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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 _____)
14 FEDERAL TRADE COMMISSION,)
15)
16 Plaintiff,)
17 v.)

18 ELECTRONIC PRODUCTS DISTRIBUTION,)
L.L.C.,)
19 ENERGIZER PRODUCTS, INC.,)
ABFLEX USA, INC.,)
20 AB ENERGIZER, L.L.C.,)
THOMAS C. NELSON,)
21 MARTIN VAN DER HOEVEN,)
DOUGLAS GRAVINK,)
22 and)
GARY HEWITT)

23 _____)
24 Defendants.)
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CIVIL ACTION NO. 02-CV-888BEN (AJB)

**Stipulated Final Judgment and Order
for Permanent Injunction, Monetary
and Other Equitable Relief As To
Energizer Products, Inc., Douglas
Gravink and Gary Hewitt**

1 The Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), filed an Amended
2 Complaint for permanent injunction, consumer redress and other relief, pursuant to Section 13(b)
3 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), against the Defendants,
4 Electronic Products Distribution, L.L.C., Energizer Products, Inc. (“EPI”), Abflex USA, Inc., AB
5 Energizer, L.L.C., Thomas C. Nelson, Martin Van Der Hoeven, Douglas Gravink, and Gary Hewitt

6 The Commission and Defendants Energizer Products, Inc., Douglas Gravink and Gary
7 Hewitt (“EPI Defendants”) have stipulated to the entry of this Stipulated Final Judgment and Order
8 for Permanent Injunction, Monetary and Other Equitable Relief (“Order”) in settlement of the
9 Commission’s Amended Complaint against the EPI Defendants. The EPI Defendants waive all
10 rights to seek judicial review or otherwise challenge or contest the validity of this Order. The EPI
11 Defendants also waive any claim that they may have held under the Equal Access to Justice Act, 28
12 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order. The Court, being
13 advised in the premises, finds as follows:

14 FINDINGS

- 15 1. In its Amended Complaint, the Commission alleged that the EPI Defendants
16 violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. The
17 Commission sought permanent injunctive relief for alleged deceptive acts or
18 practices by the EPI Defendants in connection with the marketing and sale of an
19 electronic muscle stimulation device, the AB Energizer.
- 20 2. The Commission has the authority under Section 13(b) of the FTC Act, 15 U.S.C.
21 § 53(b), to seek the relief it has requested.
- 22 3. This Court has jurisdiction of the subject matter and of the parties. Venue in the
23 Southern District of California is proper.
- 24 4. The Amended Complaint states a claim upon which relief may be granted against
25 the EPI Defendants.
- 26 5. The activities of the EPI Defendants as alleged in the Commission’s Amended
27 Complaint were or are in or affecting commerce, as defined in Section 4 of the FTC
28 Act, 15 U.S.C. § 44.

- 1 6. On August 5, 2002, an involuntary bankruptcy petition for relief under the
2 liquidation provisions of Chapter 7 of Title 11 of the United States Code
3 (“Bankruptcy Code”) was filed against Energizer Products, Inc., which case is styled
4 In re Energizer Products, Inc., Case No. SV02-17005 KL (Bankr. C.D. Cal.)
5 (“Bankruptcy Case”). On May 16, 2003, the Bankruptcy Court entered an order for
6 relief under Chapter 7 of the Bankruptcy Code against Energizer Products, Inc. On
7 June 6, 2003, the Bankruptcy Court approved the appointment of David K. Gottlieb
8 (“Bankruptcy Trustee”) as the Chapter 7 trustee on behalf of the debtor, Energizer
9 Products, Inc. The Commission’s action against Defendant Energizer Products, Inc.,
10 including the enforcement of a judgment other than a money judgment obtained in
11 this action, is not stayed by 11 U.S.C. § 362 (a)(1), (2), (3) or (6) because it is an
12 exercise of the Commission’s police or regulatory power as a governmental unit
13 pursuant to 11 U.S.C. § 362(b)(4) and thus falls within an exception to the
14 automatic stay.
- 15 7. The Commission and the EPI Defendants stipulate and agree to this Order, without
16 trial or final adjudication of any issue of fact or law, to settle and resolve all matters
17 in dispute arising from the Amended Complaint to the date of entry of this Order.
18 The EPI Defendants have waived service of a summons for the Amended Complaint
19 and have waived all rights to seek review of, or otherwise challenge or contest the
20 validity of this Order. By entering this stipulation, the EPI Defendants do not admit
21 any wrongdoing including any of the allegations set forth in the Amended
22 Complaint, other than jurisdictional facts.
- 23 8. Each party to this Order shall bear its own costs and attorneys’ fees incurred in
24 connection with this action.
- 25 9. Entry of this Order is in the public interest.
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1 comprehend it. The visual disclosure must be of a size and shade, with a
2 degree of contrast to the background against which it appears, and must
3 appear on the screen for a duration and in a location, sufficiently noticeable
4 for an ordinary consumer to read and comprehend it.

5 2. In a print advertisement, promotional material, or instructional manual, the
6 disclosure must be in a type size and location sufficiently noticeable for an
7 ordinary consumer to read and comprehend it, in print that contrasts with the
8 background against which it appears.

