

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	PUBLIC DOCUMENT
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.)	
_____)	

RESPONDENTS' POST TRIAL BRIEF

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case has been marked by a continuing shift in the various theories that Complaint Counsel has advanced to support their position that the Ab Force advertisements make the various claims identified in the Complaint. The original theory of Complaint Counsel's case was stated at the initial pre-hearing conference as follows:

[R]espondents ... apparently believed they could avoid Commission action by not explicitly repeating the verbal claims in the infomercials to which they refer, and the main issue in this case is whether consumers got it, whether consumers thought, when they saw the Ab Force commercials, that they were being promised the same benefits as were being touted in the infomercials they were seeing daily, the trim wastes [*sic*], well defined abs and slim bodies in the Ab Force ads. Quite simply we can prove that consumers got it...."

In Complaint Counsel's opening statement at the trial of this matter, Ms. Vecellio advised the Court that "this case is about an ab belt that was marketed by exploiting the simultaneous advertising for other ab belts," (Trial Tr. ¶17), identifying three particular infomercials for the Ab Energizer, Fast Abs and AbTronic products (Trial Tr. ¶18-19). Complaint Counsel's position was very clear that "the Ab Force ads called to mind the infomercials for the other ab belts," both by the wording of the advertising and the visual similarity to those infomercials and "asked consumers to remember those fantastic ab belt infomercials and implicitly what those infomercials said ab belts could do." (Trial Tr. ¶¶ 20-21). In short, Complaint Counsel's theory was clear, if unproven: the purpose and effect of the Ab Force ads was to get consumers to recall particular claims in particular infomercials for particular products and to accomplish this result by providing specific verbal and visual cues that would trigger this recall.

After trial, it is now clear that Complaint Counsel's case has failed for at least three reasons:

(1) Complaint Counsel has adduced no direct evidence that even one purchaser of the Ab Force made the connection that Complaint Counsel hypothesizes. All that Complaint Counsel has advanced in support of this hypothesis is the “facial analysis” tendered by their expert, Dr. Michael B. Mazis. That facial analysis was formed after reading the Complaint in this matter and on the basis of an inadequate and unsophisticated view of the advertising that was present in the marketplace at the time that the Ab Force advertisements were running. Indeed, Dr. Mazis was never advised by Complaint Counsel that any advertisements for ab belt products other than the three infomercials to which the Complaint refers were present in the market. Nor did Dr. Mazis make any effort to search the internet or visit retail stores to determine the existence of other advertising forces that shaped the perceptions of consumers who saw the Ab Force advertising.

(2) The theory that Dr. Mazis advanced on the stand is also facially inconsistent with the theory advanced by Complaint Counsel outlined above. Dr. Mazis, in the demonstrative exhibit that was used to illustrate and summarize his testimony, graphically described a number of possible sources of information about ab belts that could – and in Dr. Mazis’ view did – impact the views of consumers who saw the Ab Force advertising. These sources, of course, included the infomercials for the three products quoted in the Complaint, but also included such disparate sources of information as retail packaging, advertising for other ab belts (found on the internet, radio, catalogs and print ads) as well as word of mouth. Dr. Mazis was, of course, unaware of what messages were being conveyed by any of these sources since he had been provided by Complaint Counsel only with one source of advertising for ab belts – the three infomercials that were identified in the Complaint. What Dr. Mazis failed to appreciate is that if consumers obtained information about ab belts from a host of sources in addition to the three infomercials

identified in the Complaint, there is no assurance that they will “import” into their own minds the particular claims that the Complaint ascribes to the Ab Force.

(3) The only remaining string to Complaint Counsel’s bow was the consumer survey conducted under the supervision of Dr. Mazis. As Dr. Jacob Jacoby, Respondents expert witness, established in detail, the procedures used in the survey failed the most basic requirements for professional acceptance. Specifically, Dr. Mazis failed to screen the participants in the survey for familiarity with the three infomercials for ab belt products despite his view that the infomercials caused the high rate at which the respondents viewing the “control” version of the Ab Force commercial found claims that were nowhere made in that commercial. Similarly, Dr. Jacoby exposed the leading nature of the questions in the questionnaires utilized in the survey and the irrelevance of the questions used to purportedly choose an appropriate survey universe. Finally, Dr. Jacoby explained how dropping 81 participants who were supposedly “inattentive” was not only inconsistent with accepted scientific practice but would have the effect of reducing the percentage of participants who supposedly took away a misleading message from a result that was already legally borderline to an even lower level.

