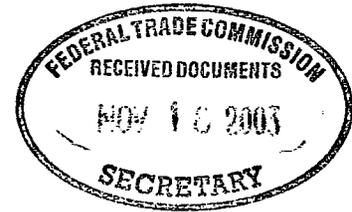


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



In the Matter of

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

DOCKET NO. 9313

**MOTION TO QUASH**

Counsel for defendants Electronic Products Distribution, LLC, Abflex USA, Inc., AbEnergizer LLC, Thomas C. Nelson, and Martin Van Der Hoeven (collectively, the “EPD defendants”)<sup>1</sup> in the pending case *FTC v. Electronic Products Distribution, LLC, et al.*, No. 02-CV-0888 H (AJB) (S.D. Cal. filed May 7, 2002) respectfully submits this motion to quash certain discovery requests propounded by the respondents in this matter upon the Federal Trade Commission (“FTC”) or in the alternative for a Protective Order pursuant to sections 3.34 and 4.10 of the FTC Rules of Practice.

**FACTS**

On October 1, 2003, the FTC issued an administrative complaint against Telebrands Corp, TV Savings, LLC, and Ajit Khubani (collectively, the “Telebrands respondents”) alleging “[t]he acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.” *In the Matter of Telebrands Corp.*, No. 9313, at 12 (October 1, 2003). The complaint alleges that the “respondents have operated as

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<sup>1</sup> Energizer Products, Inc. is also a defendant in the EPD litigation, but is not a party to the instant motion.

a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force, an electronic muscle stimulation (“EMS”) device.” *Id.* at 2.

The complaint further stated that “[t]hrough advertisements for the Ab Force, respondents represented that the Ab Force used the same technology and was just as powerful and effective as other more expensive EMS devices that were advertised on program-length television commercials (“infomercials”) during or shortly before the time period in which the Ab Force commercials appeared.” *Id.* One of the other EMS devices named by the FTC in the complaint is the AbEnergizer, which was “substantially similar in appearance to the Ab Force, [was] comprised of components substantially similar to those identified in [the complaint], and [was] widely advertised through television infomercials.” *Id.* at 7.

The AbEnergizer is the subject of a separate litigation filed by the FTC. *See FTC v. Electronic Products Distribution, LLC, et al.*, No. 02-CV-0888 H (AJB) (S.D. Cal. filed May 7, 2002). The gravamen of the FTC’s complaint in the EPD litigation relates to certain advertising claims made for the AbEnergizer EMS device.

No discovery has been sought or produced in the EPD litigation regarding the claims made in the AbEnergizer advertisements or the substantiation for such claims. Rather, in order to facilitate settlement negotiations, the FTC issued discovery requests to all defendants, seeking, among other things, financial disclosures, compensation records, communications with various individuals, diaries, and journals. In short, the FTC asked for, and the EPD defendants produced, documents other than those that refer, relate, or pertain in any manner to substantiation for the advertising claims made for the AbEnergizer.

On November 10, 2003, the FTC notified the EPD defendants “that Respondents in the matter of Telebrands Corp., FTC Docket No. 9313 have served interrogatories and requests for

documents upon the Commission.” See FTC letter to Lewis Rose and Andrew Strenio, November 10, 2003 (Exhibit “A”). The letter informed the EPD defendants that the notification was being done pursuant to the protective order issued in the EPD case, and that the FTC’s discovery responses were due on November 12, 2003.<sup>2</sup>

## ARGUMENT

### I. **The EPD Defendants Object To The Scope Of The Discovery Requests As Being Overbroad, As Seeking The Production Of Information That Is Not Relevant, And As Not Being Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.**

Because the EPD defendants have not been provided with copies of the discovery requests themselves,<sup>3</sup> the EPD defendants’ only knowledge of the Telebrands respondents’ discovery requests comes from the FTC letter received on November 10, 2003. The FTC cites only one document request as being at issue. According to the FTC, the relevant discovery request seeks: “All documents relating to any investigation conducted by you or on your behalf relating to any advertising claims or representations relating to the Ab Force or any other EMS device.” FTC Letter of November 10, 2003 (Exhibit “A”). Clearly, the FTC’s investigation into the AbEnergizer would constitute an investigation into an EMS device, thus, as written, this request calls for *all documents* produced by the EPD defendants pursuant to that investigation.