9 3. On a product label, the disclosure must be in a type size and location
10 sufficiently noticeable for an ordinary consumer to read and comprehend it
11 and in print that contrasts with the background against which it appears.
12 *Provided, however,* if a disclosure on a bottle label or package label is made
13 in a location other than the principal display panel, the bottle label or
14 package label must (i) include the statement, “**See important safety**
15 **warning(s) on [insert disclosure location],**” in a type size and location on
16 the principal display panel sufficiently noticeable for an ordinary consumer
17 to read and comprehend it and in print that contrasts with the background
18 against which it appears; and (ii) place the disclosure on the bottle label and,
19 if applicable, the package label, within a border that is a color or shade that
20 contrasts with the background against which it appears. *Provided further,*
21 that in a multi-page insert, the disclosure must appear on the cover page or
22 first page.

23 4. The disclosure must be in understandable language and syntax. Nothing
24 contrary to, inconsistent with, or in mitigation of the disclosure can be used
25 in any advertisement or on any label.

26 5. In the case of advertisements disseminated by means of an interactive
27 electronic medium, such as software, the Internet, or online services, “in
28 close proximity” means on the same Web page, online service page, or other

1 electronic page, and proximate to the triggering representation, and does not
2 include disclosures accessed or displayed through hyperlinks, pop-ups,
3 interstitials or other means.

4 E. “Competent and reliable scientific evidence” means tests, analyses, research,
5 studies, or other evidence based on the expertise of professionals in the relevant
6 area, that has been conducted and evaluated in an objective manner by persons
7 qualified to do so, using procedures generally accepted in the profession to yield
8 accurate and reliable results.

9 F. “EMS device” means an electrically powered device that repeatedly contracts
10 muscles by passing electrical currents through electrodes contacting the affected
11 body area.

12 G. “EPI Defendants” means Energizer Products, Inc., Douglas Gravink, and Gary
13 Hewitt.

14 H. “Food,” “Drug,” and “Device” mean as defined by Section 15 of the FTC Act, 15
15 U.S.C. § 55.

16 I. The term “including” in this Order shall mean “without limitation.”
17

18 **ORDER**

19 **PROHIBITED REPRESENTATIONS**

20 **I.**

21 **IT IS ORDERED** that the EPI Defendants, their successors and assigns, and their officers,
22 agents, servants, employees, and attorneys, and all persons in active concert or participation with
23 them who receive actual notice of this Order by personal service or otherwise, whether acting
24 directly or through any corporation, subsidiary, division, or other device, in connection with the
25 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the AB
26 Energizer, or any substantially similar device, are hereby permanently enjoined from representing,
27 in any manner, expressly or by implication, that any such device:

28 A. causes or promotes loss of weight, inches, or fat;

- 1 B. causes or promotes muscle growth or hypertrophy;
- 2 C. causes or promotes well-defined abdominal muscles, including through the use of
- 3 terms such as “rock-hard abs,” “six-pack abs,” “washboard abs,” “ripped abs,”
- 4 “chiseled abs,” “cut abs,” “well-developed abs,” and/or any other terms with
- 5 substantially similar meaning;
- 6 D. is equivalent to or superior to abdominal exercises such as sit-ups, crunches, or any
- 7 substantially similar exercises;
- 8 E. makes a material contribution to any system, program, or plan that produces the
- 9 results referenced in Subparts I.A through I.D; or
- 10 F. is safe in general or safe for all users.

11 *Provided, however,* that nothing in this Order shall prohibit the EPI Defendants from making any

12 representation for any device that is specifically stated in an Indications for Use Statement issued

13 for that device under any premarket approval application or premarket notification approved or

14 cleared by the Food and Drug Administration.

15

16 **II.**

17 **IT IS FURTHER ORDERED** that the EPI Defendants, their successors and assigns, and

18 their officers, agents, servants, employees, and attorneys, and all persons in active concert or

19 participation with them who receive actual notice of the Order by personal service or otherwise,

20 whether acting directly or through any corporation, subsidiary, division, or other device, in

21 connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or

22 distribution of any EMS device not covered by Paragraph I of the Order, are hereby permanently

23 enjoined from misrepresenting, in any manner, expressly or by implication, that:

- 24 A. any such device causes or promotes loss of weight, inches, or fat;
- 25 B. any such device causes or promotes muscle growth or hypertrophy;
- 26 C. any such device causes or promotes well-defined abdominal muscles, including
- 27 through the use of terms such as “rock-hard abs,” “six-pack abs,” “washboard abs,”
- 28 “ripped abs,” “chiseled abs,” “cut abs,” “well-developed abs,” and/or any other

1 terms with substantially similar meaning;

2 D. use of any such device for any period of time is equivalent to or superior to
3 abdominal exercises such as sit-ups, crunches, or any substantially similar exercises;

4 E. any such device makes a material contribution to any system, program, or plan that
5 produces the results referenced in Subparts II.A through II.D; or

6 F. the device is safe in general or safe for all users.

7 *Provided, however,* that nothing in this Order shall prohibit the EPI Defendants from making any
8 representation for any device that is specifically stated in an Indications for Use Statement issued
9 for that device under any premarket approval application or premarket notification approved or
10 cleared by the Food and Drug Administration.

11
12 **III.**

13 **IT IS FURTHER ORDERED** that the EPI Defendants, their successors and assigns, and
14 their officers, agents, servants, employees, and attorneys, and all persons in active concert or
15 participation with them who receive actual notice of this Order by personal service or otherwise,
16 whether acting directly or through any corporation, subsidiary, division, or other device, in
17 connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or
18 distribution of the AB Energizer, any other EMS device, or any food, drug, dietary supplement, or
19 device, or any other product, service, or program, are hereby permanently enjoined from making
20 any representations regarding the performance, benefits, safety, or efficacy of any such product,
21 service, or program, unless, at the time the representation is made, the EPI Defendants possess and
22 rely upon competent and reliable scientific evidence that substantiates the representation.

