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

13  
14 FEDERAL TRADE COMMISSION, )  
15 )  
16 )

Plaintiff, )  
17 )

v. )  
18 )

ELECTRONIC PRODUCTS DISTRIBUTION, )  
19 )

L.L.C., )  
ENERGIZER PRODUCTS, INC., )  
20 )

ABFLEX USA, INC., )  
AB ENERGIZER, L.L.C., )  
21 )

THOMAS C. NELSON, )  
22 )

MARTIN VAN DER HOEVEN, )  
23 )

DOUGLAS GRAVINK, )  
24 )

and )  
25 )

GARY HEWITT, )  
26 )

Defendants. )  
27 )

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

**Stipulated Final Judgment and Order  
for Permanent Injunction, Monetary  
and Other Equitable Relief As to  
Electronic Products Distribution,  
Abflex USA, AB Energizer, Thomas C.  
Nelson and Martin Van Der Hoeven**

02-CV-888BEN

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

6 The Commission and Defendants Electronic Products Distribution, L.L.C., AbFlex USA,  
7 Inc., AB Energizer, L.L.C., Thomas C. Nelson, and Martin Van Der Hoeven ("EPD Defendants"),  
8 have stipulated to the entry of this Stipulated Final Judgment and Order for Permanent Injunction,  
9 Monetary and Other Equitable Relief ("Order") in settlement of the Commission's Amended  
10 Complaint against the EPD Defendants. The EPD Defendants waive all rights to seek judicial  
11 review or otherwise challenge or contest the validity of this Order. The EPD Defendants also  
12 waive any claim that they may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412,  
13 concerning the prosecution of this action to the date of this Order. The Court, being advised in the  
14 premises, finds as follows:

#### 15 FINDINGS

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

5. The activities of the EPD Defendants as alleged in the Commission's Amended Complaint were or are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

6. The Commission and the EPD Defendants stipulate and agree to this Order, without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute arising from the Amended Complaint to the date of entry of this Order.

The EPD Defendants have waived service of a summons for the Amended Complaint and have waived all rights to seek review of, or otherwise challenge or contest the validity of this Order. By entering this stipulation, the EPD Defendants do not admit any wrongdoing, including any of the allegations set forth in the Amended Complaint, other than jurisdictional facts.

7. Each party to this Order shall bear its own costs and attorneys' fees incurred in connection with this action.

8. Entry of this Order is in the public interest.

## DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

A. “AB Energizer” means the AB Energizer electronic muscle stimulation device challenged in the Amended Complaint.

B. “Assisting others” means knowingly providing any of the following services to any person or entity: (a) performing customer service functions for any person or entity, including, but not limited to, receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other advertising or marketing material for any person or entity; or (c) performing advertising or marketing services of any kind for any person or entity.

1 C. "California Prosecutors" means the District Attorney Offices from the California  
2 state counties of Napa, Solano, and Sonoma, and the City Attorney of San Diego,  
3 who together are involved in prosecuting a related state enforcement action: The  
4 People of the State of California v. Electronic Products Distribution, LLC et al.,  
5 Case Nos. 26-16823 and 26-24123 (Cal. Super. Ct. County of Napa).

6 D. "Clearly and prominently" means as follows:

- 7 1. In an advertisement communicated through an electronic medium (such as  
8 television, video, radio, and interactive media such as the Internet, online  
9 services and software), the disclosure must be presented simultaneously in  
10 both the audio and visual portions of the advertisement. *Provided, however,*  
11 that in any advertisement presented solely through visual or audio means, the  
12 disclosure may be made through the same means in which the ad is  
13 presented. *Provided further,* that in any advertisement communicated  
14 through interactive media that is presented predominantly through visual or  
15 audio means, the disclosure may be made through the same means in which  
16 the ad is predominantly presented. The audio disclosure must be delivered in  
17 a volume and cadence sufficient for an ordinary consumer to hear and  
18 comprehend it. The visual disclosure must be of a size and shade, with a  
19 degree of contrast to the background against which it appears, and must  
20 appear on the screen for a duration and in a location, sufficiently noticeable  
21 for an ordinary consumer to read and comprehend it.
  - 22 2. In a print advertisement, promotional material, or instructional manual, the  
23 disclosure must be in a type size and location sufficiently noticeable for an  
24 ordinary consumer to read and comprehend it, in print that contrasts with the  
25 background against which it appears.
  - 26 3. On a product label, the disclosure must be in a type size and location
- 27