Moreover, there is no competent evidence to support two of the basic factual underpinnings of Complaint Counsel’s case: that the three infomercials for the other ab belt products “saturated” the airwaves and that individuals who viewed the Ab Force commercials would necessarily be familiar with those infomercials, including the specific claims in them. In fact, Complaint Counsel’s basis for claiming that the three infomercials “saturated” the airwaves is based entirely on the purported rankings for infomercials contained in the JW Greensheets and the Infomercial Marketing Report. There was no evidence adduced at trial to establish a basis

for the purported rankings contained in the Greensheet and, indeed, the testimony of Mr. Khubani establishes that there are both the means and the incentive to under or over report the factual indicators which serve as the input for the rankings. Moreover, Complaint Counsel produced no evidence to support its position that the individuals who viewed the Ab Force commercials would necessarily have seen the three identified ab belt infomercials and, as Mr. Khubani testified, given the different times of day and channels on which infomercials and spot advertising (such as the Ab Force spots) run, there is every reason to suspect they did not. At the very least, the fact that the Ab Force advertisements were run at different times and on different stations than the competitive ab belt infomercials strongly suggests that there was no intent on the part of Telebrands to “free ride” on the claims contained in those infomercials.

Nor is there any support for Complaint Counsel’s suggestion that Mr. Khubani purposely created a commercial with the intent of ensuring that customers would recall the details of claims in the infomercials for the other ab belt products. In fact, the steps taken by Mr. Khubani in moving from the first test version of an advertisement for a radio spot through the early test versions of the television commercials to the actual spots that rolled out and generated over 95% of the Ab Force sales in the campaign reflect a studied attempt to make no claims other than those that were permissible: Ab Force contained the same technology as higher priced ab belts at a significantly lower price. This is in the strong tradition of “compare and save” claims which have characterized Telebrands’ competitive strategy in the marketplace for many years.

In summary, Complaint Counsel has offered up a “facial analysis” which is not only without support in facts, but inconsistent with the multiple “source of information” analysis advanced on the stand by Dr. Mazis and a consumer perception survey which fails to meet

minimum standards of scientific acceptability. There is no support in the record for Complaint Counsel's assertion that Ab Force advertising made the claims alleged in the Complaint.

II. SUMMARY OF THE ALLEGATIONS AGAINST RESPONDENTS

A. THE LEGAL FRAMEWORK OF THE CASE

The Complaint in this matter alleges that Respondents engaged in unfair or deceptive acts or practices in making false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C §§ 45 and 52. This case arises out of the sale of an electronic ab belt product called the Ab Force by Respondents Telebrands Corporation, TV Savings LLC, and Ajit Khubani. The sale of that ab belt was perfectly legal and the Complaint does not claim to the contrary. Moreover, the only two claims explicitly made in advertising for the Ab Force were (1) that the product was technologically comparable to competitive electronic ab belts, (2) but was significantly less expensive than those ab belts; the Complaint does not challenge either of those claims. Rather, the Complaint alleges that Respondents violated sections 5 and 12 of the Federal Trade Commission Act by making false or misleading claims in their advertising for Ab Force that caused consumers to believe that the Ab Force product would cause a loss of weight, a loss of fat, loss of inches, and would endow consumers with six-pack abs. The parties agree that these claims are not expressly stated in the Ab Force advertising.

To prove its case, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would likely interpret the message of the advertisement to have made the alleged claims. *Novartis Corporation*, 127 F.T.C. 580, 679 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000). Claims are either express claims, in which the claim directly states the representation at issue, or implied claims. *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (citing *In re Thompson Medical*, 104 F.T.C. 648,

788 - 789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). It is clear that the claims at issue here are implied.

In looking at whether the asserted claims were made, the Commission will look first to the advertising itself. *Kraft*, 114 F.T.C. at 121. If it can be determined with confidence that the claims appear in the advertising, then resort to extrinsic evidence of those claims is unnecessary. If, however, the claims are not self-evident or reasonably apparent on the face of the advertising, then Complaint Counsel must put forward extrinsic evidence that the advertising made the asserted claims. *Kraft*, 114 F.T.C. at 121 (citing *Thompson Medical*, 104 F.T.C. at 789; *In re Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

B. THE THEORIES ADVANCED BY COMPLAINT COUNSEL

Complaint Counsel has asserted that there are two bases on which to find that Respondents made the claims at issue. The first is that elements in the Ab Force ads cause an association in consumers' minds between the Ab Force and ads for AbTronic, Ab Energizer and Fast Abs. The second theory is that elements within the four corners of the advertising itself directly make the challenged claims. Complaint Counsel attempted at trial to establish these theories of liability through a facial analysis and by presentation of extrinsic evidence in the form of a copy test.

