

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

**COMPLAINT COUNSEL’S MEMORANDUM IN
OPPOSITION TO RESPONDENTS’ MOTION TO COMPEL**

Respondents Telebrands Corp., TV Savings LLC, and Ajit Khubani seek an order compelling Complaint Counsel to produce the work product of their non-testifying experts on the subject of consumer perception of the advertising at issue in this matter. Respondents have not demonstrated, however, that “exceptional circumstances” in this case render it “impracticable” for them to “obtain facts or opinions on the same subject by other means.” COMMISSION RULE OF PRACTICE 3.31(c)(4)(B)(ii). Moreover, Respondents’ argument is contrary to the weight of Commission precedent. Respondents have failed to overcome the non-testifying expert and work product privileges asserted by Complaint Counsel, and their motion to compel should be denied.

BACKGROUND

The complaint in this case alleges that respondents employed false, deceptive, and unsubstantiated advertisements to sell the “Ab Force” electronic muscle stimulation (“EMS”)

device in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. § 45 and 52. Respondents' advertisements contained statements and depictions that reminded consumers, expressly and by implication, of pervasive and deceptive program-length television commercials ("infomercials") for strikingly similar EMS belts sold by others at the time. *See* Compl., ¶¶ 10-11 ("I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. . . . The Ab Force is just as powerful and effective as those expensive ab belts sold by others.").

As in many other Section 5 and 12 advertising cases, consumer perception of the relevant advertisements is a key issue in this case. Complaint Counsel have furnished Respondents with documents relevant to consumer perception, including consumer complaints and correspondence revealing consumers' reactions to the advertisements at issue. Respondents also possess many documents of their own that are relevant to consumer perception of Ab Force advertisements.

Complaint Counsel have also provided Respondents a list of privileged documents, which has been further clarified at Respondents' request. Identified in this privilege log were research questionnaires, tabulations, and tapes used in a preliminary copy test ("pre-test") of Ab Force television advertising, and emails relating thereto. These materials were prepared at Complaint Counsel's direction and request, in anticipation of litigation and hearing, by non-testifying experts in market research, consumer surveys, and video production and recording. Complaint Counsel have withheld these research materials pursuant to the attorney work product privilege and the non-testifying expert privilege.

Respondents have demanded that Complaint Counsel produce certain pre-test materials. Complaint Counsel have declined to produce these materials. Respondents filed their motion to compel on December 11th. Complaint Counsel now offer their response.

ARGUMENT

I. The Withheld Documents Constitute Attorney Work Product and the Product of Non-Testifying Experts

The requested pre-test materials, including survey questionnaires, tabulations, tapes, and emails relating thereto, embody and reflect the mental impressions and processes, analyses, and conclusions of Complaint Counsel's non-testifying experts. These materials are attorney work product and are generally protected from disclosure by the work product privilege.

"The work product privilege provides a lawyer with a degree of privacy to assemble information, sift the facts, prepare legal theories and plan strategy free from unnecessary intrusion by opposing counsel." Order, *In re Detroit Auto Dealers Ass'n*, Docket No. 9189, 1985 WL 260986 (Apr. 17, 1985).¹ The privilege "further[s] the interests of clients and, ultimately, the cause of justice." Order, *In re Schering Corp.*, Docket No. 9232 (May 10, 1990), attached as Exhibit A. This privilege has been codified in the Commission's Rules of Practice:

[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

RULE 3.31(c)(3) (emphasis added).

The withheld materials were created in anticipation of litigation and hearing in this matter. This is the fourth case that the Commission has brought against the deceptive marketing

¹ Except when otherwise indicated, pinpoint citations are not available for the electronic documents cited herein.

of electronic ab belts since May 2002.² At Complaint Counsel's request, consulting experts not expected to testify in this matter developed the pre-test in August 2003, because the present litigation was imminent. The timeframe and purpose of Complaint Counsel's research establishes that the materials were created in anticipation of litigation and preparation for hearing, and are entitled to the work product privilege. *See, e.g., Order, In re Rambus, Inc.*, Docket No. 9302, 2003 WL 21206558 (May 13, 2003); *Detroit Auto Dealers Ass'n, Inc., supra*, 1985 WL 260986; *Banks v. Wilson*, 151 F.R.D. 109, 112 (D. Minn. 1993).

Additionally, the withheld materials were prepared by experts not expected to be called as witnesses, and are therefore protected by the Commission's non-testifying expert privilege:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

RULE 3.31(c)(4)(B)(ii).

Respondents do not contest that several non-testifying experts developed and created the withheld pre-test materials. First, a professor of marketing at a prominent business school utilized his expertise in marketing research to develop the pre-test questionnaires, to perform appropriate calculations, and to draw conclusions. Second, a professional video producer used his expertise in video production and recording to develop and produce the pre-test tapes. Lastly,

² As Complaint Counsel mentioned at the pre-hearing conference in this matter, the Commission sued the marketers of three EMS belts in 2002. These cases were styled as follows: *FTC v. Electronic Products Distribution, LLC, et al.*, Civ. No. 02-888H(AJB) (S.D. Cal.) ("AB Energizer"); *FTC v. Hudson Berkley Corp., et al.*, Civ. No. S-02-649-PMP-RJJ (D. Nev.) ("AbTronic"); *FTC v. United Fitness of America, LLC, et al.*, Civ. No. S-02-648-KDJ-LRL (D. Nev.) ("Fast Abs").

a professional survey contractor employed its expertise in surveying consumers. Complaint Counsel does not expect to call these experts to testify regarding the pre-test and does not plan to introduce this research in evidence in this proceeding. Accordingly, the pre-test materials are generally privileged from disclosure under the Commission's non-testifying expert privilege.

The fact that the withheld materials were created by experts not expected to testify does not affect their status as work product. *See* RULE 3.31(c)(3). Indeed, the very order that Respondents rely upon expressly characterizes precisely the same type of copy test materials withheld here as "work product." *In re Kraft, Inc.*, Docket No. 9208, slip op. at 2 (July 10, 1987), attached as Exhibit B.

II. Respondents Have Failed to Establish that the Work Product Privilege and the Non-Testifying Expert Privilege are Inapplicable

As discussed above, the Commission's Rules of Practice afford vigorous protection to work product prepared in anticipation of litigation by experts not expected to be called to testify. To prevail on their motion, Respondents must meet a standard even more strict than that applied to attorney work product in general. More than "substantial need" and "undue hardship," Respondents must demonstrate "exceptional circumstances under which it is impracticable for [them] . . . to obtain facts or opinions on the same subject by other means." *Compare* RULE 3.31(c)(3) *with* RULE 3.31(c)(4)(B)(ii). They have failed to show that such exceptional circumstances exist in this case.

Respondents' argument relies almost exclusively on a single Commission order, *In re Kraft, Inc.*, *supra*. Respondents argue that the *Kraft* order granting the *issuance of a subpoena* for copy test materials similar to those withheld as privileged here establishes that copy testing or

survey results obtained in anticipation of litigation must be produced upon demand. (*See* Resp't's Mem. at 2.) This argument totally misconceives Commission law and is contrary to established Commission and federal court precedents.