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

- 14 4. The disclosure must be in understandable language and syntax. Nothing  
15 contrary to, inconsistent with, or in mitigation of the disclosure can be used  
16 in any advertisement or on any label.
- 17 5. In the case of advertisements disseminated by means of an interactive  
18 electronic medium, such as software, the Internet, or online services, “in  
19 close proximity” means on the same Web page, online service page, or other  
20 electronic page, and proximate to the triggering representation, and does not  
21 include disclosures accessed or displayed through hyperlinks, pop-ups,  
22 interstitials or other means.

23 E. “Competent and reliable scientific evidence” means tests, analyses, research,  
24 studies, or other evidence based on the expertise of professionals in the relevant  
25 area, that has been conducted and evaluated in an objective manner by persons  
26 qualified to do so, using procedures generally accepted in the profession to yield  
27

accurate and reliable results.

F. "EPD Defendants" means Electronic Products Distribution, L.L.C., AbFlex USA, Inc., Ab Energizer, L.L.C., Thomas C. Nelson, and Martin Van Der Hoeven.

G. "EMS device" means an electrically powered device that repeatedly contracts muscles by passing electrical currents through electrodes contacting the affected body area.

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

I. "PHD" means PHD, Inc., PHD East, Inc., PHD West, Inc., and PHD Southwest, Inc., individually and collectively, debtors and debtors-in-possession in Chapter 11 cases pending in the United States Bankruptcy Court for the Northern District of Ohio, Case Nos. 03-10361 and 03-11090 through 03-11092 (Bankr. N.D. Ohio).

J. The term "including" in this Order shall mean "without limitation."

## **ORDER**

### **PROHIBITED REPRESENTATIONS**

#### **I.**

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

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

B. causes or promotes muscle growth or hypertrophy;

C. causes or promotes well-defined abdominal muscles, including through the use of

1 terms such as "rock-hard abs," "six-pack abs," "washboard abs," "ripped abs,"  
2 "chiseled abs," "cut abs," "well-developed abs," and/or any other terms with  
3 substantially similar meaning;

4 D. is equivalent to or superior to abdominal exercises such as sit-ups, crunches, or any  
5 substantially similar exercises;

6 E. makes a material contribution to any system, program, or plan that produces the  
7 results referenced in Subparts I.A through I.D; or

8 F. is safe in general or safe for all users.

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

## 14 II.

15 **IT IS FURTHER ORDERED** that the EPD Defendants, their successors and assigns, and  
16 their officers, agents, servants, employees, and attorneys, and all persons in active concert or  
17 participation with them who receive actual notice of the Order by personal service or otherwise,  
18 whether acting directly or through any corporation, subsidiary, division, or other device, in  
19 connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or  
20 distribution of any EMS device not covered by Paragraph I of the Order, are hereby permanently  
21 enjoined from misrepresenting, in any manner, expressly or by implication, that:

22 A. any such device causes or promotes loss of weight, inches, or fat;

23 B. any such device causes or promotes muscle growth or hypertrophy;

24 C. any such device causes or promotes well-defined abdominal muscles, including  
25 through the use of terms such as "rock-hard abs," "six-pack abs," "washboard abs,"  
26 "ripped abs," "chiseled abs," "cut abs," "well-developed abs," and/or any other  
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1 terms with substantially similar meaning;

- 2 D. use of any such device for any period of time is equivalent to or superior to  
3 abdominal exercises such as sit-ups, crunches, or any substantially similar exercises;  
4 E. any such device makes a material contribution to any system, program, or plan that  
5 produces the results referenced in Subparts II.A through II.D; or  
6 F. the device is safe in general or safe for all users.