23 *Provided, however,* that nothing in this Order shall prohibit the EPI Defendants from making any
24 representation for any product that is specifically permitted in labeling for such product by
25 regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling
26 and Education Act of 1990.

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IV.

IT IS FURTHER ORDERED that the EPI Defendants, their successors and assigns, and their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, service, or program, are hereby permanently enjoined from misrepresenting, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

REQUIRED DISCLOSURES

V.

IT IS FURTHER ORDERED that the EPI Defendants, their successors and assigns, and their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any EMS device:

- A. must disclose, clearly and prominently, (1) in any external packaging or labeling; and (2) in any advertisement (other than television or radio advertisements 60 seconds or shorter), promotional material, or telephone or electronic communication that contains any representation about the safety of the EMS device, in close proximity to the safety representation; the following:

WARNING: This product uses electrical muscle stimulation. Do not use over your head or chest. Do not use this device if you have a cardiac pacemaker, implanted defibrillator, or other implanted metallic or electronic device. This device could cause lethal rhythm disturbances to the heart and should not be used by people with suspected or diagnosed heart problems. Apply stimulation only to normal, intact, clean skin. Do not apply stimulation over open wounds or over swollen, infected, or inflamed areas or skin eruptions, e.g., phlebitis, thrombophlebitis, varicose veins, etc. Do

1 not apply stimulation over, or in close proximity to, cancerous
2 lesions. The safety of electrical stimulation during pregnancy has not
been established.

3 unless, at the time the representation is made, the EPI Defendants possess and rely
4 upon competent and reliable scientific evidence that such product is safe for all users
5 and produces no adverse side effects. This requirement is in addition to, and not in
6 lieu of, any disclosures that the Food and Drug Administration may require for such
7 devices.

8 *Provided, however,* that, if the EPI Defendants possess competent and reliable
9 scientific evidence that the product is safe for users with a particular condition, the
10 EPI Defendants may remove that particular condition from the disclosure required
11 by this Order. *Provided further,* that if the EPI Defendants believe or have reason to
12 believe other uses of the product or health conditions may pose health risks, those
13 uses or conditions may be added to the warning. *Provided further,* that if the Food
14 and Drug Administration issues a final rule requiring a warning on the labeling of
15 EMS devices, the EPI Defendants must substitute that warning for the disclosures
16 required in this Part.

17 B. must disclose, clearly and prominently, in any television or radio advertisement 60
18 seconds or shorter for any EMS device that contains representations about the safety
19 of the EMS device, in close proximity to the representation, the following:

20 **WARNING:** This product uses electronic muscle stimulation and is
21 not safe for all users, particularly those with implanted metallic or
22 electronic devices. Review the health and safety warnings on our
website, [domain name of website], or call us toll-free at [toll-free
telephone number], before buying this product.

23 unless, at the time the representation is made, the EPI Defendants possess and rely
24 upon competent and reliable scientific evidence that such product is safe for all users
25 and produces no adverse side effects.

26 *Provided that* for a period of time beginning with the date of the first broadcast of
27 any such television or radio advertisement shorter than 60 seconds for any EMS
28 device that contains safety representations about the EMS device and ending no

1 **PROHIBITED PRACTICES: MAIL OR TELEPHONE ORDER RULE**

2 **VII.**

3 **IT IS FURTHER ORDERED** that from the Effective Date of the Preliminary Injunction,
4 June 24, 2002, the EPI Defendants, their successors and assigns, and their officers, agents, servants,
5 employees, and attorneys, and all persons in active concert or participation with them who receive
6 actual notice of this Order by personal service or otherwise, whether acting directly or through any
7 corporation, subsidiary, division, or other device, are hereby permanently enjoined from

8 A. Violating any provision of the FTC’s Trade Regulation Rule Concerning Mail or
9 Telephone Order Merchandise (“Mail Order Rule”), 16 C.F.R. Part 435, including
10 but not limited to:

- 11 1. Failing to offer to the buyer, clearly and conspicuously and without prior
12 demand, an option either to consent to a delay in shipping or to cancel the
13 order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1);
14 and
15 2. Failing to deem an order canceled and to make a prompt refund to buyers
16 who are entitled to such refunds under the Mail Order Rule, as required by
17 16 C.F.R. § 435.1(c).

18 B. In the event the Mail Order Rule is hereafter amended or modified, the EPI
19 Defendants’ compliance with the Mail Order Rule as so amended or modified shall
20 not be deemed a violation of this Order.