In no way can *all documents* produced by the EPD defendants be relevant to the FTC’s investigation of Ab Force, or the Telebrands respondents’ defense of that investigation. The Telebrands investigation is centered upon claims made by Ab Force comparing that device to

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<sup>2</sup> According to the FTC website (<http://www.ftc.gov/os/adjpro/d9313/index.htm>), the document requests were issued on October 23, 2003, yet notification was not provided to the EPD defendants until November 10, 2003. This motion is thus being filed within two days after the EPD defendants first were notified about the discovery requests.

<sup>3</sup> While the existence of the discovery requests is noted on the FTC website (<http://www.ftc.gov/os/adjpro/d9313/index.htm>), the discovery requests themselves are not available.

other EMS devices. But as written, the discovery request goes well beyond that scope and compels the FTC to produce the entire universe of AbEnergizer documents, a universe that includes, among other things, financial disclosures of the individuals named in the FTC investigation of the AbEnergizer and other confidential commercial documents. It can not be argued that EPD documents such as individual financial disclosures could directly relate or even in any way lead to the discovery of admissible evidence relating to advertising claims made by the Ab Force device.

As such, the Telebrands respondents' document request referenced by the FTC, and any other discovery requests that may relate to EPD confidential documents, must be quashed for being overbroad, irrelevant, and not reasonably calculated to lead to admissible evidence.

**II. The Documents Produced By The EPD Defendants Were Part Of A Confidential Production And Thus Should Not Be Publicly Released.**

The vast majority of documents produced by the EPD defendants were produced as confidential documents.<sup>4</sup> Moreover, the EPD documents produced to the FTC were produced under a protective order (Exhibit "B") which, in light of the sensitive nature of the documents, was asked for the EPD defendants and agreed to by the FTC. If the Telebrands respondents' discovery request is allowed to stand as written, and were the FTC to produce all documents in its possession regarding the AbEnergizer to the Telebrands respondents, the result of this

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<sup>4</sup> Numerous statutes and regulations relate to the FTC's handling of confidential documents. *See* 15 U.S.C. § 46(f) ("the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential"); 16 C.F.R § 4.10 ("Except as provided in paragraphs (f) or (g) of this section or in § 4.11 (b), (c), (d), or (i), no material that is marked or otherwise identified as confidential and that is within the scope of § 4.10(a)(8), and no material within the scope of § 4.10(a)(9) that is not otherwise public, will be made available, without the consent of the person who produced the material").

disclosure would be the passing of confidential operating and financial information directly to the hands of a competitor, defeating the confidentiality the EPD defendants sought before they had produced even a single document to the FTC.

The FTC Rules of Conduct provide that “confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and § 4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate.” 16 C.F.R. § 4.10(g)(3) (2003). The financial and commercial documents produced by the EPD defendants to the FTC fall under the protections of both 15 U.S.C. 46(f), and 16 C.F.R. § 4.10(a)(2) and thus their disclosure must be subject to a protective or *in camera* order.

It is the EPD defendants’ understanding that there is no existing protective order in the instant case. The absence of a protective order must preclude the disclosure of the EPD defendants’ documents under the FTC Rules of Procedure.

Likewise, the EPD defendants are unable to seek an *in camera* order under the procedures outlined in the FTC Rules. The Rules provide that “[a] party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. Parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten (10) days notice of the proposed use of such material. Each such motion must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear.” 16 C.F.R. § 3.45 (2003). The EPD defendants were provided with two days notice, not the required ten days notice, and because the

FTC has not provided the EPD defendants with a list of the EPD documents they intend to produce, the EPD defendants are unable to attach copies of the documents in question.