The *Kraft* order merely authorized the issuance of a subpoena to complaint counsel pursuant to Rule 3.36. *In re Kraft, supra*, slip op. at 1, 2. Judge Parker made no final ruling on the work product privilege asserted; instead, he specifically permitted complaint counsel to move to quash the subpoena. *Id.* at 3. No motion to quash was filed in *Kraft*, so there was never any final ruling that Kraft had overcome the asserted privilege. The *Kraft* order does not establish any binding precedent requiring the production of research materials withheld as privileged here.

Respondents rely greatly on *Kraft* and discuss no other Commission cases because their argument is contrary to established Commission precedent. Conspicuous by its absence in respondents' motion, for example, is a more recent order rejecting demands for copy test materials in *In re Schering Corp., supra*, attached as Exhibit A.

In the *Schering* case, the respondent sought copy test questionnaires and documents related thereto, which Commission staff claimed were protected by the work product privilege. Like Respondents here, Schering argued the copy test materials were not privileged because it "need[ed] the documents to prepare its defense." *In re Schering Corp.*, slip op. at 2. Citing the work product privilege rule, which was then codified in Rule 3.31(b)(3), Judge Timony ruled:

[S]imple assertions of substantial need do not constitute the showing of need required by Rule 3.31(b)(3). . . . Respondent does not assert, for example, that essential witnesses have lost their memory of the central issue in the case, and that the witnesses' statements must therefore be produced.

Id. (internal citations and quotations omitted).

Schering also argued, as Respondents argue here, that the copy test materials were not privileged because the respondent could not “exactly duplicate complaint counsel’s research.”

Judge Timony responded:

That is not the standard. To determine if the work product protection should be overridden, the standard under Rule 3.31(b)(3) is the inability, without undue hardship, to obtain the “substantial equivalent.” Respondent presumably could hire an expert and conduct its own copy test research.

Id. Notably, Judge Timony rejected the respondents’ demand for copy test materials after applying a more lenient standard than the standard applicable here. *Compare* RULE 3.31(c)(3) *with* RULE 3.31(c)(4)(B)(ii). This Court should reject Respondents’ effort to resuscitate the arguments rejected in *Schering*.

Respondents also neglected to mention in their motion that there are other Commission precedents holding that copy tests or consumer surveys and results are protected from disclosure by the work product privilege. Judge Parker, for one, ruled in *Safeway Stores, Inc.* that surveys and related documents created by Safeway’s marketing research division at the direction of its attorneys and in anticipation of litigation were protected from disclosure by the work product privilege. *See* Order, *In re Safeway Stores, Inc.*, Docket No. 9053, slip op. at 5 (June 30, 1976), attached as Exhibit C. Similarly, consumer surveys and analysis of such surveys were found to be protected from disclosure by the work product privilege in *In re Fisher Foods, Inc.*, Docket No. 9062, slip. op. at 3-4 (June 17, 1976) (Dufresne, J.), attached as Exhibit D. Similar results obtain in federal court proceedings. *See, e.g., Connelly v. Dun & Bradstreet, Inc.*, 96 F.R.D. 339, 342 (D. Mass. 1982); *see also Starter Corp. v. Converse, Inc.*, Civ. No. 95-3678, 1996 WL 694437, at *1 (S.D.N.Y. Dec. 3, 1996).

Respondents next argue that Complaint Counsel’s pre-test materials “describing final test methodology or procedure, raw data, or survey results” are “facts” and therefore are not privileged. This argument is contrary to the Commission’s Rules of Practice, which expressly protect facts developed in anticipation of litigation. *See* RULE 3.31(c)(4)(B)(ii) (extending privilege to “facts known . . . by an expert”); RULE 3.31(c)(3) (extending privilege to “documents and tangible things otherwise discoverable”). Commission precedent also rejects Respondents’ argument. The ALJ opinions cited *supra* page 7 denied access to *all* documents referring or relating to the copy tests or surveys, including their results. *See In re Schering Corp.*, *supra*, slip op. at 2-3 (concluding that copy tests “and the data obtained therefrom” were privileged); *see also In re Safeway Stores, Inc.*, slip. op. at 1-2, 5; *In re Fisher Foods, Inc.*, slip. op. at 3-4.³

Copy test methodologies, observations, and results reveal, directly or indirectly, the mental processes, mental impressions, analyses, and recorded conclusions of the experts who conduct them. Regardless of the label that Respondents apply to Complaint Counsel’s work product, the pre-test materials should be protected as privileged absent the “exceptional

³ Similarly, the court in *In re Grand Jury Subpoena*, 599 F.2d 504, 512 (2d Cir. 1979), held that the answers to a questionnaire created in anticipation of litigation constitute attorney work product. *See also In re Grand Jury Investigation*, 599 F.2d 1224, 1229-30 (3d Cir. 1979) (concluding that work product privilege applied to questionnaires and interview memoranda used in anticipation of litigation).

The two district court cases cited by Respondents are inapposite. In the first case, the plaintiff had already disclosed part of its consumer survey, and the court ruled that the plaintiff had waived work product privilege. *See Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Prods., Inc.*, 140 F.R.D. 373, 377 (E.D. Wisc. 1991). In the second case, there was no consumer survey at issue. The magistrate judge ordered the production of tests conducted on air, water, soil, and dust—documents entirely unlike the consumer research at issue in this case. *See Southern Scrap Material Co. v. Fleming*, Civ. No. 01-2554, 2003 WL 21474516, at *17 (E.D. La. June 18, 2003) (Knowles, M.J.). Moreover, the defendant asserting the work product privilege did not claim that these documents were generated by a non-testifying expert. *See id.* at *16.

circumstances” called for in Rule 3.31(c)(4)(B)(ii).

III. Respondents Have Failed to Demonstrate the Circumstances Necessary to Breach the Asserted Privileges

Respondents cannot prove what they seem to profess—that it is “impracticable” for them to obtain facts or opinions on the subject of consumer perception of the advertising at issue. They cannot even demonstrate undue hardship, for they already possess documents relating to consumer perception, and can readily obtain more.

One day after they filed their motion to compel, Respondents informed Complaint Counsel that they had within their possession approximately 5,700 documents “referring or relating to consumer perception” of Ab Force advertising. (*See* Resp’t’s Objections and Responses to Complaint Counsel’s First Set of Requests for Production, Dec. 12, 2003, at 7 (attached as Exhibit E).) Complaint counsel has also produced consumer complaints and correspondence relevant to consumers’ perceptions. Furthermore, Respondents are quite capable of hiring their own marketing experts to undertake copy test research if they so desire. *See In re Schering Corp., supra*, slip op. at 2.⁴

Respondents do not disclose or confront these facts in their motion. Instead, they simply assert that the privileged pre-test materials are needed to prepare their defense—possibly, they speculate, to refute the complaint’s allegations. Bare assertions of substantial need do not constitute the “exceptional circumstances” contemplated by Rule 3.31(c)(4)(B)(ii) or the “undue hardship” required by Rule 3.31(c)(3). *See In re Schering Corp., supra*, slip op. at 2 (“It is not

⁴ Indeed, at the pre-hearing conference in this case, Respondents’ counsel appeared to indicate that his clients would contact experts to answer the complaint’s allegations. (*See* Tr., Nov. 4, 2003, at 8 (excerpt attached as Exhibit F).)

enough for defendant to assert that the information is critically important, . . . relevant, and not available by practical means.”) (applying Rule 3.31(c)(3) and quoting *Connelly*, 96 F.R.D. at 342); *see also Detroit Auto Dealers Ass’n, supra*, 1985 WL 260986 (“Respondents state that information in the withheld documents is crucial to preparation of their defense. This general statement fails to show that the information is essential to a fair determination of the cause.”).

