Dr. Mazis did not adequately explain why participants who did not remember the name of the product could not otherwise have formed perceptions of the advertising claims. In fact, when the Court posed this question to Dr. Mazis directly, it went unanswered.

400. The effect of dropping 81 respondents for this reason had the effect of exaggerating the results, in Dr. Jacoby's opinion, significantly. Consequently, the results cannot be deemed a reliable and accurate survey of consumers' perceptions of the advertising claims contained in the 60-second rollout Ab Force television ad.

CONCLUSIONS OF LAW

I. THE ALLEGED VIOLATION

401. The Complaint in this matter alleges that Respondents engaged in unfair or deceptive acts or practices in the making of false advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52 (Tr. 5).

402. Specifically, the Complaint alleges that shortly before the time period in which the Ab Force commercials appeared, the AbTronic, Ab Energizer and Fast Abs products were offered for sale, sold, and distributed throughout the United States. (CX-1, ¶ 11). The complaint alleges that these three products were similar in appearance to the Ab Force, were comprised of components substantially similar to the Ab Force, and were widely advertised through television infomercials. (CX-1, ¶ 11). The Complaint also asserts that these three ads made advertising claims of weight, fat and inch loss; that the products caused well-defined abdominal muscles; and that the devices were equivalent to or more effective than regular exercise. (CX-1, ¶¶ 16-18).

403. The Complaint alleges that the Ab Force ads represented that the Ab Force used the same technology and was just as powerful and effective as other, more expensive EMS devices that were advertised by infomercials shortly before Ab Force appeared. (CX-1, ¶¶ 9-10). Through this advertising, and by reference to AbTronic, Ab Energizer and Fast Abs, the

Complaint asserts that respondents represented that the Ab Force could cause loss of weight, fat, or inches; that the Ab Force caused well-defined abdominal muscles; and that the Ab Force was equivalent to or more effective than regular exercise. (CX-1, ¶ 21).

II. LEGAL STANDARD AND ANALYTICAL FRAMEWORK

404. Section 5 of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45. Section 12 of the Federal Trade Commission Act declares dissemination of false advertisements regarding certain categories of products to constitute an unfair or deceptive act or practice under Section 5. 15 U.S.C. § 52.

405. Advertising violates Sections 5(a) and 12 of the Federal Trade Commission Act if it is likely to mislead reasonable consumers to the consumers’ detriment. *In re Novartis Corporation, et al.*, 127 F.T.C. 580, 678 – 679 (1998); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 777 (1994). In practice, the Commission’s deception analysis is applied as a three-part test: (1) a claim was made; (2) the claim was likely to mislead a reasonable consumer; and (3) the claim was material. *Novartis*, 127 F.T.C. at 679. There is no requirement of intent. *Id.*

A. FRAMEWORK FOR DETERMINING IF THE CHALLENGED CLAIMS WERE MADE

406. The threshold question in this matter is what claims may reasonably be ascribed to the advertising for the Ab Force product. *Novartis Corporation*, 127 F.T.C. 580, 679 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000).

407. Although proof of actual deception is not required, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would interpret the message of the advertisement to have made the alleged claims. *Id.*; *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992), cert. denied, 113 S. Ct. 1254 (1993). For analytical

purposes, the Commission often distinguishes between express claims and implied claims in evaluating what messages an advertisement can reasonably be interpreted as containing. Kraft, 114 F.T.C. at 120.

408. Express claims directly state the representation at issue. *Id.* (citing *In re Thompson Medical*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987)). Implied claims are any claims that are not express. Kraft, 114 F.T.C. at 120. They range on a continuum from claims that would be “virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.” *Id.* (quoting *Thompson Medical*, 104 F.T.C. at 789).

1. STANDARDS FOR EMPLOYING A FACIAL ANALYSIS

409. The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself. Kraft, 114 F.T.C. at 121. The Commission has stated that it is often able to conclude that an advertisement contains an implied claim by evaluating the advertisement and the circumstances surrounding it. *Id.* (citing Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 176 – 177 (1984)(“Deception Statement”)).

410. But, implied claims may only be found where it may be determined with confidence, after examining all of the constituent elements of the advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad. *Stouffer*, 118 F.T.C. at 777 (citing Kraft, 970 F.2d at 318); *Thompson Medical*, 104 F.T.C. at 320.