21
22 **LETTER OF CREDIT REQUIRED FOR CERTAIN ACTIVITIES**

23 **VIII.**

24 **IT IS FURTHER ORDERED** that Defendant Douglas Gravink (“Gravink”), whether
25 directly, in concert with others, or through any business entity or other device, is hereby
26 permanently restrained and enjoined from engaging or participating in, assisting others to engage or
27 participate in, or owning, controlling or managing any entity engaged in, any manufacturing,
28 labeling, advertising, promotion, offering for sale, sale or distribution of any food, drug, dietary

1 supplement, device, or any other product, service or program that purports to promote the loss of
2 weight, fat or inches, unless at least two (2) weeks prior to engaging in these activities, Gravink
3 obtains an irrevocable letter of credit (“Letter of Credit”) in the principal sum of \$150,000 issued
4 by a financial institution and payable to the Federal Trade Commission. Both the financial
5 institution that issues the Letter of Credit and the form of the Letter of Credit must be acceptable to
6 the FTC. The terms and conditions of the Letter of Credit are as follows:

- 7 A. The Letter of Credit shall be conditioned upon compliance with Sections 5(a) and 12
8 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and the provisions of this Order. The
9 Letter of Credit shall be deemed continuous and remain in full force and effect as
10 long as Gravink is engaging in any activity that requires obtaining the Letter of
11 Credit. Gravink shall maintain the Letter of Credit until the later of (a) one year
12 after he provides notice to the Commission that he has ceased engaging in any of the
13 aforementioned activities that require obtaining the Letter of Credit or
14 (b) completion of any pending investigation or law enforcement activity of which
15 Gravink has notice. The Letter of Credit shall cite this Order as the subject matter of
16 the Letter, and shall provide surety thereunder against financial loss resulting from
17 whole or partial failure of performance due, in whole or in part, to any violation of
18 Sections 5(a) and 12 of the FTC Act, or the provisions of this Order.
- 19 B. The irrevocable Letter of Credit shall be in favor of the Federal Trade Commission
20 for the benefit of any consumer injured as a result of any activities that required
21 obtaining the Letter of Credit. Gravink shall pay all costs and expenses associated
22 with creating and maintaining the irrevocable Letter of Credit.
- 23 C. The Letter of Credit must provide that the issuing financial institution, immediately
24 upon presentment of the Letter of Credit and either a copy of a) a final judgment; b)
25 an order of the Commission that has been entered against Gravink for consumer
26 redress or disgorgement in an action brought under the provisions of the FTC Act
27 that has been entered; or c) a final order of the Commission finding that Gravink has
28 violated this Order, or the provisions of the FTC Act, and determining the amount of

1 consumer redress or disgorgement to be paid; must pay to the Commission so much
2 of the funds of the Letter of Credit as does not exceed the amount of consumer
3 redress or disgorgement ordered, and which remains unsatisfied at the time notice is
4 provided to the financial institution issuing the Letter of Credit.

5 D. The Letter of Credit required pursuant to this Paragraph is in addition to, and not in
6 lieu of, any other bonds required by federal, state or local law.

7 E. At least two (2) weeks before commencing any activity that requires obtaining the
8 Letter of Credit, Gravink shall provide notice to the Commission describing in
9 reasonable detail the activities and include in the notice a copy of the Letter of
10 Credit obtained. The Commission must approve the Letter of Credit and Gravink
11 may not commence any activity that requires obtaining the letter of Credit prior to
12 such approval.

13 F. Gravink shall not disclose the existence of the Letter of Credit to any consumer
14 without simultaneously making the following disclosure: "The Letter of Credit is
15 required by Order of the U.S. District Court for the Southern District of California in
16 *FTC v. Electronic Products Distribution, Inc., et al.*, 02-CV-888H (AJB), to settle
17 charges that Defendant Douglas Gravink engaged in false advertising regarding
18 electronic abdominal exercise devices." The disclosure shall be stated or set forth in
19 a clear and conspicuous manner in close proximity to the disclosure of the Letter of
20 Credit's existence. If in print, the disclosure shall be separated from all other text, in
21 100 percent black ink against a light background, in print at least as large as the
22 main text of the sales material or document.

23
24 **MONETARY JUDGMENT**

25 **IX.**

26 **IT IS FURTHER ORDERED** that:

27 A. Judgment is entered in favor of the Commission and against EPI and its successors
28 and assigns, in the amount of FORTY THREE MILLION FOUR HUNDRED

1 THOUSAND (\$43,400,000.00) (“EPI Judgment”).

2 B. EPI agrees that pursuant to Section 502 of the Bankruptcy Code, 11 U.S.C. § 502,
3 the FTC shall hold an allowed general unsecured claim in the EPI Bankruptcy Case
4 in the amount of FORTY THREE MILLION FOUR HUNDRED THOUSAND
5 DOLLARS (\$43,400,000), which the EPI Defendants stipulate is the total net
6 amount that consumers paid to purchase AB Energizer via direct response sales by
7 the EPI Defendants, less any payment made under Paragraph IX (C). The FTC shall
8 be entitled to participate in any distribution in the Bankruptcy Case paid on account
9 of allowed general unsecured claims in such case, pursuant to Section 726 of the
10 Bankruptcy Code, 11 U.S.C. § 726 or § 1129 (as applicable), and in accordance with
11 the priorities of the Bankruptcy Code.

12 C. Judgment is entered in favor of the Commission and against Defendants Douglas
13 Gravink and Gary Hewitt, jointly and severally in the amount of ONE HUNDRED
14 AND TWENTY THOUSAND DOLLARS (\$120,000). The \$120,000 shall be paid
15 under the following terms and conditions:

16 1. Within five (5) days after entry of this Order, Defendants Douglas
17 Gravink and Gary Hewitt shall pay the full sum of ONE HUNDRED AND
18 TWENTY THOUSAND DOLLARS (\$120,000) to the Commission by
19 certified cashier’s check made payable to the Federal Trade Commission,
20 Division of Finance, 600 Pennsylvania Avenue, NW, Washington DC
21 20580, Reference Information, FTC v. Electronic Products Distribution,
22 Matter No. X020064, or by wire transfer in accord with directions provided
23 by the Federal Trade Commission.