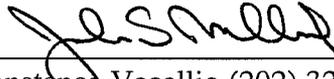
Similarly, “mere speculation of hope that the requested . . . [material] may prove to be contradictory or impeaching is not sufficient” to overcome the work product privilege. *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 93 (S.D.N.Y. 1980); *see Banks*, 151 F.R.D. at 113 (“The mere fact that the Plaintiffs are interested in utilizing the statement, for such impeachment purposes as it might bear, is unpersuasive. . . . The Rule calls for a ‘showing,’ and not a mere hypothesis.”). Respondents have not overcome the work product and non-testifying expert privileges asserted by Complaint Counsel.

CONCLUSION

The Commission’s Rules of Practice and the weight of Commission precedent both strongly counsel against the unwarranted discovery of work product created in anticipation of litigation by non-testifying experts. Respondents can readily obtain facts or opinions regarding consumers’ perceptions by means other than obtaining the preparatory research of Complaint Counsel through discovery. “Discovery was hardly intended to enable a learned profession to perform on wits borrowed from the adversary.” *Detroit Auto Dealers Ass’n, supra*, 1985 WL 260986.

For all of the foregoing reasons, Respondents’ attempt to breach the work product and non-testifying expert privileges asserted by Complaint Counsel should be rejected.

Respectfully submitted,



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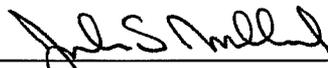
Dated: December 22, 2003

Complaint Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W, Suite NJ-2122
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2003, I caused *Complaint Counsel's Opposition to Respondents' Motion to Compel* to be filed and served as follows:

- (1) the original and one (1) paper copy filed by hand delivery to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W. Room H-112
Washington, D.C. 20580
- (3) one (1) paper copy by first class mail and one (1) electronic copy via email to:
Edward F. Glynn, Jr., Esq.
Theodore W. Atkinson, Esq.
VENABLE LLP
575 Seventh St., N.W.
Washington, D.C. 20004



JOSHUA S. MILLARD

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

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

ORDER DENYING RESPONDENTS' MOTION TO COMPEL

On December 11, 2003, Respondents Telebrands Corp., TV Savings LLC, and Ajit Khubani moved to compel Complaint Counsel to produce the work product of several experts not expected to be called as witnesses on the subject of consumer perception of the advertising at issue in this matter. Complaint Counsel filed their memorandum in opposition to Respondents' motion on December 22, 2003.

Respondents have not overcome the asserted non-testifying expert and work product privileges. Accordingly, upon due consideration of the parties' submissions, it is hereby

ORDERED that Respondents' Motion to Compel is DENIED.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
SCHERING CORPORATION,
a corporation.

Docket No. 9232

ORDER DENYING MOTION TO COMPEL

Respondent moves to compel complaint counsel to produce three documents¹ involving a copy test (a survey of consumers regarding their perception of an ad). The test was undertaken for this case at complaint counsel's request before the complaint issued.

The parties have joined issue² on complaint counsel's assertion that the documents are protected from discovery as work product under Rule 3.31(b)(3). The work product protection was explained in Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 342 (D. Mass. 1982):

Rule 26(b)(3) [the F.R.C.P. equivalent of FTC Rule 3.31(b)(3)] . . . states that discovery may not be had of documents . . . which have been prepared in anticipation of litigation, without a showing of substantial need for such materials and an inability to obtain the equivalent by other means without undue hardship. These documents . . . which have been prepared in anticipation of litigation, considered "work product", are granted a qualified exemption from the liberal rules regarding discovery. The policy behind 'work product' protection, as articulated by the

¹ The documents include the copy test questionnaires and two memos by Dr. Thomas Maronick of the Commission's staff who designed the test and analyzed its results in October and November of 1987. Dr. Maronick will not be called as a witness by complaint counsel in this proceeding.

² Complaint counsel also rely on the deliberative privilege and Rule 3.31(b)(4)(ii) exempting from discovery the work of a non-testifying expert.

Court in Hickman v. Taylor, 329 U.S. 495, 511 (1947) and confirmed recently in Upjohn v. United States, 449 U.S. 383, 397-402 (1981), lies in the necessity for lawyers to work with a degree of privacy in order to further the interests of clients and, ultimately, the cause of justice.

If the party seeking the information is able to show that it has a "substantial need for the materials in preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means," production of the factual information³ in the documents will be ordered. Rule 3.31(b)(3). Even if the work product protection is thus overridden, the order compelling production "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. Id.

Respondent argues that it needs the copy test documents to prepare its defense. However, simple assertions of substantial need do not constitute the showing of need required by Rule 3.31(b)(3): "It is not enough for the defendant to assert that the information is critically important, . . . relevant, and not available by practicable means." Connelly, 96 F.R.D. at 343. Respondent does not assert, for example, that essential witnesses have lost their memory of the central issue in the case, and that the witnesses' statements must therefore be produced. Hickman v. Taylor, 329 U.S. at 511; Xerox v. IBM Corp., 64 F.R.D. 367, 377 (S.D.N.Y. 1974).

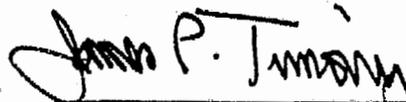
Respondent also argues that it "cannot exactly duplicate complaint counsel's research" and therefore the copy test documents should be produced. That is not the standard. To determine if the work product protection should be overridden, the standard under Rule 3.31(b)(3) is the inability, without undue hardship, to obtain the "substantial equivalent." Respondent presumably could hire an expert and conduct its own copy test research. "For aught that appears, the essence of what [respondent] seeks either has been revealed to him already through the interrogatories or is readily available to him direct

³ Respondents argument that it seeks only the facts provided by persons surveyed in the copy test is similar to the demand in Hickman v. Taylor where the Court refused to override the work product protection of oral statements of witnesses given to and written by Fortenbaugh, attorney for the tug boat company. 329 U.S. at 512-13. Such facts may well be discoverable, (e.g., in interrogatories), but production of the copy test documents with those facts can be compelled only by a proper showing of need and hardship under the rule.

from witnesses for the asking." Hickman v. Taylor, 329 U.S. at 509. Mere inconvenience or expense will not defeat work product protection. Connelly, 96 F.R.D. at 343.