However, a facial review of the advertising does not support Complaint Counsel's argument that consumers would have made an association between the Ab Force on the one hand and the ads for AbTronic, Ab Energizer and Fast Abs on the other. Such a determination requires going well beyond the four corners of the advertising itself and requires the adoption of a number of assumptions that simply have not been proven in this case. If this Court were to

adopt the facial analysis advanced by Dr. Mazis, it would represent a significant departure from the law set forth in *Kraft, Stouffer* and other cases.

Nor has Complaint Counsel provided adequate and reliable extrinsic evidence to conclude that the Ab Force advertising conveyed the challenged claims to consumers. The opinions of Dr. Mazis in this regard are based entirely on a copy test he conducted in this matter. But as Dr. Jacoby explained, there are a number of serious flaws in the methodology of the copy test that are fundamentally fatal to the reliability of that study.

Finally, Complaint Counsel may argue that the Ab Force advertising reflects Respondents' intent to convey the claims asserted in this matter. This argument stands in stark contrast to the evolution of the Ab Force advertising and marketing. As reflected in the evidence presented at trial, Mr. Khubani—who drafted the copy for all of the advertising at issue—intended to market the Ab Force with a "compare and save" comparative advertising campaign. The advertisements created by Mr. Khubani, while each slightly different in wording and style, all convey the overall message that the Ab Force product was technologically similar to other EMS ab products on the market but at a significantly lower price. Complaint Counsel has presented absolutely no evidence that these claims were false or misleading.

III. RESPONDENTS MARKETED THE AB FORCE UNDER A "COMPARE AND SAVE" STRATEGY AND STUDIOUSLY AVOIDED MAKING ANY OF THE CHALLENGED CLAIMS.

I have been in this business for twenty years. There are lots of different ways I could have marketed the Ab Force product, but I chose a very specific way to market it. I only wanted to...say two things in that advertisement, and that was you're getting the same technology as the other EMS ab belts for a much, much lower price, and that's what I stuck to...I did everything to make sure that that was all I was saying, and we ended up rolling it out, and that's what it was. It was a compare and save advertisement.

(Khubani Tr. 534). This testimony, offered by Ajit Khubani at trial, summarizes and underscores the strategy Telebrands employed to market the Ab Force and the advertising Telebrands created to promote the Ab Force product. It demonstrates that, at bottom, this is a case about the use and effect of comparative advertising when a product is promoted as a less expensive product that is technologically similar to others in the marketplace.

Complaint Counsel would have this Court believe that this case is instead about Telebrands' attempt to subtly but intentionally market the Ab Force as promising weight loss, fat loss, loss of inches around the waist, "six-pack" abs and as an alternative to regular exercise, claims that even Complaint Counsel's own expert believes were not made on the face of the ads at issue. In advancing its version of the events to the Court, Complaint Counsel has presented an extraordinarily narrow view of the marketplace for EMS ab products at the time the Ab Force was introduced, and has argued that the advertising demonstrates Telebrands' intention to advertise the Ab Force in a false and misleading manner. The evidence introduced at trial, however, supports none of Complaint Counsel's arguments, and demonstrates that the Complaint against Respondents should be dismissed.

A. CONTRARY TO COMPLAINT COUNSEL'S ASSERTIONS, THE MARKETPLACE WAS SATURATED WITH SIMILAR EMS AB PRODUCTS AT THE TIME THE AB FORCE WAS INTRODUCED, AND KHUBANI CONSIDERED THESE PRODUCTS IN DECIDING TO MARKET THE AB FORCE.

At trial, Complaint Counsel attempted to show that Mr. Khubani only had the advertisements for the AbTronic, Ab Energizer and Fast Abs in mind when he created the reference to "other ab belt infomercials," and has argued that because of this, the advertising referred specifically and only to those three products, and therefore intended to cause an association by consumers of the Ab Force with the challenged claims contained in ads for

AbTronic, Ab Energizer and Fast Abs. This assertion was flatly contradicted by testimony and other evidence at trial, which established that there were a number of EMS ab products on the market at the time, many of which contained representations having nothing to do with the challenged claims at issue.

1. EMS Ab Products on the Market at the Time

Long before Telebrands decided to enter the EMS ab product category with the Ab Force product, Mr. Khubani was personally familiar with EMS technology, having been treated with EMS following an accident. (Khubani Tr. 444 - 445). In early 2001, several months before the Ab Force was introduced, Mr. Khubani became aware that EMS ab products were being sold on the market. Specifically, in January 2001, Mr. Khubani saw a product called the Rio Ab Belt being promoted at a trade show in Chicago. (Khubani Tr. 464). Mr. Khubani had seen that same product sometime earlier, at a drugstore in Monte Carlo, where he was attending a DRA trade show. (Khubani Tr. 464).

By late 2001, the market for EMS ab products had become "saturated" with EMS ab products offered by competitors. (Khubani Tr. 461). The number of products on the market was, in fact, one of the factors that led to the decision to market the Ab Force. (Khubani Tr. 478 - 479).