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

11 **III.**

12 **IT IS FURTHER ORDERED** that the EPD Defendants, their successors and assigns, and  
13 their officers, agents, servants, employees, and all persons in active concert or participation with  
14 them who receive actual notice of this Order by personal service or otherwise, whether acting  
15 directly or through any corporation, subsidiary, division, or other device, in connection with the  
16 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the AB  
17 Energizer, any other EMS device, or any food, drug, dietary supplement, or device, or any other  
18 product, service, or program, are hereby permanently enjoined from making any representations  
19 regarding the health or fitness benefits, safety, or efficacy of any such product, service, or program,  
20 unless, at the time the representation is made, the EPD Defendants possess and rely upon  
21 competent and reliable scientific evidence that substantiates the representation. *Provided, however,*  
22 that nothing in this Order shall prohibit the EPD Defendants from making any representation for  
23 any product that is specifically permitted in labeling for such product by regulations promulgated  
24 by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of  
25 1990.



1 IV.

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

10  
11 REQUIRED DISCLOSURES

12 V.

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

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

24 **WARNING:** This product uses electrical muscle stimulation. Do  
25 not use over your head or chest. Do not use this device if you have a  
26 cardiac pacemaker, implanted defibrillator, or other implanted  
27 metallic or electronic device. This device could cause lethal rhythm  
disturbances to the heart and should not be used by people with  
suspected or diagnosed heart problems. Apply stimulation only to

1 normal, intact, clean skin. Do not apply stimulation over open  
2 wounds or over swollen, infected, or inflamed areas or skin  
3 eruptions, e.g., phlebitis, thrombophlebitis, varicose veins, etc. Do  
4 not apply stimulation over, or in close proximity to, cancerous  
5 lesions. The safety of electrical stimulation during pregnancy has not  
6 been established.

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

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

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

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

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

1           *Provided that* for a period of time beginning with the date of the first broadcast of  
2           any such television or radio advertisement shorter than 60 seconds for any EMS  
3           device that contains safety representations about the EMS device and ending no  
4           sooner than thirty days after the last broadcast, the EPD Defendants must maintain  
5           both a website and a toll-free telephone number that include the required warning set  
6           forth in Subpart V(A) above, and a website that clearly and prominently sets forth  
7           the full text of such warning on the home page or teaser page of the website, i.e., the  
8           first page that appears when the consumer visits the website.

9  
10           **PROHIBITED PRACTICES: REGARDING REFUNDS AND CHARGES**

11                           **VI.**

12           **IT IS FURTHER ORDERED** that the EPD Defendants, their successors and assigns, and  
13           their officers, agents, servants, employees, and all persons in active concert or participation with  
14           them who receive actual notice of this Order by personal service or otherwise, whether acting  
15           directly or through any corporation, subsidiary, division, or other device, in connection with the  
16           manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any  
17           product or service sold after the Effective Date of the Preliminary Injunction, June 24, 2002,  
18           are hereby permanently enjoined from:

- 19           A.     Misrepresenting, expressly or by implication, the terms of the seller's refund,  
20                 cancellation, exchange, or repurchase policies;
- 21           B.     Failing to honor, in a timely manner, any valid consumer request for a refund,  
22                 cancellation, exchange, or repurchase;
- 23           C.     Failing to provide at least one reasonable means consumers may effectively use to  
24                 obtain a refund, cancellation, exchange, or repurchase pursuant to the terms of the  
25                 seller's refund, cancellation, exchange, or repurchase policies; and
- 26           D.     If a toll-free telephone number or other telephone number is provided to consumers
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1 for customer services, including but not limited to, making a complaint or obtaining  
2 a refund, cancellation, exchange, or repurchase pursuant to the terms of the seller's  
3 refund, cancellation, exchange, or repurchase policies, failing to ensure sufficient  
4 access to such telephone line so that consumers may effectively use it for such  
5 customer services.

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

8 **VII.**

9 **IT IS FURTHER ORDERED** that the EPD Defendants, their successors and assigns, and  
10 their officers, agents, servants, employees, and all persons in active concert or participation with  
11 them who receive actual notice of this Order by personal service or otherwise, whether acting  
12 directly or through any corporation, subsidiary, division, or other device, are hereby permanently  
13 enjoined from:

14 A. Violating any provision of the FTC's Trade Regulation Rule Concerning Mail or  
15 Telephone Order Merchandise ("Mail Order Rule"), 16 C.F.R. Part 435, including  
16 but not limited to:

- 17 1. Failing to offer to the buyer, clearly and conspicuously and without prior  
18 demand, an option either to consent to a delay in shipping or to cancel the  
19 order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1);  
20 and  
21 2. Failing to deem an order canceled and to make a prompt refund to buyers  
22 who are entitled to such refunds under the Mail Order Rule, as required by  
23 16 C.F.R. § 435.1(c).