In the absence of a proper showing of need and hardship, such surveys undertaken in anticipation of litigation and the data obtained therefrom are protected from disclosure as "work product." Upjohn v. United States, 449 U.S. 383, 397-402 (1981); Connelly, supra.⁴

The motion is denied.



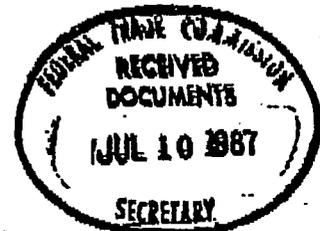
James P. Timony
Administrative Law Judge

Dated: May 10, 1990

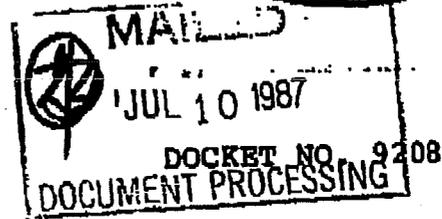
⁴ Flowers Industries, Inc., Docket 9148, (Order Granting, in Part, Motion to Quash Subpoena, Sept. 11, 1981), slip op. at 7-8 (Timony, ALJ); Safeway Stores, Inc., Docket 9053 (Ruling on Respondent's Claims of Privilege, June 30, 1976) (Parker, ALJ); Fisher Foods, Inc., Docket 9062 (Order Denying Respondent's Motion for the Issuance of a Subpoena Duces Tecum, June 17, 1976), slip op. at 3-4 (Dufresene, ALJ).

EXHIBIT B

UNITED STATE OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
KRAFT, INC.
a corporation.



ORDER RULING ON RESPONDENT'S MOTION FOR
DOCUMENTS IN THE POSSESSION OF COMPLAINT COUNSEL

Pursuant to §§ 3.31(b)(1), 3.34(b) and 3.36 of the Commission's Rules of Practice, respondent Kraft, Inc. has asked me to issue a subpoena duces tecum requiring complaint counsel to turn over certain documents in their possession to Kraft. The requested subpoena contains eleven specifications, the first seven of which seek all documents relating to the allegations in paragraphs 6, 7, 8, 9, 10, 11, and 12 of the complaint. Specification eight seeks documents relating to consumer perceptions conveyed by advertisements which are referred to in the complaint; nine, all documents relating to the nutritional content or quality of Kraft singles, imitation cheese products, and five ounces of milk; ten, communications between the Commission or its staff and the Attorney General of California or his staff relating to Kraft or its advertising; and, eleven, all documents identified in complaint counsel's responses to Kraft's first set of interrogatories.

The requested specification seek several categories of documents in complaint counsel's possession:

- (1) Those received from Kraft during the investigation which led to the complaint.
- (2) Communications with third parties.
- (3) Those prepared by or for complaint counsel, such as interview reports, analyses of evidence, surveys, letters to and from potential witnesses, and recommendations to their superiors and to the Commission.

Kraft knows which of its documents it gave the Commission during the investigation, but it seeks disclosure of the relevance of each document to particular complaint allegations. While Kraft is entitled to this information, a subpoena is the wrong vehicle for obtaining such knowledge. At the prehearing conference which will be held shortly, I will establish, inter alia, deadlines for the production of documents which the parties intend to offer in evidence and, if after analyzing the documents, Kraft cannot determine the relevance of some it may challenge the admissibility of those documents.

Other documents which Kraft seeks -- interview reports, written analyses of evidence, memoranda recommending action, communications between the Commission and the Attorney General of California -- are work product or relate to the deliberative process and are generally immune from disclosure. Safeway Stores, Inc., Docket No. 9053 (June 30, 1976); Bell & Howell Co., Docket No. 9099 (April 11, 1970); FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984).

While withholding the work product and internal memoranda which Kraft seeks will not prejudice its ability to prepare its defense, one category of documents causes me concern -- those relating to copy test research performed at the direction of complaint counsel in anticipation of litigation. These documents are work product but they contain significant evidence relating to the issues raised in the complaint. If complaint counsel intend to offer the surveys in evidence, they should be revealed now so that Kraft's attorney's can begin analyzing them. If they are not offered in evidence, they may lend some support to Kraft's claim that its advertisements do not imply what the Commission believes they do.

Kraft can develop and offer its own evidence of consumer perceptions but it cannot exactly duplicate complaint counsel's research. Therefore, since Kraft has a need for the surveys conducted by or for complaint counsel, and since the precise information contained in the surveys cannot be obtained through any other means (Section 3.36(b) of the Rules of Practice), I will approve a subpoena directing complaint counsel to turn them over to counsel for Kraft. Therefore,

IT IS ORDERED that Kraft's request for a subpoena duces tecum containing proposed specifications 1-7 and 9-11 be, and it hereby is, denied.

IT IS FURTHER ORDERED that Kraft shall prepare for my signature a subpoena duces tecum directing complaint counsel to produce all surveys relating to consumer perceptions or impressions received from or conveyed by any of the Kraft advertisements attached to or otherwise described in and subject to the complaint. If

complaint counsel intend to move to quash this subpoena, they shall do so within five (5) business days of its receipt.



Lewis F. Parker
Administrative Law Judge

DATED: July 10, 1987

EXHIBIT C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
SAFEWAY STORES, INC.,
a corporation.

DOCKET NO. 9053

RULING ON RESPONDENT'S CLAIMS OF PRIVILEGE

On May 24, 1976, respondent Safeway made its return on a subpoena issued by me but withheld certain documents, claiming that they were exempt from disclosure because of both the attorney-client and work product privileges.

These documents have been given to me for my analysis in conjunction with a memorandum filed by respondent in support of its claims of privilege. There are eight groups of documents:

1. Tabular analyses of 1973 Commission surveys prepared by Mr. Wesley Odell, a statistician hired by Safeway. These analyses were prepared by Mr. Odell pursuant to the instructions of Safeway's legal division and outside counsel.
2. Documents associated with a survey of some Safeway stores in the Dallas, Texas area conducted at the direction and under the supervision of Safeway's attorneys in June 1974.
3. Documents associated with a survey of some Safeway stores in the Seattle, Washington area in June 1974. This survey was also directed and supervised by Safeway's attorneys.
4. A memorandum from Safeway's president and chief executive officer to its retail division managers. The memorandum issues instructions concerning pricemarking of "ad special markdown items" and is based on an attached memorandum from Safeway's general counsel to Safeway's president, board chairman, and senior vice president in

charge of retail operations. The general counsel's memorandum analyzes Safeway's Dallas and Seattle surveys and refers to certain FTC surveys of Safeway's price-marking operation.

5. Documents associated with a survey of some Safeway stores in the Portland, Oregon area in September 1974. The survey was conducted by Safeway's market research division at the direction and under the supervision of Safeway's corporate and outside attorneys.

6. Documents associated with a survey of some Safeway stores in the Kansas City area in September 1974, conducted by Safeway's market research division at the direction and under the supervision of Safeway's corporate attorneys.

7. A handwritten note from Safeway's general counsel, routed through the senior vice president-retail operations, to Safeway's president. The note analyzes the surveys referred to in paragraphs 5 and 6, supra.