24 2. All funds paid pursuant to this Order shall be deposited into a fund
25 administered by the Commission, the California Prosecutors, or their agents
26 to be used for equitable relief, including, but not limited to consumer redress
27 and any attendant expenses for the administration of any redress fund. In the
28 event that direct redress to consumers is wholly or partially impracticable or

1 funds remain after redress is completed, the Commission and/or the
2 California Prosecutors may apply any remaining funds for such other
3 equitable relief (including consumer information remedies) as they determine
4 to be reasonably related to the EPI Defendants' practices alleged in the
5 Amended Complaint. Any funds not used for such equitable relief shall be
6 deposited to the U.S. Treasury or the fund managed by the California
7 Prosecutors as disgorgement. The EPI Defendants shall have no right to
8 challenge the Commission's or the California Prosecutor's choice of
9 remedies under this Section.

10 D. Time is of the essence for the payment specified in Paragraph IX(C) above. In the
11 event of any default in payment by Defendants Douglas Gravink and Gary Hewitt,
12 which default continues for ten (10) days beyond the due date of payment, the full
13 amount in Paragraph IX(C) due from Defendants Douglas Gravink and Gary Hewitt,
14 together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of
15 default to the date of payment, less any distributions received in the EPI Bankruptcy
16 Case, shall immediately become due and payable.

17 E. The EPI Defendants shall have no right to contest the manner of distribution chosen
18 by the Commission or the California Prosecutors. No portion of any payments
19 under the Judgment herein shall be deemed a payment of any fine, penalty, or
20 punitive assessment.

21 F. The EPI Defendants agree that the facts as alleged in the Amended Complaint filed
22 in this action shall be taken as true in any subsequent litigation filed by the
23 Commission to enforce its rights pursuant to this Order, including, but not limited
24 to, a nondischargeability complaint in any bankruptcy case.

25 G. To the extent possible, the EPI Trustee in Bankruptcy shall provide its complete list
26 of consumer purchasers of the AB Energizer, including most recently updated
27 contact information and all prior purchase information, to the Commission within
28 thirty (30) days of the date of entry of this Order. The customer lists shall be in a

1 searchable electronic format and shall include the name and address of all direct
2 response purchasers of the AB Energizer belt, gel, diet supplement, and all related
3 continuity products (products sold on a continuing basis) and shall include the
4 number of each product purchased, the date of purchase, and the number of times
5 each consumer made a repeat purchase.

6 **RIGHT TO REOPEN**

7 **X.**

8 **IT IS FURTHER ORDERED** that:

- 9 A. The Commission's agreement to this Order requiring that Defendants Douglas
10 Gravink and Gary Hewitt pay less than the total net amount that consumers paid to
11 purchase AB Energizers via direct response sales is expressly premised upon the
12 truthfulness, accuracy, and completeness of the December 2004 financial statements,
13 and sworn deposition testimony that Defendants Gravink and Hewitt provided to the
14 Commission which contain material information relied upon by the Commission in
15 negotiating and agreeing to the terms of this Order.
- 16 B. If the Commission should have evidence that any EPI Defendant executing any of
17 the above-referenced financial statements or responsible for providing any other
18 testimony or information referenced above failed to disclose any material asset the
19 value of which exceeds \$5,000, materially misrepresented the value of any asset, or
20 made any other material misrepresentation in or omission from Defendants Douglas
21 Gravink's or Gary Hewitt's financial statements or other financial information
22 Defendants Douglas Gravink and Gary Hewitt provided to the Commission, the
23 Commission may move that the Court reopen this Order for the sole purpose of
24 allowing the Commission to modify the monetary liability of said Defendant. If the
25 Court finds that said Defendant failed to disclose any material asset, materially
26 misrepresented the value of any asset, or made any other material misrepresentation
27 or omission in the above-referenced financial statements, testimony, or information,
28 then this Final Order shall be reopened for the purpose of requiring payment from

1 the individual Defendant who made or is responsible for the misrepresentation to the
2 Commission of additional monetary redress in the amount of FORTY THREE
3 MILLION FOUR HUNDRED THOUSAND DOLLARS (\$43,400,000.00), which
4 the Defendants Gravink and Hewitt stipulate is the total net amount that consumers
5 paid to purchase the AB Energizer via direct response sales by the EPI Defendants,
6 as set forth in Paragraph IX of this Order, less the sum of any amounts paid by the
7 EPI Defendants in this action after the date of this Final Order. *Provided*, however,
8 that in all other respects this Order shall remain in full force and effect unless
9 otherwise ordered by the Court; and *provided further*, that any proceedings instituted
10 under this Paragraph shall be in addition to and not in lieu of any other civil or
11 criminal remedies as may be provided by law, including proceedings the
12 Commission may initiate to enforce this Order. For the purposes of reopening or
13 enforcing this Paragraph X(B), including but not limited to a non-dischargeability
14 complaint filed in a bankruptcy case, the EPI Defendants waive any right to contest
15 any of the allegations set forth in the Amended Complaint filed in this matter.