In addition to the AbTronic, Ab Energizer and Fast Abs products, Mr. Khubani considered a number of other EMS ab products being advertised on television and sold in the direct response market. (Khubani Tr. 445 - 474). For example, Mr. Khubani recalled that an EMS ab product called the SlenderTone Flex was advertised on QVC in the fall of 2001. (Khubani Tr. 446 - 447). He was also aware of an EMS ab product from Emson called CyberBody that was advertised on television, (Khubani Tr. 449), as well as products called

FlexTone and Gym Form that were advertised on television prior to the marketing of the Ab Force. (Khubani Tr. 474).

In addition to these products, Mr. Khubani was aware that there were several EMS ab products advertised on television by IGIA, a competitor of Telebrands that was heavily marketing EMS ab products. (Khubani Tr. 449 - 450). Specifically, Mr. Khubani recalled ads for the IGIA Mini Wireless Massage, the Accusage, the Electrosage, and the ElectroGym. (Khubani Tr. 449 - 460). Mr. Khubani was personally familiar with each of these products, and testified that each of these products relied on the same EMS technology used by the Ab Force, e.g., they all used electrical stimulation to cause involuntary muscle contraction in the same manner as the eventual Ab Force product. (Khubani Tr. 452 – 455).

In addition to these products, which Mr. Khubani recalled were advertised on television,¹ he recalled several other EMS ab products that were sold before or at the time the Ab Force was introduced. These included the ElectroFlex, the ElectroTone and the Omron Sports Massager. (Khubani Tr. 466).

These products were not unknown to Complaint Counsel when the Complaint was issued against Respondents. Indeed, Complaint Counsel has admitted that a number of these EMS devices were sold before or at the time the Ab Force was being marketed. (RX-80, Interrogatory No. 9).

¹ Many of these products were advertised nationally on television with some frequency. The Jordan Whitney Greensheets, which were relied on by Complaint Counsel in this case, reflect that a number of other EMS ab products were airing with some frequency (although the Greensheets are only reliable to show ads are being aired with some frequency). These include Electrosage, Accusage and Electrogym. (CX-73 to CX-95; see also Respondents' Proposed Findings of Fact, ¶ 45).

Nor were AbTronic, Ab Energizer and Fast Abs the only "ab belts" on the market at the time. At least two of the products Mr. Khubani considered, SlendertoneFlex and Electrogym, were ab "belts" in that they attached around the waist. (RX-74; RX-79). Moreover, the ads for AbTronic, Ab Energizer and Fast Abs were not the only "infomercials" on television at the time. The Accusage ad was a long-form commercial (RX-74), and contained in that advertisement was a premium for the Electrogym product (RX-74). In short, the AbTronic, Ab Energizer and Fast Abs infomercials were not the only ab belts considered by Mr. Khubani, nor were they the only long-form commercials he considered.

But the evidence does not support Complaint Counsel's parsing of these commercials by program length or whether they were products that attached around the waist. Mr. Khubani testified that these products were, as far as he considered, all in the same marketing category, EMS ab products, because they all used similar technology, e.g., electrical stimulation intended to cause involuntary muscle contraction. (Khubani Tr. 452 – 455). Complaint Counsel introduced absolutely no evidence that these products would not be considered in the same category as AbTronic, Ab Energizer and Fast Abs, and their expert, Dr. Mazis, declined an invitation to offer an opinion on the subject. (Mazis, Tr. 136).

2. Many EMS Ab Products Available at the Time and Considered by Mr. Khubani Made Representations Unrelated to the Challenged Claims at Issue.

Complaint Counsel essentially argue that the only claims in existence at the time Mr. Khubani decided to enter the market with the Ab Force product were the claims made in the ads for AbTronic, Ab Energizer and Fast Abs. But Mr. Khubani testified that the products made a number of representations, running the gamut from weight loss and exercise claims such as those

purportedly found in the ads for AbTronic, Ab Energizer and Fast Abs, as well as representations that the products offered massage and toning benefits. (Khubani Tr. 471 - 472).

Several of these ads were shown at trial and videotapes of those ads were introduced into evidence. The ads shown at trial for the IGIA products (the Accusage, the Electrosage, the ElectroGym and the IGIA Mini Wireless Massager) contained statements concerning relaxing massage and toning, but did not contain any of the claims challenged by Complaint Counsel in this case. (RX-72; RX-73; RX-74; RX-77). Moreover, Mr. Khubani testified that the claims he saw on QVC for the SlendertoneFlex were similar to the claims made in the SlenderTone Flex commercial shown at trial, with the exception that the product was not touted as FDA approved on QVC as it was in the commercial that later aired. (Khubani Tr. 447 – 449; RX-79). The SlendertoneFlex made representations regarding muscle toning, but, again, did not make any of the claims asserted by Complaint Counsel as being contained in the ads for AbTronic, Ab Energizer and Fast Abs. (RX-79).