8. A memorandum from a senior attorney for Safeway, routed through Mr. R.J. Van Gemert, to Mr. Magowan, a Safeway vice president and Tulsa division manager. The document was written on April 9, 1975, after the present complaint was issued and deals with a legal analysis of the appropriate retention period for advertised item availability and pricing checks. The document also appears to have been forwarded to other retail division managers, all of whom are vice presidents, and to other individuals in the Los Angeles division.

In their answer to respondent's memorandum, complaint counsel do not challenge its claims of privilege with respect to documents referred to in paragraphs 1, 7 and 8. Complaint counsel claim, however, that neither the attorney-client nor the work product privilege protects the documents referred to in paragraphs 2, 3, 4, 5 or 6 (hereafter referred to as "group 2, group 3..." etc. documents) from disclosure and Safeway's claims with respect to these documents must, therefore, be ruled upon.

The Attorney-Client Privilege

According to the most eminent expert on evidence:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are, at this instance, permanently protected (7) from disclosure by himself or by the legal adviser (8) except the protection be waived." 8 Wignore Evidence §2292, p. 554 (Rev. Ed. 1961).

The group 2, 3, 5 and 6 documents are the results of surveys conducted by Safeway personnel in Dallas, Seattle, Portland, and Kansas City several months after Safeway had been served with an investigatory subpoena duces tecum and had been advised of the results of the FTC's 1973 survey as it pertained to checkstand operations. Correspondence associated with these surveys indicates that each was prompted by the 1973 FTC survey and was conducted at the direction and under the supervision of Safeway's counsel. For example, a July 3, 1974 memorandum states that the Dallas survey was recommended by the legal division to check the results of the FTC survey. A June 18, 1974 memorandum reveals that the Seattle survey was conducted so that Safeway could ensure compliance with the FTC's pricing policies.

The group 4 documents consist of a legal analysis of the Dallas and Seattle surveys, a recommendation that the president forward it to the regional managers, and a letter from Safeway's president doing that. The Portland and Kansas City surveys, conducted after the Dallas and Seattle ones, were undoubtedly undertaken for the same reason -- to check the accuracy of the FTC's 1973 survey.

In my opinion, these surveys (group 2, 3, 5 and 6) and the correspondence referring to them (group 4) are exempt from disclosure because they are attorney-client communications whose primary purpose was to advise and assist the client with respect to a legal, rather than business matter, for the surveys were conducted in connection with a matter of legal concern to Safeway -- that is, the accuracy of the FTC's 1973 surveys of its operations. They were not conducted as a part of Safeway's usual business endeavors.

Complaint counsel argue that the attorney-client privilege does not apply to these surveys or documents analyzing them because respondent has not provided enough information to

determine whether those employees involved in the surveys who communicated with its attorneys are "clients", for it is their claim that only communications by those who are in the corporation's "control group" are entitled to the protection of the attorney-client privilege:

"...[U]nder the 'control group' test those corporate employees who claim to communicate to a lawyer as 'the client' for the corporation must be 'in a position to control or take substantial part in a decision about action that the corporation may take on the attorney's advice'" (Complaint Counsel's Answer, p. 4).

Complaint counsel concedes that some courts do not agree with this restrictive interpretation of the privilege and extend the privilege to communications by a corporation's employee made at the direction of his superior and within the scope of his employment. See Holiday Inns Inc. v. Fay, 451 F.2d 343, 344 (5th Cir. 1971). Some go so far as to extend the privilege to an employee's communications regardless of his status or authority in the corporation. U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357, 361 (D. Mass. 1950).

Complaint counsel's arguments are not convincing. It may well be, as they claim, that the individuals who conducted the market surveys are not in Safeway's "control group" for they have no authority to establish or alter Safeway's pricing policy. However, I view these surveys in a different light. They were conducted by employees and analyzed and transmitted by its legal counsel to Safeway employees (its president and vice presidents) who do control and can alter Safeway policy. Viewed from this perspective, these communications might well be seen as involving Safeway's "control group". */ In any event,

*/The fact that in some cases the communications were transmitted from their attorneys to members of the control group rather than from members of the group to their attorneys does not invalidate the claim of privilege. See Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968).

these communications meet the more generous requirements of those courts which reject the "control group" test. Therefore, I find that all documents which Safeway withheld are immune from production because their purpose was to assist in the formulation of legal advice to Safeway. */

Work Product

As alternative support for Safeway's claim of privilege, I hold that the surveys were prepared in anticipation of litigation at the direction of its attorneys and are therefore "work product". Hickman v. Taylor, 392 U.S. 495 (1947).

According to complaint counsel, these surveys could not have been conducted in anticipation of litigation because such surveys have been regularly conducted by Safeway since July 1971 to ascertain its compliance with Trade Regulation Rule 424. Complaint counsel also claim that the surveys are reports of facts rather than the disclosure of an attorney's mental impressions or opinions.

The Commission has consistently taken the position that violation of its trade regulation rules constitutes violations of the FTC Act (Count II of the present complaint is a concrete example of this position) and corporate activity which seeks to ensure compliance with such rules can fairly be said to be in contemplation of litigation. See Galambus v. Consolidate Freightways Corp., 64 F.R.D. 468 (N.D. Ind. 1974).

"The authorities indicate that prudent parties anticipate litigation and often begin preparation prior to the time suit is formally commenced."
Id. at 472.

While certain routinely conducted factual investigations may not be considered "work product", I believe that these surveys are the direct result of attorneys' recommendations

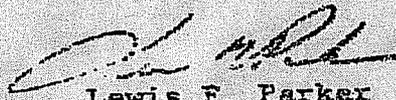
*/See United Shoe Machinery, supra, in which Judge Wyzanski withheld from production documents "the principal purpose for which... was to solicit or give an opinion on law or legal services...."

and are entitled to be considered part and parcel of those attorneys' work on behalf of Safeway.

Conclusion

Upholding Safeway's claims of privilege will not withhold from complaint counsel any evidence which is essential, for the complaint would hardly have issued in hopes that its allegations would be proved solely by surveys which have been withheld by Safeway on the ground of privilege. Furthermore, disclosure of these surveys might well discourage Safeway or other potential respondents in Commission proceedings from conducting analyses of their compliance with trade regulation rules such as that involved in this case because of fear that such analyses might be used in subsequent Commission proceedings. Therefore,

IT IS ORDERED that those documents which Safeway has refused to produce because of its claims of privilege are exempt from disclosure in this proceeding.



Lewis F. Parker
Administrative Law Judge

June 30, 1976

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

x-7

322

In the Matter of
FISHER FOODS, INC.,
a corporation.

DOCKET NO. 9062

ORDER DENYING RESPONDENT'S "MOTION FOR
THE ISSUANCE OF A SUBPOENA DUCES TECUM"

On June 1, 1976, counsel for Fisher filed the motion identified in the caption with the Secretary. Complaint counsel filed their "Answer to Respondent's Motion . . ." in accord with the extension of time I orally gave them pursuant to Commission Rule 3.22(c) and (d).