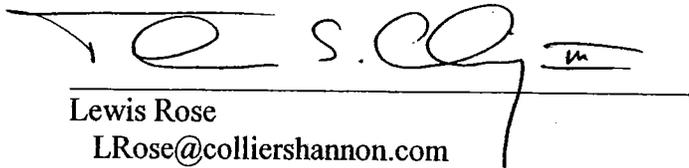
In short, the FTC should not be required to produce the EPD confidential documents because the FTC can only produce the EPD confidential information via the procedures outlined in 16 C.F.R. § 4.10(g)(3), and the protections specifically provided for in that regulation are not available here for the EPD defendants.

### CONCLUSION

The EPD defendants respectfully request that the Telebrands respondents' discovery requests that relate to EPD confidential documents in the possession of the FTC be quashed for being overbroad, irrelevant, and not reasonably calculated to lead to admissible evidence. In the alternative, if the Telebrands respondents' discovery requests are allowed to stand as written, then the EPD defendants respectfully request that no EPD documents be produced by the FTC pending a protective order affording the EPD documents the highest degree of protection in accordance with the FTC Rules of Practice.

DATED: November 12, 2003

Respectfully Submitted, .



Lewis Rose

LRose@colliershannon.com

Thomas S. Cushing III

TCushing@colliershannon.com

COLLIER SHANNON SCOTT, PLLC

3050 K Street, NW, Suite 400

Washington, DC 20007

202-342-8400

202-342-8451 (fax)

Attorneys for EPD Defendants

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of

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

DOCKET NO. 9313

**ORDER ON MOTION TO QUASH**

Having read the EPD defendants Motion to Quash, and having fully considered the same,  
I hereby rule that the Motion is GRANTED.

IT IS THEREFORE ORDERED, that all discovery requests previously issued by the  
respondents in this case are quashed as to any documents in the possession of the FTC relating to  
the FTC investigation into the AbEnergizer EMS device.

ORDERED:

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Stephen J. McGuire  
Chief Administrative Law Judge

November \_\_, 2003

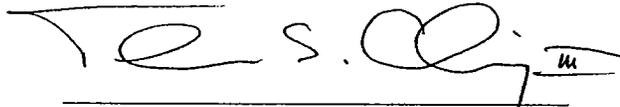
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 12<sup>th</sup> day of November, 2003, a true and correct copy of the foregoing **MOTION TO QUASH**, was delivered via facsimile and regular United States first-class mail, postage prepaid, to the following:

Walter C. Gross  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Edward F. Glynn, Jr.  
Theodore W. Atkinson  
Venable LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, DC 20004

Counsel of Record for Telebrands respondents



Thomas S. Cushing III





Division of Enforcement  
Bureau of Consumer Protection

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
600 PENNSYLVANIA AVENUE, NW  
WASHINGTON, DC 20580

November 10, 2003

VIA FAX TRANSMISSION AND FIRST CLASS MAIL

Lewis Rose, Esq.  
Collier Shannon Scott, PLC  
3050 K St., NW, Suite 400  
Washington D.C. 20007-5108

Andrew J. Strenio, Jr., Esq.  
Sidley Austin Brown and Wood LLP  
1501 K Street  
Washington, D.C., 20005

Re: FTC v. Electronic Products Distribution, LLC, et al.

Dear Messrs. Rose and Strenio:

This letter is to advise you that Respondents in the matter of Telebrands Corp., FTC Docket No. 9313 have served interrogatories and requests for documents upon the Commission. Some responsive materials are subject to the Stipulated Protective Order in FTC v. Electronic Products Distribution, L.L.C.. The document request at issue reads as follows; "All documents relating to any investigation conducted by you or on your behalf relating to any advertising claims or representations relating to the Ab Force or any other EMS device." This letter is to provide you with notice as required by the EPD Protective Order, of the pending discovery requests. Our response is due on November 12, 2003. In the event that you choose to file a motion to quash, you should know that FTC does not plan to take a position. I have enclosed a copy of the Protective Order in Telebrands for your information

Sincerely,

A handwritten signature in cursive script that reads "Walter C. Gross".