24 B. In the event the Mail Order Rule is hereafter amended or modified, the EPD  
25 Defendants' compliance with the Mail Order Rule as so amended or modified shall  
26 not be deemed a violation of this Order.



1 case, Defendants stipulate is the total net amount consumers paid to purchase AB  
2 Energizers in retail stores, and shall be entitled to participate in any distribution in  
3 the bankruptcy case(s) paid on account of similar allowed general unsecured claims  
4 in accordance with the priorities of the Bankruptcy Code, pursuant to 11 U.S.C. §  
5 726 or § 1129 (as applicable).

6 C. Defendant EPD shall pursue its claims against PHD, including but not limited to  
7 timely filing proofs of claim against PHD in Bankruptcy Case Nos. 03-10361 and  
8 03-11090 through 03-11092 (Bankr. Ct. N.D. Ohio). Defendant EPD shall turn over  
9 to the FTC all distributions or other monies it receives from or on behalf of PHD to  
10 satisfy EPD's claims against PHD, whether incident to the bankruptcy cases or  
11 following dismissal of the bankruptcy cases, within fifteen (15) days of the receipt  
12 of such monies.

13 D. Defendant EPD shall pay \$24,000 (twenty four thousand), under the following terms  
14 and conditions:

- 15 1. Within five (5) days after the entry of this Order, Defendant EPD shall pay  
16 the full sum of \$24,000 to the Commission by wire transfer or certified  
17 cashier's check made payable to the Federal Trade Commission.
- 18 2. All funds paid to the FTC pursuant to this Order shall be deposited into a  
19 fund administered by the Commission, or the California Prosecutors, or their  
20 agents, to be used for equitable relief, including, but not limited to consumer  
21 redress and any attendant expenses for the administration of any redress  
22 fund. In the event that direct redress to consumers is wholly or partially  
23 impracticable or funds remain after redress is completed, the Commission  
24 and/or the California Prosecutors may apply any remaining funds for such  
25 other equitable relief (including consumer information remedies) as they  
26 determine to be reasonably related to the EPD Defendants' practices alleged  
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1 in the Amended Complaint. Any funds not used for such equitable relief  
2 shall be deposited to the United States Treasury or the fund managed by the  
3 California Prosecutors as disgorgement. The EPD Defendants shall have no  
4 right to challenge the Commission's or the California Prosecutor's choice of  
5 remedies under this Section.

6 E. Time is of the essence for any payments made pursuant to Paragraphs IX(C) and (D)  
7 above. In the event of any default in payment by Defendant Electronic Products  
8 Distribution, L.L.C., which default continues for ten (10) days beyond the due date  
9 of payment, the full settlement amount in Paragraph IX(D) due from Defendants  
10 Electronic Products Distribution, L.L.C., together with interest, as computed  
11 pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall  
12 immediately become due and payable.

13 F. The EPD Defendants shall have no right to contest the manner of distribution  
14 chosen by the Commission or the California Prosecutors. No portion of any  
15 payments under the Judgment herein shall be deemed a payment of any fine, penalty,  
16 or punitive assessment.

17 G. The EPD Defendants agree that the facts as alleged in the Amended Complaint filed  
18 in this action shall be taken as true in any subsequent litigation filed by the  
19 Commission to enforce its rights pursuant to this Order, including, but not limited  
20 to, a nondischargeability complaint in any bankruptcy case.  
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**RIGHT TO REOPEN**

**X.**

**IT IS FURTHER ORDERED** that:

- A. The Commission's agreement to this Order, requiring that the Defendants pay less than the total net amount that consumers paid to purchase AB Energizers in retail stores is expressly premised upon the truthfulness, accuracy, and completeness of the information provided by the EPD Defendants regarding each Defendant's financial condition. This information, represented in the sworn deposition testimony of Messrs. Nelson and Van Der Hoeven taken in connection with this action and the July 2004 financial statements and related correspondence provided to the Commission, contains material information relied upon by the Commission in negotiating and agreeing to the terms of this Order:
- B. If the Commission should have evidence that any Defendant executing any of the above-referenced financial statements or responsible for providing any other testimony or information referenced above failed to disclose any material asset the value of which exceeds \$1,000, materially misrepresented the value of any asset, or made any other material misrepresentation in or omission from the EPD Defendants' financial statements or other financial information provided to the Commission, the Commission may move that the Court reopen this Order for the sole purpose of allowing the Commission to modify the monetary liability of said Defendant. If the Court finds that said Defendant failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in the above-referenced financial statements, testimony, or information, then this Final Order shall be reopened for the purpose of requiring payment from the EPD Defendant(s) who made or is responsible for the misrepresentation to the Commission of additional monetary redress in the amount of FORTY ONE