16 17 COMPLIANCE MONITORING

18 XI.

19 **IT IS FURTHER ORDERED** that, for the purpose of monitoring and investigating
20 compliance with any provision of this Order,

- 21 A. Within ten (10) days of receipt of written notice from a representative of the
22 Commission, the EPI Defendants shall submit additional written reports, sworn to
23 under penalty of perjury; produce documents for inspection and copying; appear for
24 deposition; and/or provide entry during normal business hours to any business
25 location in such defendant's possession or direct or indirect control to inspect the
26 business operation.
- 27 B. In addition, the Commission is authorized to monitor compliance with this Order by
28 all other lawful means, including but not limited to the following:

1. obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45; and
2. posing as consumers and suppliers to: the EPI Defendants, the EPI Defendants' employees, or any other entity managed or controlled in whole or in part by the EPI Defendants, without the necessity of identification or prior notice.

Provided that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

- C. The EPI Defendants shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

COMPLIANCE REPORTING BY DEFENDANTS

XII.

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

- A. For a period of five (5) years from the date of entry of this Order,
 1. Individual EPI Defendants shall notify the Commission of the following:
 - a. Any changes in the defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - b. Any changes in the defendant's employment status (including self-employment) within ten (10) days of the date of such change. Such notice shall include the name and address of each business that defendant is affiliated with, employed by, or performs services for; a

1 statement of the nature of the business; and a statement of
2 defendant's duties and responsibilities in connection with the
3 business; and

4 c. Any changes in the defendant's name or use of any aliases or
5 fictitious names.

6 2. The EPI Defendants shall notify the Commission of any changes in corporate
7 structure that may affect compliance obligations arising under this Order,
8 including but not limited to a dissolution, assignment, sale, merger, or other
9 action that would result in the emergence of a successor corporation; the
10 creation or dissolution of a subsidiary, parent, or affiliate that engages in any
11 acts or practices subject to this Order; the dismissal or conversion of the EPI
12 Bankruptcy Case; the filing of a subsequent bankruptcy petition; or a change
13 in the corporate name or address, at least thirty (30) days prior to such
14 change, *provided that*, with respect to any proposed change in the
15 corporation about which the defendant learns less than thirty (30) days prior
16 to the date such action is to take place, the defendant shall notify the
17 Commission as soon as is practicable after obtaining such knowledge.

18 B. One hundred eighty (180) days after the date of entry of this Order, each EPI
19 Defendant shall provide a written report to the FTC, sworn to under penalty of
20 perjury, setting forth in detail the manner and form in which the defendant has
21 complied and is complying with this Order. This report shall include, but not be
22 limited to:

- 23 1. Any changes required to be reported pursuant to subparagraph (A) above;
24 and
25 2. A copy of each acknowledgment of receipt of this Order obtained by the
26 defendant pursuant to Paragraphs XVI.

27 C. For the purposes of this Order, the EPI Defendants shall, unless otherwise directed
28 by the Commission's authorized representatives, mail all written notifications to the

1 Commission to:

2 Associate Director for Enforcement

3 Federal Trade Commission

4 600 Pennsylvania Avenue, N.W.

5 Washington, D.C. 20580

6 Re: FTC v. Electronic Products Distribution, L.L.C., et al.

- 7 D. For purposes of the compliance reporting required by this Paragraph, the
8 Commission is authorized to communicate directly with the EPI Defendants.

9
10 **RECORD KEEPING PROVISIONS**

11 **XIII.**

12 **IT IS FURTHER ORDERED** that for a period of eight (8) years from the date of entry of
13 this Order, the EPI Defendants and any business where the EPI Defendants individually or together
14 are the majority owner or otherwise manage or control the business, and the Defendants' agents,
15 employees, officers, corporations, successors, and assigns, and those persons or entities in active
16 concert or participation with them who receive actual notice of this Order by personal service or
17 otherwise are hereby restrained and enjoined from failing to create and retain the following records
18 in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or
19 distribution of AB Energizer, or any food, drug, dietary supplement, device, or any product, service
20 or program that purports to promote health and/or fitness benefits:

- 21 A. Accounting records that reflect the cost of goods or services sold, revenues
22 generated, and the disbursement of such revenues;
- 23 B. Personnel records accurately reflecting: the name, address, and telephone number of
24 each person employed in any capacity by such business, including as an independent
25 contractor; that person's job title or position; the date upon which the person
26 commenced work; and the date and reason for the person's termination, if
27 applicable;
- 28 C. Customer files containing the names, addresses, phone numbers, dollar amounts

1 paid, quantity of items or services purchased, and description of items or services
2 purchased, to the extent such information is obtained in the ordinary course of
3 business;

4 D. Complaints and refund requests (whether received directly, indirectly or through any
5 third party) and any responses to those complaints or requests; and

6 E. Copies of all sales scripts, training materials, advertisements, or other marketing
7 materials.

8 F. All materials that were relied upon in making any representations contained in the
9 materials identified in subpart XIII(E).

10 G. All other documents evidencing or referring to the accuracy of any claim therein or
11 to the safety or efficacy of any product or service covered under this Order; and

12 H. Records accurately reflecting the name, address, and telephone number of each
13 manufacturer, laboratory or other entity engaged in the development or creation of
14 any testing obtained for the purpose of advertising, marketing, promoting, offering
15 for sale, distributing, or selling a product or service covered under this Order.