Whether or not the Court makes a specific finding as to what claims were affirmatively included in these ads, the advertisements introduced at trial do not support the assertion by Complaint Counsel that the only, or even predominant, claims being disseminated to consumers were the claims contained in the ads for AbTronic, Ab Energizer and Fast Abs. Those claims simply are not made in the advertisements for the other EMS ab products viewed by Mr. Khubani in late 2001, nor is there any dispute that these ads were never formally challenged by the Commission through the issuance of a Complaint against the advertisers of those products.

B. THE DECISION TO MARKET THE AB FORCE USING A "COMPARE AND SAVE" STRATEGY WAS NECESSITATED BY THE SATURATION OF THE MARKETPLACE, AND RESPONDENTS SUBSTANTIATION ONLY FOR "COMPARE AND SAVE" CLAIMS.

Although Complaint Counsel have argued that Respondents engaged in the Ab Force advertising without regard to the claims made and without regard to substantiation, the evidence indicates that the "compare and save" marketing strategy was used by Telebrands precisely because there was no substantiation for any other claims (with the exception of "relaxing massage"), and certainly not for the claims challenged in the Complaint.

Mr. Khubani specifically considered whether the claims he could make about the product were substantiated. (Khubani Tr. 479). Several factors convinced Mr. Khubani that he could truthfully sell the Ab Force using a "compare and save" strategy, and influenced Telebrands' decision to enter the EMS ab product market with "compare and save" advertising.

First, in Mr. Khubani's estimation, the market for EMS ab products had become saturated by late 2001 because of the number of EMS ab products entering the market, and was reaching its maturity. (Khubani Tr. 461). Mr. Khubani described this as the time at which price points for competing products begin to drop, and which Mr. Khubani decided was the beginning of the decline of popularity of the product category with consumers. (Khubani Tr. 478 - 479).

Second, Mr. Khubani became aware through his contacts in Asia that Telebrands could obtain from a manufacturer an EMS device comparable to those being sold for a landed cost of approximately two dollars. (Khubani Tr. 444). At this price, Mr. Khubani determined he could import the product and resell it for as little as \$10. (Khubani Tr. 444). He believed that at this price, the product could be sold significantly below the price point of any competing product, and that, at that price, it may be a successful seller. (Khubani Tr. 444).

Third, Mr. Khubani discovered that the manufacturer he was considering was also the manufacturer for two potentially competing products, the AbTronic and the Fast Abs products. (Khubani Tr. 266). Mr. Khubani also learned that the Ab Force product would have the same current output as those competing products. (Khubani Tr. 266).

Armed with this knowledge, Mr. Khubani realized that he could sell the Ab Force using a "compare and save" strategy and be truthful in comparing the Ab Force to similar products and in claiming that the price of the Ab Force was significantly lower. (Khubani Tr. 267). Another factor he considered in developing a marketing strategy was whether the claims he could make about the product were substantiated. (Khubani Tr. 479). Mr. Khubani was aware that the Ab Force was technologically comparable to other products on the market, and decided to make that a focus of the advertising. (Khubani Tr. 479).

Consequently, Mr. Khubani drafted the test advertising as "compare and save" comparative advertising, whereby a reference was made to other products in the category with respect to technology, and a focus was maintained on the price advantage of the Ab Force. (Khubani Tr. 486 - 487).

C. THE ADVERTISING CREATED BY RESPONDENTS CONVEYS EXPRESS "COMPARE AND SAVE" CLAIMS

Having determined to market the Ab Force under a "compare and save" comparative advertising campaign, Mr. Khubani drafted text for print, radio, television, internet and e-mail advertisements that reflected that marketing strategy. In its effort to parse and challenge select language and isolated images from the advertisements, Complaint Counsel has ignored the overwhelming express claims made in the advertisements. Each of the advertisements at issue highlight two central themes: that the Ab Force is technologically similar to other products in the marketplace, but is much less expensive than those other products. By creating a "bandwagon

effect" through the generation of excitement for the product, Mr. Khubani estimated that the price advantage alone would be sufficient to generate successful levels of sales. He was right.

Focusing not on the forest, but on select trees, Complaint Counsel has argued that certain individual phrases and images conveyed an altogether different impression to consumers. In doing so, however, Complaint Counsel pays disproportionate attention to the language contained in "test" advertising that was used to gauge whether the product should be marketed in the first place, and which was later revised prior to full roll out of the advertising and the product to the public. Complaint counsel also focuses in large measure on the introductory statements in the ads, which were drafted in order to create consumer identification with the EMS ab product category and to highlight the price advantage of the Ab Force.