After careful consideration of the specifications and justifications advanced in the motion, the rebuttals in the answer and the items listed in the appendix thereto showing the kinds of documents sought, plus a review of authorities cited by each side and others, I have concluded that the motion should be denied. In essence, the reason is that counsel for Fisher has not convinced me that the circumstances obtaining here are so compelling that the release of those materials sought by Fisher (for which provision to provide them has not already been made by complaint counsel) in order to facilitate the just resolution of the complaint outweighs the public interest in maintaining the confidentiality of the intra-governmental advisory and deliberative communications and attorney work products he is seeking. Cf. Hickman v. Taylor, 329 U.S. 495, 504-508, 510-513 (1947); Carl Zeiss Stiftung v. V. E. B. Carl Zeiss Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd per curiam sub nom. V. E. B. Carl Zeiss Jena v. Clark, 384 F.2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952 (1967); NLRB v. Sears Roebuck & Co., 421 U.S. 132, 154-55 (1975). In other words, in balancing the respondent's right to prepare a proper defense in this matter with the Commission's vital interest in maintaining the integrity and efficiency of the administrative process, the scales, in this instance, tip in favor of maintaining confidentiality. See The Coca-Cola Co., et al., 3 CCH TRR par. 20,852 at p. 20,711 (FTC 1975); Sun Oil Co. v. United States, 514 F.2d 1020, 1024-1025 (Ct. Cl. 1975). I do not believe that denial of the motion will

result either in undue prejudice or hardship in the presentation of Fisher's case. See Xerox Corp., 3 CCH TRR par. 20,353 at p. 20,238 (FTC 1974).

Commission Rule 3.36(b), in essence, provides that what is sought must be relevant; its production must be reasonable to accomplish and it must not be available from other sources by voluntary or compulsory methods. Buttressing the Commission's rule are the well established precedents that the Commission's decision and policymaking processes are protected from indiscriminate disclosure. See Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 945 (Ct. Cl. 1958). It also is well established that intra-agency materials which are of an advisory or deliberative nature are protected because their disclosure "would be injurious to the consultative functions which the privilege of nondisclosure protects," Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973).

Having related the foregoing to the request made by counsel for Fisher, my rationale for denying the requests for materials contained in the various specifications, on the basis of the information in the motion and answer, is indicated by the typewritten (capitalized) notations on the photocopies of the eleven specifications contained in the motion which follow this page.

1. All documents that refer or relate to the Spring 1973 Survey, the October 1973 Survey (and any other Survey that complaint counsel expects to introduce or refer to at trial either to prove the violation alleged in the Complaint herein or otherwise), including without limitation documents referring or relating to any of the following:

(a) Analysis of the results of each such Survey;

(b) Comparison of the results of each such survey with results of other Surveys, whether such other Surveys were conducted by the Commission or not;

(c) Conclusions drawn from each such Survey;

(d) Recommendations resulting from each such Survey. ATTORNEY WORK PRODUCT; ADVISORY/CONSULTATIVE.

2. All documents that refer or relate to each Survey conducted in connection with, or relied on by the Commission in adopting and promulgating Trade Regulation Rule 424, including without limitation documents referring or relating to the following:

(a) Analysis of the results of each such Survey;

(b) Comparison of the results of each such Survey with results of other Surveys, whether such other Surveys were conducted by the Commission or not;

(c) Conclusions drawn from each such Survey;

(d) Recommendations resulting from each

such survey. ATTORNEY WORK PRODUCT; ADVISORY/CONSULTATIVE.

3. All documents that refer or relate to, or contain, the results of, or the analysis or comparison of the results of each Survey of which the Commission has knowledge pertaining to the unavailability or mispricing of advertised goods in the retail food industry whether conducted by the Commission or otherwise. UNREASONABLE DUE TO BREADTH; ATTORNEY WORK PRODUCT.

4. All documents that refer or relate to the adoption or promulgation of Trade Regulation Rule 424 (including "Note I" of such Rule), or revisions of such Rule, including without limitation the following:

(a) Memoranda containing staff recommendations with respect to the FTC Docket(s) that led to the adoption of Trade Regulation Rule 424;

(b) Memoranda and reports containing the policy analyses and recommendations based on the results of the surveys conducted by the Commission's Bureau of Economics prior to the adoption of Trade Regulation Rule 424;

(c) Documents containing policy analyses or revealing the Commission's deliberative process with respect to the adoption and promulgation of Trade Regulation 424. ADVISORY/CONSULTATIVE; DELIBERATIVE.

5. All documents that refer or relate to, or contain, the definition or meaning of, or the standards

intended to be established by, or the factors to be considered in determining the application of, each of the following words and phrases contained in Trade Regulation Rule 424:

- (a) "readily available to customers";
- (b) "clear and adequate notice";
- (c) "reasonably anticipated demand";
- (d) "conspicuously and readily available for sale";
- (e) "circumstances beyond the advertiser's control";
- (f) "clear and conspicuous disclosure".

ADVISORY/CONSULTATIVE; DELIBERATIVE

6. All documents that refer or relate to, or contain, the enforcement policy of the Commission with respect to Trade Regulation Rule 424, including without limitation:

(a) Such documents as refer or relate to the feasibility, desirability, cost or benefit of enforcement of Trade Regulation Rule 424; and

(b) The following documents:

(i) notes, memoranda, and other documents containing policy discussions or revealing the Commission's deliberative process with respect to all formal investigations instituted by the Commission of retail food chains with regard to pricing and availability of advertised products;

(ii) documents containing policy analyses, or revealing the deliberative process or the enforcement strategy of the Com-

mission with respect to any of the formal, non-public investigations described in subpart (i) above, including the issuance of formal complaints against the Great Atlantic & Pacific Tea Company (Docket No. 8916); The Kroger Co. (Docket No. 9040); Safeway Stores, Inc. (Docket No. 9053); and Respondent; and the consent decrees in Albertson's Inc. (Docket No. C-2644); Pacific Gamble Robinson, Co. (732-3265); Fred Mayer Inc. (732-3264); Baza'r Inc. (732-3263) and Mayfair Supermarkets, Inc. (742-3197);

(iii) notes, analyses and memoranda prepared by the Commission's Office of Policy Planning and Evaluation relating or referring to Rule 424 and to formal action taken by the Commission with respect to that Rule;

(iv) notes, analyses and memoranda relating or referring to the Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco, Staff Report to the Federal Trade Commission, July 1969;

(v) all minutes, transcripts and other documents that relate to meetings of the Commissioners and refer or relate to the enforcement of Trade Regulation Rule 424. DELIBERATIVE; ATTORNEY WORK PRODUCT.

7. All documents that refer or relate to, or contain, any criteria which have been utilized, which are being utilized, which will be utilized, or which have been proposed to be utilized by the Commission in deciding whether or not to commence or terminate investigative or enforcement proceedings against any retail food store chain or other company with respect to alleged violations of Trade Regulation Rule 424 or similar alleged violations. DELIBERATIVE; ADVISORY/CONSULTATIVE.