16 **Provided that**, with respect to records that are in the possession, custody or control of the Trustee
17 in Bankruptcy for EPI, the Trustee is responsible for retaining such records until the EPI
18 bankruptcy estate is closed. If the corporate books and records are returned by the Bankruptcy
19 Trustee to any Defendant, than that Defendant must retain these records for the remainder of the
20 time period set forth in this provision. The Bankruptcy Trustee shall provide notice to the
21 Commission of the proposed abandonment or disposition of the corporate books and records of
22 Defendant Energizer Products, Inc., and, upon the Commission's request, and at the Commission's
23 expense, the Bankruptcy Trustee shall transfer such books and records to the Commission.

24 ACCESS TO BUSINESS PREMISES

25 XIV.

26 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of
27 this Order, for the purpose of further determining compliance with this Order, each EPI Defendant
28 must permit representatives of the Commission, within three (3) business days of receipt of written

1 notice from the Commission:

- 2 A. Access during normal business hours to that Defendant's office; or to any office, or
3 facility storing documents, of any business where that Defendant is the majority
4 owner of a business or directly or indirectly manages or controls the business, and
5 where the business is engaged in the manufacturing, labeling, advertising,
6 promotion, offering for sale, sale, or distribution of any food, drug, dietary
7 supplement, device, or any other product, service or program that purports to
8 promote health and/or fitness benefits, or assisting others engaged in these activities.
9 In providing such access, each Defendant shall permit representatives of the
10 Commission to inspect and copy all documents relevant to any matter contained in
11 this Order; and shall permit Commission representatives to remove documents
12 relevant to any matter contained in this Order for a period not to exceed five (5)
13 business days so that the documents may be inspected and copied; and
- 14 B. To interview the officers, directors, and employees, including all personnel involved
15 in responding to consumer complaints or inquiries, and all sales personnel, whether
16 designated as employees, consultants, independent contractors or otherwise, of any
17 business to which Subpart A of this Part applies, concerning matters relating to
18 compliance with the terms of this Order. The person interviewed may have counsel
19 present.

20 *Provided that*, upon application of the Commission and for good cause shown, the Court
21 may enter an *ex parte* order granting immediate access to the defendant's business premises for the
22 purposes of inspecting and copying all documents relevant to any matter contained in this Order.

23
24 **TAXPAYER IDENTIFICATION NUMBERS**

25 **XV.**

26 **IT IS FURTHER ORDERED** that the EPI Defendants must, in accordance with 31 U.S.C.
27 § 7701, furnish to the FTC their respective taxpayer identifying numbers (social security number or
28 employer identification number), which shall be used for purposes of collecting and reporting on

1 any delinquent amount arising out of such Defendant's relationship with the government.

2 **DISTRIBUTION OF ORDER BY DEFENDANTS**

3 **XVI.**

4 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of
5 this Order,

6 **A. Corporate Defendant:** Defendant EPI must deliver a copy of this Order to all of its
7 principals, officers, directors, and managers. Defendant EPI also must deliver
8 copies of this Order to all of its employees, agents, and representatives who engage
9 in conduct related to the subject matter of the Order. For current personnel, delivery
10 shall be within five (5) days of service of this Order upon Defendant. For new
11 personnel, delivery shall occur prior to them assuming their responsibilities.

12 **B. Individual Defendants Douglas Gravink and Gary Hewitt as Control Person:**
13 For any business that Defendants Douglas Gravink or Gary Hewitt control, directly
14 or indirectly, or in which Defendants Douglas Gravink or Gary Hewitt have a
15 majority ownership interest, Defendants Douglas Gravink and Gary Hewitt must
16 deliver a copy of this Order to all principals, officers, directors, and managers of that
17 business. Defendants Douglas Gravink and Gary Hewitt must also deliver copies of
18 this Order to all employees, agents, and representatives of that business who engage
19 in conduct related to the subject matter of the Order. For current personnel, delivery
20 shall be within five (5) days of service of this Order upon Defendant. For new
21 personnel, delivery shall occur prior to them assuming their responsibilities.

22 **C. Defendants Douglas Gravink and Gary Hewitt as employee or non-control**
23 **person:** For any business where Defendants Douglas Gravink and Gary Hewitt are
24 not a controlling person of a business but otherwise engage in conduct related to the
25 subject matter of this Order, Defendants Douglas Gravink and Gary Hewitt must
26 deliver a copy of this Order to all principals and managers of such business before
27 engaging in such conduct.
28

1 D. The EPI Defendants must secure a signed and dated statement acknowledging
2 receipt of the Order, within thirty (30) days of delivery, from all persons receiving a
3 copy of the Order pursuant to this Part.
4

5 **ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

6 **XVII.**

7
8 **IT IS FURTHER ORDERED** that each defendant, within five (5) business days of receipt
9 of this Order as entered by the Court, must submit to the Commission a truthful sworn statement
10 acknowledging receipt of this Order in substantially the same form set forth in attached Appendix
11 A.
12

13 **CESSATION OF BUSINESS ACTIVITIES**

14 **XVIII.**

15 **IT IS FURTHER ORDERED** that Defendant Energizer Products, Inc., shall not engage in
16 any business and David K. Gottlieb, as the Bankruptcy Trustee, shall not seek authority to operate
17 the business of Defendant Energizer Products, Inc. pursuant to Section 721 of the Bankruptcy
18 Code, 11 U.S.C. § 721, or otherwise.
19

20 **PROHIBITION ON SELLING CUSTOMER LISTS**

21 **XIX.**

22
23 **IT IS FURTHER ORDERED** that Defendant Energizer Products, Inc., by and through the
24 Bankruptcy Trustee, is permanently restrained and enjoined from selling, renting, leasing,
25 transferring, or otherwise disclosing the name, address, telephone number, credit or debit card
26 number, bank account number, e-mail address, or other identifying information of any person who
27 paid any money to Defendant Energizer Products, Inc. at any time prior to entry of this Order in
28

1 connection with Defendant Energizer Products, Inc.'s advertising, marketing, promoting, offering
2 for sale, selling, and distributing AB Energizers and any associated accessories, products or
3 services. *Provided, however,* that Defendant Energizer Products, Inc., by and through the
4 Bankruptcy Trustee, may disclose such identifying information to a law enforcement agency or as
5 required by any law, regulation, or court order.