The evidence introduced at trial demonstrates that the exact opposite is true. Mr. Khubani rejected draft text presented to him by Ms. Liantonio that contained exercise and "flatter tummy" claims, and shaped the advertising to focus on the "compare and save" message. The record reflects that the advertising was ever-changing, culminating in final rollout of advertising that studiously avoided the challenged claims and instead focused on a comparative advertising message that is unchallenged in this case.

1. The Initial Advertising

Telebrands markets its products to consumers through direct response advertising. (Khubani Tr. 431). Unlike traditional forms of advertising, direct response advertising typically describes a product and offers the consumer a vehicle to order the product directly by telephone, by internet or through a mailing address. (Khubani Tr. 431 - 432).

Telebrands main focus is in direct-response television ("DRTV") advertising, which includes long-form commercials, also called "infomercials," (which are typically 28 minutes, 30

seconds long), short-form spot DRTV (which are commercials that are typically 30-seconds, 60-seconds, 90-seconds or 120-seconds in length) and live show advertising, such as on QVC or Home Shopping Network. (Khubani Tr. 432 - 433).

For the Ab Force campaign, Telebrands used 60-second and 120-second short-form spots to advertise the product on television. (JX-2; JX-3; JX-4; JX-5). Consistent with its typical advertising practices, (Khubani Tr. 440- 443), Telebrands created initial commercials and other advertising that it "tested" in the marketplace to assess the level of consumer response to the Ab Force. (Khubani Tr. 440 – 443).

In the case of comparative advertising such as the Ab Force campaign, Mr. Khubani testified that a point of reference had to first be established in order to allow consumers to draw a reference point of comparison between the Ab Force and competing products on the market. (Khubani Tr. 486 - 487).

a. The Test Radio and Print Advertisements Were Early Drafts That Generated Very Few Orders

On December 18, 2001, Mr. Khubani created the first Ab Force ads, drafting a script for a 60-second test radio commercial and a print advertisement for testing. (Khubani Tr. 480 – 481; CX-1H; CX-34). In the initial test ads, Mr. Khubani decided to refer to the highest price point on the market for similar products as a point of reference, and he decided that he would make a reference to the benefits touted by competitors for their products as another point of reference. (Khubani Tr. 486 - 487).

The language contained in the first part of the test radio advertisement (“They’re the latest fitness craze to sweep the country, but they’re expensive, selling for up to \$120 each.”) was created to present a point of reference to other EMS ab products being sold on the market at the time. (Khubani Tr. 479). The price of the Ab Force was intended to be a point of reference

to other products because a comparison of the Ab Force to other products presented the idea of a significant savings. (Khubani Tr. 487). Mr. Khubani also included other language (“Have you seen those fantastic electronic ab belt commercials on TV? They’re amazing, promising to get our abs into great shape fast without exercise”) in order to serve as a reference point to consumers by providing a description of other EMS ab products on the market. (Khubani Tr. 487 - 488).

The print advertising, though differently worded, also created two points of reference for consumers. The first point of reference was the statement “Electronic ab belts are the latest craze that are sweeping the country. These are the same type of ab belts that you’ve seen nationally advertised, similar to those sold on television by other for as much as \$100 and more, but during this nationwide promotion, you can own the amazing Ab Force electronic ab belt for the unbelievable price of \$10.” (CX-34). This language served as a point of reference to other EMS ab products available on the market at that time. (Khubani Tr. 488).

The second point of reference was contained in the statement, “How can we afford to sell amazing Ab Force electronic ab belts for the unbelievable price of \$10?” (CX-34). Mr. Khubani testified this was also a point of reference to other EMS ab belts, with an emphasis on price. (Khubani Tr. 488).

There were significant differences between the test radio ad and the print ad with regard to the points of reference to other EMS ab products, and these differences highlight the weakness of Complaint Counsel's argument that Respondents intended to convey the challenged claims. First, the language in the beginning of the radio ad (“Have you seen those fantastic electronic ab belt commercials on TV? They’re amazing, promising to get our abs into great shape fast without exercise”) does not appear in any other advertisement for the Ab Force (compare CX-1H

and JX-2; JX-3; JX-4; JX-5). Nor does it appear in the print advertisement, which was drafted the same day by Mr. Khubani. (Compare CX-1H and CX-34).

In looking at the test radio and print advertisements as a whole, it is clear that the overwhelming message is that the Ab Force is technologically similar to other EMS ab products on the market, but is significantly less expensive than those other products. This was the heart of the "compare and save" campaign crafted by Mr. Khubani, and it is the express, clear message conveyed in these earliest of ads for the Ab Force.