Walter C. Gross  
Senior Attorney



FILED

02 NOV 25 PM 3:33

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY: *[Signature]* DEPUTY

1 LAUREEN KAPIN  
WALTER GROSS III  
2 AMY LLOYD  
CRAIG LISHER  
3 Attorneys for the Plaintiff  
Federal Trade Commission  
4 600 Pennsylvania Avenue, NW  
Washington, D.C. 20580  
5 (202) 326-3237 - LK  
6 (202) 326-3319 - WG  
(202) 326- 2559 - fax

7 JOHN D. JACOBS  
8 10877 Wilshire Boulevard  
Suite 700  
9 Los Angeles, California 90024  
(310) 824-4360  
10 (310) 824-4380 - fax

11  
12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
14

15 FEDERAL TRADE COMMISSION, )  
16 )  
Plaintiff, )

17 )  
18 v. )

19 ELECTRONIC PRODUCTS DISTRIBUTION, )  
L.L.C., )  
20 ENERGIZER PRODUCTS, INC., )  
21 ABFLEX USA, INC., )  
22 AB ENERGIZER, L.L.C., )  
THOMAS C. NELSON, )  
23 HOLLY HERNANDEZ, )  
and )  
MARTIN VAN DER HOEVEN, )

24 Defendants. )  
25 )

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

STIPULATED PROTECTIVE ORDER

26  
27 This matter is before the Court on a Joint Motion for a Protective Order by all parties in the  
28 above-captioned action. The Court, having fully considered the matter, has determined that the

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02-CV-888H

1 requested protective order is appropriate in order to ensure that this proceeding and its record are  
2 open to the public to the greatest extent possible, consistent with ensuring against the unwarranted  
3 disclosure of sensitive or confidential commercial information, whether submitted by the plaintiff,  
4 a defendant, or third party.

5 WHEREFORE, IT IS HEREBY ORDERED THAT:

6 1. As used in this Order, "Protected Information" shall refer to any document or  
7 portion thereof that contains either (1) competitively sensitive information, including trade secrets  
8 or other confidential research, development, commercial, or financial information, as such terms  
9 are used in Rule 26(c)(7) of the Federal Rules of Civil Procedure and Section 6(f) of the Federal  
10 Trade Commission Act, 15 U.S.C. § 46(f), and in the cases so construing them, and in any rules  
11 promulgated pursuant to or in implementation of them; (2) any other information, the disclosure of  
12 which is specifically governed by the Federal Trade Commission Act or the Federal Food Drug and  
13 Cosmetic Act; (3) any information provided to the Federal Trade Commission by any other  
14 government agency or third party upon a request or requirement of confidentiality; or (4) personally  
15 identifiable information from third party consumers, including, but not limited to names, addresses,  
16 telephone numbers, e-mail addresses, social security numbers, and bank account or credit card  
17 information. "Document" shall refer to any discoverable writing or recording, as defined in Rule  
18 1001 of the Federal Rules of Evidence, or any transcript of oral testimony in the possession of a  
19 party or a third party.

20 2. In complying with informal discovery requests or discovery requests served upon  
21 them pursuant to the Federal Rules of Civil Procedure, counsel for any party to this action, or any  
22 person or entity not a party to this action ("third party") may designate any document or portion  
23 thereof submitted in response to such discovery requests as Protected Information, including  
24 documents obtained by them from third parties pursuant to discovery or as otherwise obtained. In  
25 the event that counsel for any party to this action objects to the designation of information as  
26 Protected Information, said counsel may, within 20 days of receipt of any document containing  
27 information so designated, file with the Court a motion in opposition to such designation, stating  
28

1 the grounds for counsel's opposition, and request that the Court compel the production of the  
2 information as unprotected.

3 3. The parties, in conducting discovery from third parties, shall provide to each third  
4 party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5 4. A designation of confidentiality shall constitute a representation to the Court, in  
6 good faith and after careful determination, that the material is not reasonably believed to be already  
7 in the public domain and that counsel believes the material so designated constitutes Protected  
8 Information as defined in Paragraph 1 of this Order.