411. Moreover, the facial interpretation may not be based on a few parsed elements taken out of context. Instead, the Commission must consider the overall net impression of the

advertisement, taken as a whole. *Stouffer*, 118 F.T.C. at 777 (citing *Kraft*, 970 F.2d at 314, 319). The determination must be made based on the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. *Stouffer*, 118 F.T.C. at 177 (citing *Thompson Medical*, 104 F.T.C. 648). A facial analysis does not involve the effect of individual words, phrases or visual images. *Thompson Medical*, 104 F.T.C. at 793. Indeed, individual words, phrases or visual images in an advertisement can effectively counter other words, phrases or visual images also contained in that advertisement. *Stouffer*, 118 F.T.C. at 789, n. 1.

412. However, if, based on the initial review of the evidence from the advertisement itself, the Commission cannot conclude with confidence that an advertisement cannot reasonably be read to contain a particular implied message, the Commission will not find the ad to have made the claim unless extrinsic evidence allows the Commission to conclude that such a reading of the ad is reasonable. *Kraft*, 114 F.T.C. at 121 (citing *Thompson Medical*, 104 F.T.C. at 789; *In re Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

2. STANDARDS FOR CONSIDERING EXTRINSIC EVIDENCE

413. The extrinsic evidence the Commission has demonstrated that it prefers to use is “direct evidence of what consumers actually thought upon reading the advertisement in question.” *Thompson Medical*, 104 F.T.C. at 789. This type of extrinsic evidence may also include consumer surveys, also called copy tests. These surveys are used in lieu of individual testimony because, in most cases, it is “too costly to obtain the statements of enough individual consumers in another manner (e.g., by way of affidavits) to be reasonably confident that the consumers’ views on the record of the proceeding were representative of the entire group to

which the ad was addressed.” Thompson Medical, 104 F.T.C. at 789 - 790; see also Stouffer, 118 F.T.C. at 779.

414. However, the Commission requires that such consumer surveys be methodologically sound and include reliable results. Thompson Medical, 104 F.T.C. at 790; Kraft, 114 F.T.C. at 121; Cliffdale Associates, 103 F.T.C. at 164-66. In determining whether a consumer survey is methodologically sound, the Commission will look to whether it "draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." Thompson Medical, 104 F.T.C. at 790. The Commission looks to whether such evidence is reasonably reliable and probative of the underlying issues at hand. See, *In re Bristol-Myers Co.*, 85 F.T.C. 688, 743-44 (1975). A survey that is not methodologically sound or which has been incorrectly analyzed should be afforded little weight. See, Kraft, 114 F.T.C. at 121; 970 F.2d at 318.

415. A second type of evidence the Commission will look at is evidence not specifically showing how consumers understood the challenged advertisements, but showing how consumers might ordinarily be expected to perceive or understand representations like those contained in the challenged ads. Thompson Medical, 104 F.T.C. at 790. For example, the Commission might consider evidence respecting the common usage of terms, as well as generally accepted principles drawn from market research showing that consumers generally respond in a certain manner to advertisements that are presented in a particular way. *Id.*

416. A third type of evidence the Commission will consider if offered is the opinion of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted. Thompson Medical, 104 F.T.C. at 790. However, where the opinions voiced by experts are not adequately supported, the Commission will ordinarily give those opinions little weight. *Id.* The

Commission considers “to be adequately supported [those] opinions that describe empirical research or analyses based on generally recognized marketing principles or other objective manifestations of professional expertise. Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue.” *Id.*, n. 11.

417. In all instances, the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *Kraft*, 114 F.T.C. at 122 (citing *Deception Statement*, 103 F.T.C. at 176). Whether looking from evidence at the ad itself, extrinsic evidence or both, the Commission considers the overall net impression of the advertising in determining what messages may be reasonably ascribed to it. *Kraft*, 114 F.T.C. at 122; *Thompson Medical*, 104 F.T.C. at 790.

B. FRAMEWORK FOR DETERMINING WHETHER CLAIMS ARE LIKELY TO MISLEAD REASONABLE CONSUMERS

419. If Complaint Counsel establishes that the asserted claims were made in the challenged advertising, then Complaint Counsel must then prove that the advertising claims are likely to mislead reasonable consumers into believing those claims.