Complaint Counsel has focused on the introductory language of the test radio ad, which simply states that other products made certain advertising claims related to exercise. But in their zeal to highlight this language, Complaint Counsel overlooks two things. First, the introductory statement found in the test radio ad does not make promises that the Ab Force provides the same benefits, but only refers to promises made in other ads, and then only as a point of reference to those products. Second, Complaint Counsel avoids the fact that the print ad was created contemporaneously with the radio ad, but contains language that is significantly different from that found in the test radio ad. These differences in the test radio script and the print ad were merely the result of Mr. Khubani's drafting process, a process that selected test ad language on the basis of "what sound[ed] best." (Khubani Tr. 489 - 490). Moreover, that difference in language belies Complaint Counsel's insinuation that the test radio script embodied Respondents' intent to convey the challenged claims.

There is no evidence in the language of the test radio script or the print ad that Mr. Khubani intended to draw a comparison between Ab Force on the one hand and the claims made in the AbTronic, Ab Energizer and Fast Abs infomercials on the other. Rather, the evidence indicates that these points of reference were intended to draw a comparison between the Ab

Force, and other EMS ab products on the market at the time, with the focus on price and technological similarity.

The test radio advertisement ran for a very brief period of time and generated the fewest orders of any of the advertisements challenged. Specifically, the test radio ad ran generated 211 orders, which was less than six-one-hundredths of one percent of the total Ab Force orders. (Khubani Tr. 493 – 494; RX-61). Similarly, the print advertisement ran for one week in February 2002 and again for a week in March 2002, generating a total of 6,871 orders, or approximately two percent of all Ab Force orders placed. (JX-1, ¶ 34; RX-61).

b. The Test Television Spots

In addition to the test radio ad and the print ad, in late December 2001, Telebrands and Collette Liantonio of Concepts TV Productions, Inc. created two test television commercials for the Ab Force product. One spot was a 60-second commercial later given the production code AB-B-60. (JX-1, ¶¶ 22- 23). A second spot was a 120-second commercial later given the production code AB-B-120. (JX-1, ¶ 24; Khubani Tr. 22 - 23).

1) The decision to reject a draft script that contained challenged claims demonstrates the intent to affirmatively avoid any such claims.

In creating this advertising, Mr. Khubani took actions that are clearly inconsistent with Complaint Counsel's argument that Respondents intended the Ab Force commercials to contain the challenged implied claims.

First. When Mr. Khubani spoke with Ms. Liantonio about the script for the commercials, he told her that the Ab Force product was going to be the least expensive of its type on the market, and that Telebrands would therefore compete with others in the marketplace based on price. (JX-6, Liantonio Dep. 54 - 57). Consequently, Mr. Khubani instructed Ms. Liantonio that

the script should not contain any claims other than claims concerning price. (JX-6, Liantonio Dep. 56 – 57; Khubani Tr. 490 - 491).

Second. Mr. Khubani expressly rejected a draft script provided to him that contained several exercise and weight-related claims. Specifically, Ms. Liantonio—who had not seen the Ab Force product, and who had not seen any ads for other EMS ab products (JX-6, Liantonio Dep. 30 -33)—presented Mr. Khubani with a draft script the morning of the shoot that contained the following introduction:

"Do you wish you could get into shape fast without exercise? Wouldn't you love to have a flatter tummy without painful sit-ups? There are millions of Americans just like you who have discovered the power of those amazing Electronic Ab Belts advertised on television."

(JX-6, Liantonio Dep. 35 – 36; RX-34).

When Ms. Liantonio showed Mr. Khubani the script, Mr. Khubani saw that Ms. Liantonio had made “all the claims I didn't want to make—you know, flatter tummy, without painful sit-ups and so on...” (Khubani Tr. 490). Mr. Khubani testified that when he saw the script he “knew I had to rewrite the script.” (Khubani Tr. 490). He testified that he did not want to make those or similar claims because “we didn't possess substantiation to make those claims.” (Khubani Tr. 490). Consequently, Mr. Khubani discarded Ms. Liantonio's draft and rewrote the scripts while Ms. Liantonio finished setting up for the shoot. (Khubani Tr. 484 – 486; 490 – 491; JX-6, Liantonio Dep. 56-57). The new script completely eliminated Ms. Liantonio's opening and instead opened with point-of-reference statements similar to those found in the print advertisements. (Khubani Tr. 486 – 489; JX-2; CX-1B; JX-4).²

² The Transcript of the AB-B-60 test commercial was attached to the Complaint as Exhibit B, and was admitted as Exhibit CX-1B. Respondents note, however, that the Transcript is mislabeled as being a transcript of AB-E-60. CX-1B is actually a Transcript of the test commercial (AB-B-60), and not a transcript of the 60-second rollout commercial (AB-E-60)

There could hardly be any clearer evidence of Respondents' desire to avoid the challenged claims than the fact that when presented with such claims in a draft script, Mr. Khubani rejected that script out of hand in favor of a rewritten script that avoided any such claims. Moreover, the fact that Mr. Khubani expressly told Ms. Liantonio to avoid claims other than price—a fact corroborated by Ms. Liantonio—provides ample evidence that Respondents sought to avoid the very claims they are now charged with making.