9 5. Material may be designated as Protected Information by placing on or affixing to the  
10 document containing such material (in such manner as will not interfere with the legibility thereof),  
11 or if an entire folder or box of documents is confidential by placing or affixing to that folder or box,  
12 the designation "PROTECTED INFORMATION- FTC v. EPD" or any other appropriate notice  
13 that identifies this proceeding, together with an indication of the portion or portions of the  
14 document considered to be Protected Information. Masked copies of documents may be produced  
15 where the portions masked contain privileged matter, provided that the copy produced shall  
16 indicate at the appropriate point that portions have been deleted.

17 6. Protected Information may be disclosed only to: (a) assigned judges and court  
18 personnel; (b) FTC counsel, their associated attorneys, FTC Commissioners, and other employees,  
19 contractors, or consultants of the FTC; (c) outside counsel of record for defendants ("outside  
20 counsel"), their associated attorneys and other employees of their law firm(s), provided they are not  
21 employees of a defendant; (d) anyone retained to assist outside counsel in the preparation or trial of  
22 this action (including consultants), provided that (i) they are not affiliated in any way with a  
23 defendant or with any other company or person involved in the manufacture, promotion, marketing,  
24 advertising, sale, or distribution of Electronic Muscle Stimulators or any substantially similar  
25 device, and (ii) they have executed the Confidentiality Agreement in the form of Attached Exhibit  
26 A; and (e) any person who has been identified as an author or recipient of the particular Protected  
27 Information disclosed. Notwithstanding the proviso set forth in 6(d) of this paragraph, upon  
28 execution of the Confidentiality Agreement in the form of Attached Exhibit A, Defendants or their

1 employees may be granted access to Protected Information consisting of consumer complaints for  
2 the limited purposes described in Paragraph 8 of this Protective Order and so long as Defendants  
3 and their employees abide by the applicable provisions set forth in this Protective Order. Access to  
4 any other categories of Protected Information will be resolved by the Parties on a case-by-case basis  
5 and any disputes that cannot be resolved regarding the need for access to Protected Information by  
6 Defendants or their employees shall be submitted to the Court for resolution.

7 7. The parties' counsel will maintain protected information in a prudent manner  
8 reasonably sufficient to secure such protected information against unauthorized disclosure, and to  
9 take vigorous action to assure that personnel in their offices will treat Protected Information in the  
10 same manner. If any party should employ the services of an outside consultant or expert, and  
11 should the expert's services require access to Protected Information, the parties' counsel must, prior  
12 to allowing the outside consultant or expert access to Protected Information, obtain an executed  
13 Confidentiality Agreement in the form of attached Exhibit A.

14 8. The parties' counsel, counsel's employees, and any outside experts or consultants  
15 retained by the parties shall use Protected Information solely for the purpose of conducting the  
16 above-captioned litigation and not for any other purpose. Disclosure of Protected Information to  
17 any person described in Paragraph 6 of this Order shall be only for the purposes of the litigation-  
18 related activities in this action, and any appeal of this, or any related, proceeding, and any  
19 subsequent administrative proceeding arising from this action, and for no other purpose  
20 whatsoever. Provided, however, that the Commission may, subject to taking appropriate steps to  
21 preserve the confidentiality of such material, use or disclose Protected Information as provided by  
22 (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases  
23 so construing them; and (2) any other legal obligation imposed upon the Commission. The  
24 Commission agrees to provide reasonable notice to Defendants in the event that Defendants'  
25 Protected Information is responsive to any requests invoked pursuant to the Freedom of  
26 Information Act, discovery in an administrative or other legal proceeding, or a congressional  
27 inquiry.

1           9.     In the event that any Protected Information is contained in any pleading, motion,  
2 exhibit or other paper (collectively the "Papers") filed or to be filed with the Clerk of the Court, the  
3 parties shall prominently specify that the Papers contain Protected Information on the first page of  
4 the submission and any subsequent page containing Protected Information. In addition, the Clerk  
5 shall be so informed by the party filing such papers, and subject to a further order of this Court, that  
6 portion of any pleading, motion, deposition transcript, or other document submitted or presented to  
7 or filed with the Court containing Protected Information shall be placed under seal. Such material  
8 shall not be available to persons other than the Court, authorized employees of the Court, and  
9 persons authorized by this Protective Order. In the event that any Protected Information is used in  
10 any Court proceeding herein, the parties shall make a good faith attempt to stipulate as to the  
11 procedures for the use of Protected Information. If necessary, any dispute regarding the procedures  
12 for use of Protected Information in such proceedings shall be submitted to the Court for resolution.  
13 Upon or after filing any paper containing Protected Information, the filing party may file on the  
14 public record a duplicate copy of the paper that does not reveal Protected Information.