1 MILLION FIVE HUNDRED THOUSAND (\$41,500,000), which the EPD  
2 Defendants stipulate is the total net amount that consumers paid to purchase AB  
3 Energizers in retail stores, as set forth in Paragraph IX of this Order, less the sum of  
4 any amounts paid by the EPD Defendants in this action after the date of this Final  
5 Order, which amount would be rendered immediately due and payable. *Provided*,  
6 however, that in all other respects this Order shall remain in full force and effect  
7 unless otherwise ordered by the Court; and *provided further*, that any proceedings  
8 instituted under this Paragraph shall be in addition to and not in lieu of any other  
9 civil or criminal remedies as may be provided by law, including proceedings the  
10 Commission may initiate to enforce this Order. For the purposes of reopening or  
11 enforcing this Paragraph X(B), including but not limited to a non-dischargeability  
12 complaint filed in a bankruptcy case, the EPD Defendants waive any right to contest  
13 any of the allegations set forth in the Amended Complaint filed in this matter.  
14

## 15 COMPLIANCE MONITORING

### 16 XI.

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

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

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

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

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

## COMPLIANCE REPORTING BY DEFENDANTS

### XII.

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

- A. For a period of five (5) years from the date of entry of this Order,
1. Individual EPD Defendants shall notify the Commission of the following:
    - a. Any changes in the defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
    - b. Any changes in the defendant's employment status (including self-employment) within ten (10) days of the date of such change. Such

1 notice shall include the name and address of each business that  
2 defendant is affiliated with, employed by, or performs services for; a  
3 statement of the nature of the business; and a statement of  
4 defendant's duties and responsibilities in connection with the  
5 business; and

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

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

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

- 23 1. Any changes required to be reported pursuant to subparagraph (A) above;  
24 and  
25 2. A copy of each acknowledgment of receipt of this Order obtained by the  
26 defendant pursuant to Paragraph XVI.  
27

1 C. For the purposes of this Order, the EPD Defendants shall, unless otherwise directed  
2 by the Commission's authorized representatives, mail all written notifications to the  
3 Commission to:

4 Associate Director for Enforcement  
5 Federal Trade Commission  
6 600 Pennsylvania Avenue, N.W.  
7 Washington, D.C. 20580  
8 Re: FTC v. Electronic Products Distribution, L.L.C., et al.

9 D. For purposes of the compliance reporting required by this Paragraph, the  
10 Commission is authorized to communicate directly with the EPD Defendants or  
11 through counsel at the EPD Defendants' election.

## 12 **RECORD KEEPING PROVISIONS**

### 13 **XIII.**

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

23 A. Accounting records that reflect the cost of goods or services sold, revenues  
24 generated, and the disbursement of such revenues;

25 B. Personnel records accurately reflecting: the name, address, and telephone number of  
26 each person employed in any capacity by such business, including as an independent  
27 contractor; that person's job title or position; the date upon which the person

1 commenced work; and the date and reason for the person's termination, if  
2 applicable;

3 C. Customer files containing the names, addresses, phone numbers, dollar amounts  
4 paid, quantity of items or services purchased, and description of items or services  
5 purchased, to the extent such information is obtained in the ordinary course of  
6 business;

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

9 E. Copies of all sales scripts, training materials, advertisements, or other marketing  
10 materials.

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

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

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

19  
20 **ACCESS TO BUSINESS PREMISES**

21 **XIV.**

22 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of  
23 this Order, for the purpose of further determining compliance with this Order, each EPD Defendant  
24 must permit representatives of the Commission, within three (3) business days of receipt of written  
25 notice from the Commission:

