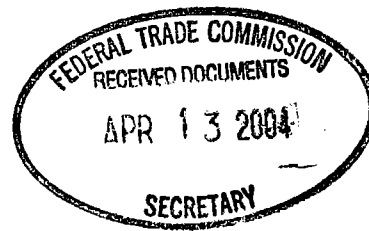


**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**



\_\_\_\_\_  
In the Matter of )  
)  
)

TELEBRANDS CORP., )  
TV SAVINGS, LLC, and )  
AJIT KHUBANI, )  
Respondents. )  
\_\_\_\_\_ )

Docket No. 9313

**ORDER DENYING COMPLAINT COUNSEL'S  
MOTION FOR SUMMARY DECISION**

**I. PROCEDURAL BACKGROUND**

On March 23, 2004, Complaint Counsel filed a Motion for Summary Decision and a Memorandum in support thereof ("Motion for Summary Decision") and a Separate Statement of Material Facts as to Which There is No Genuine Issue ("Complaint Counsel's Statement of Facts"). On April 5, 2004, Respondents filed their Opposition to Complaint Counsel's Motion for Summary Decision ("Opposition"), and their Response to Complaint Counsel's Statement of Material Facts ("Respondents' Statement of Facts"). Respondents filed a separate Motion for Summary Decision which is addressed in a separate Order. For the reasons set forth below, Complaint Counsel's motion for summary decision is **DENIED**.

**II. POSITIONS OF THE PARTIES**

**A. Summary of Arguments Raised by the Parties**

Complaint Counsel contends in its motion for summary decision that the evidence is uncontroverted that Respondents made the false claims alleged in the Complaint; that the evidence is uncontroverted that Respondents made the unsubstantiated claims challenged in the Complaint; that extrinsic evidence corroborates that Respondents made the claims; that the Ab Force does not cause weight, inch, or fat loss or build well-developed abs and it is not an effective substitute for exercise; that Respondents cannot demonstrate that Ab Force performs the claimed functions; and that all Respondents are liable for the alleged Section 5 violations.

Respondents assert that because the Ab Force advertisements did not make the challenged claims, summary decision cannot be granted in Complaint Counsel's favor. In addition, Respondents challenge Dr. Delitto's expert opinions and argue that summary decision should be granted in favor of Respondents. Respondents claim that electronic muscle stimulation ("EMS") technology is used to stimulate muscles for a wide range of medical and non-therapeutic purposes, from simple massage, muscle toning, and cosmetic uses, to pain relief, muscle re-education, and physical therapy.

### **B. No Undisputed Facts**

Based upon a review of the pleadings, the parties do not agree that any material facts are undisputed. In advance of trial, the parties are encouraged to stipulate to facts that are not disputed and submit those facts as joint stipulations prior to or at the final prehearing conference.

## **III. SUMMARY DECISION STANDARD**

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(3). These provisions are virtually identical to the provisions governing summary judgment in the federal courts under Rule 56 of the Federal Rules of Civil Procedure; the Commission applies its summary decision rule consistent with case law construing Fed. R. Civ. P. 56. *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972); *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party may not rest on mere allegations or denials of its pleading but must "come forward with 'specific facts showing that

there is a genuine issue for trial.” *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). See also *Liberty Lobby*, 477 U.S. at 256. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587. Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *State of New York v. Amfar Asphalt Corp.*, 1986 WL 27582, \*2 (E.D.N.Y. 1986); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984).

#### IV. A GENUINE DISPUTE OF MATERIAL FACTS EXISTS

The Complaint in this proceeding alleges that Respondents violated sections 5 and 12 of the Federal Trade Commission Act (“FTC Act”) in connection with their marketing of the Ab Force, an EMS device within the meaning of Sections 12 and 15 of the FTC Act. The Complaint alleges, *inter alia*, that Respondents “represented, expressly or by implication, . . . that: a) Ab Force causes loss of weight, inches, or fat; b) Ab Force causes well-defined abdominal muscles; and c) use of Ab Force is an effective alternative to regular exercise.” Complaint ¶ 19. The Complaint further alleges that these claims are “false and misleading” and constitute “unfair or deceptive acts or practices.” Complaint ¶¶ 20, 23. Respondents deny these allegations. Answer ¶¶ 19, 20, 23.

Complaint Counsel contends that there is no genuine issue of material fact as to whether Respondents made the representations challenged in the Complaint, or as to whether such representations were false and unsubstantiated. Motion for Summary Decision at 2. Respondents argues that the Ab Force advertisements did not make the challenged claims, as a matter of law, or, in the alternative, that there is a dispute over whether the claims were made. Opposition at 19, 51. Upon review, the claims made in the advertisements are either in dispute or are not sufficiently developed to render a decision on the pertinent issues of fact and law. Additional facts are thus necessary to determine whether Respondents’ advertising of the Ab Force made the claims alleged in the Complaint.

An advertisement is misleading under the FTC Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992). In implementing this standard, the Commission examines the overall net impressions of an advertisement and engages in a three-part inquiry: what claims are conveyed in the advertisement; are those claims false or misleading; and are those claims material to prospective consumers. *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *Kraft*, 970 F.2d at 314.

Complaint Counsel’s motion for summary decision presents significant factual disputes regarding what claims are conveyed in the advertisements. Complaint Counsel contends that the advertisements claimed that Ab Force would cause loss of weight, inches, or fat; build well-

belts; and whether consumers perceived the advertisements as making the advertising claims alleged.


An analysis of whether Respondents made the false claims alleged in the Complaint requires the evidence to be fully developed at trial. Whether or not the advertisements conveyed the alleged claims clearly raises genuine issues of material facts. Such factual disputes thereby preclude granting summary decision as a matter of law.

## V. CONCLUSION AND ORDER

On April 9, 2004, Complaint Counsel filed a Motion to Strike the declaration of Dr. Eric Sternlicht submitted with Respondents' Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision. On April 9, 2004, Respondents filed a Motion to Exclude the Testimony and Report of Complaint Counsel's expert Dr. Michael Mazis with regard to Complaint Counsel's Motion for Summary Decision. The contested information is not dispositive of any issue necessary for the determination of Complaint Counsel's motion and is therefore not necessary to address here.

As described above, the genuine issues of fact raised by the pleadings can only be properly determined through an evidentiary hearing. Accordingly, Complaint Counsel, having failed to demonstrate entitlement to decision as a matter of law, its motion for summary decision is **DENIED**.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

April 13, 2004