15           10.    At the time that any consultant, contractor, or other person retained to assist counsel  
16 in the preparation of this action concludes participation in the action, such person shall return to  
17 counsel all copies of documents or portions thereof designated confidential that are in the  
18 possession of such person, together with all notes, memoranda or other papers containing  
19 confidential information. After the conclusion of this litigation, (*i.e.*, a final adjudication of all  
20 claims raised herein), defendants' counsel shall, unless otherwise ordered by the Court, promptly  
21 return to the plaintiff's counsel all Protected Information (except one copy of the pleading files)  
22 provided by plaintiff and shall destroy all notes, summaries, or other documents containing  
23 Protected Information. Within 60 days of the conclusion of this litigation, counsel shall notify the  
24 plaintiff that counsel has complied with this provision of the Protective Order. Corresponding  
25 obligations of counsel for the plaintiff shall be governed by the Federal Records Act, 44 U.S.C. §  
26 3301 et seq., and the provisions of Rule 4.12 of the FTC's Rules of Practice, 16 C.F.R. § 4.12.

27           11.    The parties' counsel shall promptly notify the Court and each other of any breach of  
28 this Protective Order. Any allegations of abuse or violation of this Order may be considered by the

1 Court either for purposes of determining whether it should impose sanctions, or for purposes of  
2 determining whether the matter should be referred for appropriate disciplinary proceedings, or both.

3 12. Nothing in this Order shall be construed to effect an abrogation, waiver, or  
4 limitation of any kind on the right of the parties or third parties to assert any applicable discovery or  
5 trial privilege, or to seek modification of this Order.

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9 DATED: November 22, 2002

UNITED STATES DISTRICT JUDGE

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EXHIBIT A

CONFIDENTIALITY AGREEMENT

The undersigned, having read and understood the Protective Order governing the use of "Protected Information" (as defined in the Protective Order, a copy of which is attached hereto) obtained from [insert source] in the case of Federal Trade Commission vs. Electronic Products Distribution, L.L.C. et al., No. 02-CV-888H(AJB), hereby agrees to be bound by the terms of the Protective Order.

\_\_\_\_\_  
(Name)

Dated this \_\_\_\_ day of \_\_\_\_\_, 200\_

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**CERTIFICATE OF SERVICE**

The undersigned certifies that, on this 21<sup>st</sup> day of November, true and correct copies of the parties "Joint Motion for Protective Order" and "Stipulated Protective Order" were served, via Federal Express, on:

Larry C. Russ, Esq.  
Judith L. Meadow, Esq.  
Russ, August & Kabat  
12424 Wilshire Boulevard  
Suite 1200  
Los Angeles, CA 90025

Attorneys for Defendant Energizer Products, Inc

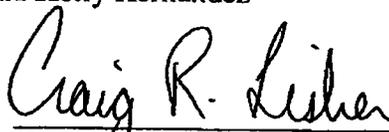
Lewis Rose, Esq.  
John Villafranco, Esq.  
Lana Leiby  
Collier Shannon Scott, P.L.L.C.  
3050 K Street, N.W.  
Washington, D.C. 20009

Attorneys for Defendants Abflex USA, Inc., Electronic Products Distribution L.L.C., AB Energizer L.L.C. and Martin Van Der Hoeven

Andrew Strenio, Esq.  
June Casalmir, Esq.  
Powell, Goldstein, Frazer & Murphey, L.L.P.  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Attorneys for Defendants Thomas Nelson and Holly Hernandez

Executed on this 21<sup>st</sup> day of November.

  
\_\_\_\_\_  
Craig Lisher  
Attorney for Plaintiff

02-CV-888H