26 A. Access during normal business hours to that Defendant's office; or to any office, or  
27

1 facility storing documents, of any business where that Defendant is the majority  
2 owner of a business or directly or indirectly manages or controls the business, and  
3 where the business is engaged in the manufacturing, labeling, advertising,  
4 promotion, offering for sale, sale, or distribution of any food, drug, dietary  
5 supplement, device, or any other product, service or program that purports to  
6 promote health and/or fitness benefits, or assisting others engaged in these activities.  
7 In providing such access, each Defendant shall permit representatives of the  
8 Commission to inspect and copy all documents relevant to any matter contained in  
9 this Order; and shall permit Commission representatives to remove documents  
10 relevant to any matter contained in this Order for a period not to exceed five (5)  
11 business days so that the documents may be inspected and copied; and

- 12 B. To interview the officers, directors, and employees, including all personnel involved  
13 in responding to consumer complaints or inquiries, and all sales personnel, whether  
14 designated as employees, consultants, independent contractors or otherwise, of any  
15 business to which Subpart A of this Part applies, concerning matters relating to  
16 compliance with the terms of this Order. The person interviewed may have counsel  
17 present.

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

21  
22 **TAXPAYER IDENTIFICATION NUMBERS**

23 **XV.**

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

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

3  
4 **DISTRIBUTION OF ORDER BY DEFENDANTS**

5 **XVI.**

6 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of  
7 this Order, the EPD Defendants shall deliver copies of the Order as directed below:

- 8  
9 A. **Corporate Defendants:** Defendants Electronic Products Distribution, L.L.C.,  
10 AbFlex USA, Inc., and AB Energizer, L.L.C. must deliver a copy of this Order to all  
11 of its principals, officers, directors, and managers. Defendants Electronic Products  
12 Distribution, L.L.C., AbFlex USA, Inc., and AB Energizer, L.L.C. also must deliver  
13 copies of this Order to all of its employees, agents, and representatives who engage  
14 in conduct related to the subject matter of the Order. For current personnel, delivery  
15 shall be within (5) days of service of this Order upon Defendant. For new  
16 personnel, delivery shall occur prior to them assuming their responsibilities.
- 17 B. **Individual Defendants Thomas C. Nelson and Martin Van Der Hoeven as**  
18 **Control Person:** For any business that Defendants Thomas C. Nelson or Martin  
19 Van Der Hoeven control, directly or indirectly, or in which Defendants Thomas C.  
20 Nelson or Martin Van Der Hoeven have a majority ownership interest, Defendants  
21 Thomas C. Nelson and Martin Van Der Hoeven must deliver a copy of this Order to  
22 all principals, officers, directors, and managers of that business. Defendants  
23 Thomas C. Nelson and Martin Van Der Hoeven must also deliver copies of this  
24 Order to all employees, agents, and representatives of that business who engage in  
25 conduct related to the subject matter of the Order. For current personnel, delivery  
26 shall be within (5) days of service of this Order upon Defendant. For new  
27 personnel, delivery shall occur prior to them assuming their responsibilities.

- 1 C. **Defendants Thomas C. Nelson and Martin Van Der Hoeven as employee or**  
2 **non-control person:** For any business where Defendants Thomas C. Nelson and  
3 Martin Van Der Hoeven are not a controlling person of a business but otherwise  
4 engage in conduct related to the subject matter of this Order, Defendants Thomas C.  
5 Nelson and Martin Van Der Hoeven must deliver a copy of this Order to all  
6 principals and managers of such business before engaging in such conduct.
- 7 D. The EPD Defendants must secure a signed and dated statement acknowledging  
8 receipt of the Order, within thirty days of delivery, from all persons receiving a copy  
9 of the Order pursuant to this Part.

10  
11 **ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

12  
13 **XVII.**

14 **IT IS FURTHER ORDERED** that each defendant, within five (5) business days of receipt  
15 of this Order as entered by the Court, must submit to the Commission a truthful sworn statement  
16 acknowledging receipt of this Order in substantially the same form set forth in attached Appendix

17 A.

18  
19 **RETENTION OF JURISDICTION**

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21 **XVIII.**

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

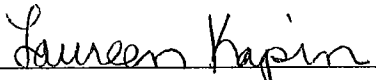


1 **SCOPE OF ORDER**

2 **XIX.**

3 **IT IS FURTHER ORDERED** that this Order resolves only claims against the EPD  
4 Defendants and does not preclude the FTC from initiating further action or seeking any remedy  
5 against any other persons or entities, including without limitations persons or entities who may be  
6 subject to this Order by virtue of actions taken in concert or participation with the EPD Defendants  
7 and persons or entities in any type of indemnification or contractual relationship with the EPD  
8 Defendants.