8. Such documents as will disclose the Commission's views as to the level of performance which constitutes compliance with the requirements of Trade Regulation Rule 424. DELIBERATIVE.

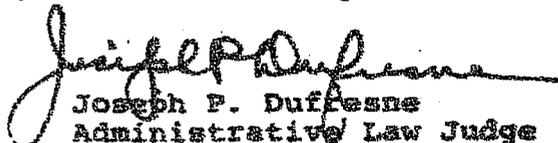
9. All documents (including but not limited to compliance reports and responses to Commission inquiries) that have been received by the Commission from retail food store chains other than Fisher, which refer or relate to the unavailability or improper price marking of advertised products. IRRELEVANT.

10. All documents that refer or relate to the investigation or enforcement proceedings against Fisher with respect to improper price marking or unavailability of advertised products. UNREASONABLE DUE TO BREADTH; COMPLAINT COUNSEL'S EVIDENTIARY MATERIALS ALREADY PROVIDED.

11. All documents that refer or relate to the action by the Commission in not approving the assurance of voluntary compliance proposed by respondent in this proceeding. IRRELEVANT; DELIBERATIVE.

Accordingly, and pursuant to Commission Rules 3.22(a) and 3.42(c),

IT IS ORDERED that the motion of counsel for Fisher identified in the caption be, and it is hereby, denied.


Joseph P. Duffesne
Administrative Law Judge

June 17, 1976

EXHIBIT E

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)	
)	
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.)	
)	

**TELEBRANDS CORP., TV SAVINGS, LLC, AND AJIT KHUBANI'S
OBJECTIONS AND RESPONSES TO
COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS**

Telebrands Corp., TV Savings, LLC, and Ajit Khubani ("Respondents"), by counsel, for their Objections and Responses to Complaint Counsel's First Set of Requests for Production of Documentary Materials and Tangible Things, respond as follows:

GENERAL OBJECTIONS

1. The information contained in these Responses is provided in accordance with the provisions and intent of the Federal Trade Commission Rules of Practice, which require the disclosure of non-privileged facts within the recipient's knowledge that may be relevant or lead to discovery of relevant information. Accordingly, by providing the information requested, the parties answering these Requests do not waive objections to their admission in evidence on the grounds of relevance, materiality, or on any other proper grounds for objections, nor do they submit to the instructions and definitions listed at the beginning of the Requests, except as those instructions and definitions specifically conform to the requirements of the aforesaid Rules and

the applicable case law developed thereunder. Specific objections are noted on advice of counsel, and without waiver of the objections reserved as stated above.

2. Discovery has only recently commenced and Respondents' investigation is ongoing. The Responses set forth herein are based upon information that has been collected and/or reviewed for the purpose of responding to these Requests. Respondents reserve the right to supplement their Responses in the event that they obtain additional, better, or different information.

3. Respondents object to each and all of the Requests to the extent they seek information that is protected from disclosure by the attorney-client privilege, work product doctrine, or other applicable privilege. Respondents do not waive any protections or privileges by responding to these Requests.

4. Respondents object to these Requests to the extent they seek information that is not relevant to the issues in this litigation or are not reasonably calculated to lead to the discovery of relevant or admissible information.

5. Respondents object to these Requests to the extent they are unreasonably vague, broad, repetitious, unduly burdensome, or purport to require the disclosure of information beyond the scope of permissible discovery under the Federal Trade Commission Rules of Practice.

6. Respondents object to these Requests to the extent that they purport to require Respondents to produce documents or information outside Respondents' possession, custody, and control.

7. Respondents incorporate by reference their General Objections in each of the specific responses set forth below.

DOCUMENT SPECIFICATIONS

REQUEST NO. 1: All documents supporting, referring, or relating to your contention that the respondents have not operated as a common enterprise as alleged in Paragraph 4 of the Complaint.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000053 - T000081.

REQUEST NO. 2: All documents (including market research) supporting, referring, or relating to your contention that the respondents have not made the representations set forth in Paragraphs 9, 19, and 21 of the Complaint. Respond fully to the Specification even if you contest whether the representations were made.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000001 - T000004; T000016 - T000047.

REQUEST NO. 3: All documents supporting, referring, or relating to your contention that the Ab Force promotional materials, including the Ab Force spots, do not refer to the devices identified in Paragraph 11 of the Complaint.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000001 - T000004; T000016 - T000047.

REQUEST NO. 4: All documents supporting, referring, or relating to each claim you contend the Ab Force promotional materials made other than those identified in the Complaint, including massage claims and product comparison claims.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000001 - T000004; T000016 - T000047.

REQUEST NO. 5: All documents supporting, referring, or relating to the contention that Ab Force promotional materials referenced or referred to EMS devices other than the devices identified in Paragraph 11 of the Complaint.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000001 - T000004; T000016 - T000047.

REQUEST NO. 6: Two complete packages (including all components contained herein) of all versions of Ab Force that the respondents have marketed in the United States or any other nation.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents are in the process of attempting to obtain samples of Ab Force products sold in the United States for complaint counsel's inspection.

REQUEST NO. 7: All promotional materials disseminated or approved for dissemination for Ab Force in the United States or any other nation.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are

responsive to this Request include, but may not be limited to, the following Bates ranges:

T000001 - T000004; T000016 - T000047.

REQUEST NO. 8: Documents sufficient to identify the date, time, and medium (*i.e.*, the specific television channel, newspaper, Internet website, or other forum) that the respondents used to disseminate all promotional materials for Ab Force.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T010785 – T010832.

REQUEST NO. 9: All instructional or educational materials referring to the promotion or sale of Ab Force.

RESPONSE:

Respondents object that the Request is vague and ambiguous.

Subject to and without waiving any of the General Objections and the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges:

T000005 - T000015.

REQUEST NO. 10: All documents referring to or relating to the promotion and sale of Ab Force, including the following:

- a. documents (including contracts, agreements, and written or recorded communications) between the respondents and any other person or entity who furnished or offered to furnish any product or service to the respondents;
- b. documents (including marketing plans, advertising proposals, advertising messages, draft promotional materials, and written or recorded communications) referring or relating to any promotional material, regardless of whether that promotional material was disseminated or not;

- c. documents (including market research, copy tests, consumer surveys, and written or recorded communications) referring or relating to consumer perception of any promotional material; and
- d. documents referring or relating to the reasons why promotional materials were not disseminated, either in the United States or any other nation.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges:

T000053 - T000081. T000082 - T000400; T000410 - T000758; T000822 - T000873; T000877 - T000883; T000885 - T000938; T000950 - T000961; T001012 – T001110; T004363 - T008696; T00944 – T009446; T009841 - T010386; T010403 - T010609; T010713 - T010746; T01050; T010752 –T010774.

REQUEST NO. 11: All documents constituting, referring or relating to advertisements and promotional materials for any EMS device other than Ab Force.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to

Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T050024 – T050068.

REQUEST NO. 12: All documents referring or relating to the efficacy of Ab Force, including all documents that tend to call into question or disprove the efficacy of Ab Force or any other EMS device.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T008697 – T009443; T009447 – T09840; T010618 – T010712.