6 *Provided further* that the Bankruptcy Trustee shall immediately abandon or dispose of any
7 such customer list by transferring such list, including all copies, to the FTC. If necessary, the
8 Bankruptcy Trustee may retain a copy of such customer list for its records but the Bankruptcy
9 Trustee agrees not to dispose of any such customer list as an asset.

10
11 **RETENTION OF JURISDICTION**

12
13 **XX.**

14 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for
15 purposes of construction, modification and enforcement of this Order.

16
17 **SCOPE OF ORDER**

18
19 **XXI.**

20 **IT IS FURTHER ORDERED** that this Order resolves only claims against the EPI
21 Defendants and does not preclude the FTC from initiating further action or seeking any remedy
22 against any other persons, including without limitation, persons or entities who may be subject to
23 this Order, by virtue of actions taken in concert or participation with the EPI Defendants and
24 persons or entities in any type of indemnification or contractual relationship with EPI Defendants.

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SO STIPULATED:

Laureen Kapin
LAUREEN KAPIN
WALTER GROSS III
AMY LLOYD
JOHN D. JACOBS
Attorneys for the Plaintiff
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
(202) 326-3237 - LK
(202) 326-3319 - WG

[Signature]
DOUGLAS GRAVINK
Individually and as President of EPI

[Signature]
GARY HEWITT
Individually and as
Vice President of EPI

[Signature]
LARRY C. RUSS, ESQ.
Russ August & Kabat
A Professional Corporation
12424 Wilshire Boulevard
Suite 1200
Los Angeles, CA 90025
Attorney for Douglas Gravink and
Gary Hewitt

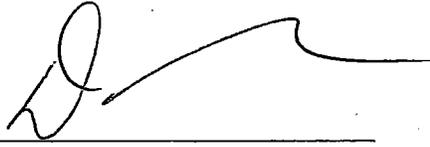
[Signature]
LARRY SIMONS
SulmeyerKupetz, PC
333 South Hope Street, 35th Floor
Los Angeles, CA 90071
Attorney for Trustee in Bankruptcy for
Energizer Products, Inc.

IT IS SO ORDERED, this _____ day of _____, 2004.

UNITED STATES DISTRICT JUDGE

1 **SO STIPULATED:**

2
3
4 LAUREEN KAPIN
5 WALTER GROSS III
6 AMY LLOYD
7 JOHN D. JACOBS
8 Attorneys for the Plaintiff
9 Federal Trade Commission
10 600 Pennsylvania Avenue, NW
11 Washington, D.C. 20580
12 (202) 326-3237 - LK
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DOUGLAS GRAVINK
Individually and as President of EPI


GARY HEWITT
Individually and as
Vice President of EPI


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Attorney for Douglas Gravink and
Gary Hewitt


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333 South Hope Street, 35th Floor
Los Angeles, CA 90071
Attorney for Trustee in Bankruptcy for
Energizer Products, Inc.

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25 **IT IS SO ORDERED**, this _____ day of _____, 2004.

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27 _____
UNITED STATES DISTRICT JUDGE

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SO STIPULATED:

LAUREEN KAPIN
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Gary Hewitt

LARRY SIMONS
SulmeyerKupetz, PC
333 South Hope Street, 35th Floor
Los Angeles, CA 90071
Attorney for Trustee in Bankruptcy for
Energizer Products, Inc.

IT IS SO ORDERED, this _____ day of _____, 2004.

UNITED STATES DISTRICT JUDGE

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APPENDIX A
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ELECTRONIC PRODUCTS DISTRIBUTION,
L.L.C.,

ENERGIZER PRODUCTS, INC.,

ABFLEX USA, INC.,

AB ENERGIZER, L.L.C.,

THOMAS C. NELSON,

MARTIN VAN DER HOEVEN,

DOUGLAS GRAVINK, and

GARY HEWITT

Defendants.

CIVIL ACTION NO. 02-CV-888BEN (AJB)

Declaration of Defendant _____

DECLARATION

(28 U.S.C. §1746)

[Name of defendant] do hereby declare as follows:

1. My name is _____. My current residence address is _____
_____ I am a citizen
of the United States and am over the age of eighteen. I have personal knowledge of
the facts set forth in this Affidavit.
2. I am a defendant in FTC v. Electronics Products Distribution, L.L.C., et al. (United
States District Court for the Southern District of California).
3. On [date], I received a copy of the Stipulated Final Judgment and Order for
Permanent Injunction, Monetary and Other Equitable Relief, which was signed by
the Honorable Marilyn L. Huff and entered by the Court on [date of entry of Order].
A true and correct copy of the Order I received is appended to this Affidavit.

I declare under penalty of perjury under the laws of the United States that the
foregoing is true and correct. Executed on [date], at [city and state].

[Full name of defendant]