9 **SO STIPULATED:**

10  
11   
12 LAUREEN KAPIN, ESQ.  
13 WALTER GROSS III, ESQ.  
14 AMY LLOYD, ESQ.  
15 Federal Trade Commission  
16 600 Pennsylvania Ave., N.W.  
Room S-4302

17 Washington, D.C. 20580  
18 (202) 326-3237 (voice)  
(202) 326-2559 (facsimile)  
19  
20 JOHN D. JACOBS, ESQ.  
California Bar. No.134154  
21 Federal Trade Commission Regional Office  
22 10877 Wilshire Boulevard  
Suite 700  
23 Los Angeles, California 90024  
24 (310) 824-4360 (voice)  
25 (310) 824-4380 (facsimile)  
26  
27

THOMAS C. NELSON  
Individually and as President of EPD

MARTIN VAN DER HOEVEN  
Individually and as President of Abflex

  
WILLIAM ROTHBARD, ESQ.  
Offices of William I. Rothbard  
2002 4<sup>th</sup> St. Suite 109  
Santa Monica, CA 90405  
(310) 314-4025 (voice)  
(310) 314-4026 (facsimile)  
Attorneys for Defendants Electronic  
Products Distribution, L.L.C, Ab  
Energizer, L.L.C., Martin Van Der  
Hoeven, and Abflex, USA, Inc.

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**SCOPE OF ORDER**

**XIX.**

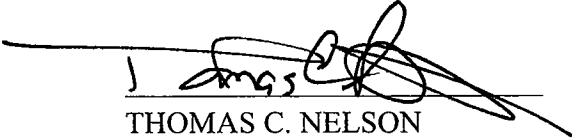
**IT IS FURTHER ORDERED** that this Order resolves only claims against the EPD Defendants and does not preclude the FTC from initiating further action or seeking any remedy against any other persons or entities, including without limitations persons or entities who may be subject to this Order by virtue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

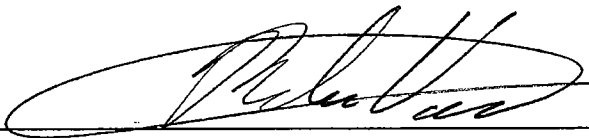
**SO STIPULATED:**

LAUREEN KAPIN, ESQ.  
WALTER GROSS III, ESQ.  
AMY LLOYD, ESQ.  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
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THOMAS C. NELSON  
Individually and as President of EPD

  
MARTIN VAN DER HOEVEN  
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(310) 314-4025 (voice)  
(310) 314-4026 (facsimile)  
Attorneys for Defendants Electronic  
Products Distribution, L.L.C, Ab  
Energizer, L.L.C., Martin Van Der  
Hoeven, and Abflex, USA, Inc.

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4 **IT IS SO ORDERED, this** \_\_\_\_\_ **day of** \_\_\_\_\_, 2005.  
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9 **UNITED STATES DISTRICT JUDGE**  
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**APPENDIX A**

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ELECTRONIC PRODUCTS DISTRIBUTION,

L.L.C.,

ENERGIZER PRODUCTS, INC.,

ABFLEX USA, INC.,

AB ENERGIZER, L.L.C.,

THOMAS C. NELSON,

MARTIN VAN DER HOEVEN,

DOUGLAS GRAVINK, and

GARY HEWITT

Defendants.

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

**Declaration of Defendant** \_\_\_\_\_

**DECLARATION**

(28 U.S.C. § 1746)

[Name of defendant] do hereby declare as follows:

1. My name is \_\_\_\_\_. My current residence address is \_\_\_\_\_ I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Affidavit.
2. I am a defendant in FTC v. Electronics Products Distribution, L.L.C., et al. (United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_).

3. On [date], I received a copy of the Stipulated Final Judgment and Order for Permanent Injunction, Monetary and Other Equitable Relief, which was signed by the Honorable Marilyn L. Huff and entered by the Court on [date of entry of Order]. A true and correct copy of the Order I received is appended to this Affidavit.

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

*[Full name of defendant]*