REQUEST NO. 13: All documents (including written or recorded communications) referring or relating to substantiation for claims made in promotional materials for Ab Force or any other EMS device.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T008697 – T009443; T009447 – T09840; T010618 – T010712.

REQUEST NO. 14: All documents referring or relating to the U.S. Food and Drug Administration and EMS devices, including Ab Force.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but

may not be limited to, the following Bates ranges: T010387; T008697 – T009443; T009447 – T09840; T010618 – T010712.

REQUEST NO. 15: All documents sufficient to show the technical specifications for all versions of Ab Force offered for sale in the United States or any other nation, including: the voltage, the pulse duration (*i.e.*, the length of the pulse, typically expressed in micro-seconds), the waveform (*i.e.*, the shape of the electrical current being transmitted through the skin), the peak current (*i.e.*, amplitude, measured in milliamps), the phase charge, and, for any interrupted current settings, the amount of time the current is one or off.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T001025 – T001026; T001028 – T001030; T001032 – T001034; T001062; T001074 – T001083; T001096. In addition see specification sheet prepared and produced as Exhibit A to Respondent Ajit Khubani's Responses to the Federal Trade Commission's September 30, 2002 Civil Investigative Demand for Written Interrogatories.

REQUEST NO. 16: All documents referring or relating to any change or variation in the technical specifications for Ab Force offered for sale in the United States or any other nation.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T001025 – T001026; T001028 – T001030; T001032 – T001034; T001062; T001074 – T001083; T001096.

REQUEST NO. 17: All documents referring or relating to the physical characteristics (such as size, color, and shape) of Ab Force.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T001025 – T001026; T001028 – T001030; T001032 – T001034; T001062; T001074 – T001083; T001096. In addition see specification sheet prepared and produced as Exhibit A to Respondent Ajit Khubani's Responses to the Federal Trade Commission's September 30, 2002 Civil Investigative Demand for Written Interrogatories.

REQUEST NO. 18: All documents referring or relating to the respondents' duties or responsibilities with respect to Ab Force.

RESPONSE:

Respondents object that the Request is overly broad, vague and ambiguous.

Subject to and without waiving any of the General Objections or the specific objections set forth herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000053 - T000081. T000082 - T000400; T000410 - T000758; T000822 - T000873; T000877 - T000883; T000885 - T000938; T000950 - T000961; T001012 – T001110; T004363 - T008696; T00944 – T009446; T009841 - T010386; T010403 - T010609; T010713 - T010746; T01050; T010752 –T010774.

REQUEST NO. 19: All documents referring or relating to all compensation, payments, and other benefits (whether in the form of cash, loans, real property, or other form) made to Ajit Khubani by Telebrands Corp. and TV Savings, LLC in conjunction with Ab Force.

RESPONSE:

Subject to and without waiving any of the General Objections or the specific objections set forth herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000048; T000050 – T000051.

REQUEST NO. 20: All versions of Ab Force product labels, package labels, package inserts, and instructions distributed to consumers in the United States or any other nation.

RESPONSE:

Respondents object to the Request to the extent it seeks information relating to the promotion or sale of the Ab Force product outside of the United States or its territories as being outside the scope of discovery permitted by Federal Trade Commission Rule of Practice § 3.31(c) because it seeks information that is outside the jurisdiction of the Federal Trade Commission, is not relevant to the allegations of the complaint and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving any of the General Objections or the specific objection herein, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T000005 – T000016.

REQUEST NO. 21: All documents constituting, referring, or relating to complaints, investigations, or legal proceedings initiated by any person or entity (including any consumer, consumer groups, government agencies, Better Business Bureaus, or competitors), relating to Ab Force.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. The documents that are responsive to this Request include, but may not be limited to, the following Bates ranges: T001111 – T008116.

REQUEST NO. 22: All documents used to prepare your responses to Complaint Counsel's First Set of Interrogatories not previously produced.

RESPONSE:

Subject to and without waiving any of the General Objections, Respondents state that they have previously produced all responsive documents to complaint counsel in response to Civil Investigative Demands. Respondents state that there are no documents they relied on, apart from documents previously produced, in answering Complaint Counsel's First Set of Interrogatories.

Dated: December 12, 2003



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Attorneys for Respondents
Telebrands Corp., TV Savings, LLC,
and Ajit Khubani

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Objections and Response to First Request for Production of Documents and Tangible Things was hand delivered this 12th day of December, 2003, to:

Connie Vecellio *
Walter Gross
Amy M. Lloyd
Joshua S. Millard
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580



Edward F. Glynn /TUA

DC2/504044

EXHIBIT F

ATTORNEY COPY

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09313

TITLE TELEBRANDS CORP., ET AL.

**PLACE FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037**

DATE NOVEMBER 4, 2003

PAGES 1 THROUGH 19

PREHEARING CONFERENCE

**FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025**

1 case, I'll give you that chance at this time, but I
2 don't feel we need to go into each and every one of
3 these items.

4 MS. VECELLIO: All right. Your Honor, I think
5 that the most important item to us was the amount of
6 time between the deadline for the deposition of experts
7 and the deadline for motion for summary judgment. We
8 anticipate filing a motion for summary judgment in this
9 case, and there was only a week between the deadline for
10 the deposition of all experts and the summary judgment
11 portion.

12 That was especially important to us that there
13 be more time between those two deadlines, and secondly,
14 that we proposed the deadline for all depositions, not
15 just experts.

16 JUDGE: Right, I saw that. Let me just inquire
17 of the parties. On this draft, are these changes the
18 changes you've made together or is this just complaint
19 counsel's proposal?

20 MR. GLYNN: This is Ms. Vecellio's handwriting,
21 but it's agreed by both parties, and we respectfully
22 submit those.

23 JUDGE: All right. Any other changes you want
24 to comment on?

25 MS. VECELLIO: Well, that was the most important

1 one. Obviously we would like a little more time in
2 general for the discovery process.

3 JUDGE: Is there anything you want to add to
4 that, Mr. Glynn?

5 MR. GLYNN: I share Ms. Vecellio's concern on
6 that point. The only other thing is that I noticed that
7 the time for the respondent's counsel to provide their
8 expert witness list was December 22. Our response is
9 due December 29. We're litigators. We're used to be in
10 the office and drafting things.

11 I've had sad experience trying to reach experts,
12 especially university professors, during the holiday
13 period, and we therefore respectfully requested that
14 that be extended a little bit, and we didn't think that
15 that would be prejudicial.

16 JUDGE: We'll give this consideration. As I
17 say, I don't intend to make a whole lot of changes in
18 this, but we'll go back, and we'll give each one of this
19 their due weight as required.

20 MS. VECELLIO: Can I say one more thing?

21 JUDGE: Yes. Go ahead, Ms. Vecellio.

22 MS. VECELLIO: On the first change we requested,
23 just from December 2 to December 4, several of us are
24 going to be out of the office right around that time, so
25 just that two days would make a difference to us on our