420. The applicable standard concerning the second part of the three-part test set forth in the *Novartis* case is whether a claim is likely to mislead; proof that particular consumers were actually deceived is not required. *Novartis*, 127 F.T.C. at 684. The test is whether the consumer’s interpretation or reaction is reasonable. *Id.* A claim is presumed reasonable if it is one that was intended to be conveyed. *Id.* Finally, a claim would likely mislead a reasonable consumer if at least a “significant minority of consumers” would be deceived by it. *Id.*

C. FRAMEWORK FOR DETERMINING WHETHER CLAIMS WERE MATERIAL

421. Finally, if Complaint Counsel has established that the claims were in fact made, and that reasonable consumers are likely to be misled by those claims, Complaint Counsel must also prove that the claims were material to the purchasing decision.

422. A “material” misrepresentation is one that involves information important to consumers and that is therefore likely to affect the consumer’s choice of, or conduct regarding, a product. *Novartis*, 127 F.T.C. 685.

423. An advertiser’s intent to make the claim generally implies that the advertiser believes that the claim is important to consumers. *Novartis*, 127 F.T.C. 687. Although the Deception Statement includes intent as a predicate fact giving rise to a presumption of materiality, 103 F.T.C. at 182, in the context of implied claims, extrinsic evidence is required to establish an intent to make the claim. *Novartis*, 127 F.T.C. at 688.

424. Consequently, to the extent Complaint Counsel seeks to establish materiality on the basis of Respondents’ intent to make the challenged claims, Complaint Counsel is required to provide extrinsic evidence of that intent on the part of the Respondents with respect to the Ab Force advertising. *Id.*

III. THE CHALLENGED ADVERTISING DID NOT MAKE THE ASSERTED CLAIMS

A. A REVIEW OF THE AB FORCE ADVERTISEMENTS DOES NOT PERMIT THE COURT TO DETERMINE THAT THE IMPLIED CLAIMS ARE EVIDENT ON THE FACT OF THE ADVERTISING

425. Each of the claims asserted in this matter are implied claims.

426. The Court cannot determine with confidence, after examining all of the constituent elements of the Ab Force advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the fact of the Ab Force ads.

427. First, to the extent Complaint Counsel alleges that the implied claims arise by association with the ads for AbTronic, Ab Energizer and Fast Abs, those implied claims are not conspicuous, self-evident or reasonably clear on the fact of the Ab Force ads.

428. Indeed, the theory advanced by Complaint Counsel that the Ab Force ads cause an association in consumers minds between the Ab Force and ads for AbTronic, Ab Energizer and Fast Abs requires looking significantly beyond the circumstances surrounding the Ab Force advertising. Consequently, a facial analysis in this case is not appropriate.

429. Second, Complaint Counsel alleges that elements contained within the four corners of the Ab Force ads convey the challenged implied claims. However, the net impression created by the interaction of all elements in the ad, rather than the impact of the few elements identified by Complaint Counsel, does not allow the Court to determine with confidence that the challenged implied claims are conspicuous, self-evident or reasonably clear on the fact of the Ab Force advertising.

B. THE EXTRINSIC EVIDENCE PROFFERED AT TRIAL DOES NOT ESTABLISH THAT THE CHALLENGED IMPLIED CLAIMS WERE MADE IN THE AB FORCE ADVERTISING

430. Because the Court could not determine with confidence, from a facial analysis, that the challenged implied claims are conspicuous, self-evident or reasonably clear on the fact of the ads, Complaint Counsel was required to provide extrinsic evidence that the implied claims were made.

431. The court has taken into account the quality and reliability of the extrinsic evidence offered. The expert testimony and copy test evidence offered by Complaint Counsel does not reliably establish that the challenged implied claims were made in the Ab Force advertising.

432. Complaint Counsel has therefore failed to prove that the challenged implied claims were made in the Ab Force ads.

CONCLUSION

433. Complaint Counsel has failed to prove that Respondents violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.

Respectfully submitted,

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June 2, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2004, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing RESPONDENTS' POST TRIAL BRIEF, RESPONDENTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, RESPONDENTS' WITNESS INDEX and RESPONDENTS' TRIAL EXHIBIT INDEX to be filed and served as follows:

(1) an original and one (1) paper copy filed by hand delivery and an electronic copy in Microsoft Word format filed by e-mail to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Rm. H-159
Washington, D.C. 20580
E-mail: secretary@ftc.gov

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

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Rm. H-112
Washington, D.C. 20580

(3) one (1) paper copy by hand delivery and by e-mail to:

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I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

/s/ Edward F. Glynn, Jr.
Edward F. Glynn, Jr.