2) The language challenged by Complaint Counsel was intended merely to serve as a point of reference to other EMS ab products.

The opening statements contained in the test commercials have been attacked by Complaint Counsel from the beginning of this case as a key element triggering consumers' association with the ads for AbTronic, Ab Energizer and Fast Abs. But the evidence presented at trial shows that Respondents intended only to create a point of reference with EMS ab products generally, and to create excitement about the product that would drive sales.

The openings to the test commercials state: “I’m sure you’ve seen those fantastic electronic ab belt infomercials on TV. They’re amazing. They’re the latest fitness craze to sweep the country, and everybody wants one. The problem is they’re expensive, selling for up to \$120 each.” (Khubani Tr. 491; JX-2; CX1-B; JX-3).

Mr. Khubani testified that he intended to accomplish two things with this language. First, he intended that this opening would serve as a point of reference for consumers by providing a description of the other EMS ab products on the market at the time, and would appeal to consumers by touting the price savings as the primary benefit of the Ab Force. (Khubani Tr. 486 - 489).

widely disseminated by Telebrands and used by Complaint Counsel’s expert, Michael B. Mazis, Ph.D., in his copy test.

Second, Mr. Khubani testified that because sales of products of this cost and type are typically “impulse purchases,” he intended the language to create excitement in consumers. (Khubani Tr. 491 - 492). This effort to create a desire on the part of consumers to purchase the product because “everyone else wants one” is called a bandwagon effect. (Khubani Tr. 492).

Dr. Jacoby, who was called by Respondents as an expert in this case, testified that the language used in the ads was consistent with the concept of creating a "bandwagon effect." (Jacoby Tr. 373 - 375). As he described it, a “bandwagon effect” is a frequently observed phenomenon in advertising used to generate interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby Tr. 373). Dr. Jacoby testified that as a result of the bandwagon effect created by this language, it was not necessary that consumers actually saw any ads for AbTronic, Ab Energizer and Fast Abs in order to create consumer desire for the Ab Force. (Jacoby Tr. 374 - 375). No evidence was offered to rebut Dr. Jacoby's opinion in this regard.

Consequently, Respondents did not need to refer to or cause an association with the AbTronic, Ab Energizer and Fast Abs ads in order to generate interest leading to sales, and any argument that such language was intended to refer to those products because sales could not be generated otherwise misses the intended purpose and practical effect of the language.

3) The use of slim models is not inconsistent with Respondents' intent to limit the Ab Force ads to "compare and save" claims.

Complaint Counsel has alleged that the intent to make these claims is also inferred from the use of models with slim bodies and well-defined abs. There are two responses to this line of attack that demonstrate that there were legitimate reasons for using attractive models in the

television advertisements that had nothing to do with an alleged intent to convey the challenged claims.

First, Mr. Khubani has testified that thin models were used in order to demonstrate the Ab Force product in use and causing involuntary muscle contractions,. (Khubani Tr. 518). Indeed, Complaint Counsel's own witness, Dr. Mazis, admitted that he had previously agreed in his deposition that thin models were useful so viewers “could see the product vibrating more or something...” (Mazis, Tr. 149 - 150).

Second, from Ms. Liantonio's point of view, it was important to see the abs of the models and to make sure that the models' abs were attractive because the product being advertised was a belt. (JX-6, Liantonio Dep. 62 - 70). She stated that in hiring the models she specified that they have attractive abs because that was the area the shooting would focus on. (JX-6, Liantonio Dep. 62 - 70). When cross-examined by Complaint Counsel as to why she did not use obese people in the advertisements—a curious question given the prevalence of attractive people in television advertisements for all sorts of products and services—Ms. Liantonio testified that using obese people would constitute “negative advertising,” which was not appropriate in her opinion. (JX-6, Liantonio Dep. 65 - 66).

2. The Rollout Advertising

Additional evidence that Respondents took measures to avoid making the challenged claims and instead sought to present the Ab Force using a "compare and save" strategy was demonstrated by the steps Respondents took after the test advertising was introduced. In addition to the changes made between the test radio ad and the print ad, and the change made by Mr. Khubani to the draft script presented to him by Ms. Liantonio, Telebrands undertook a comprehensive review of its advertising campaign and made additional changes to

the advertising after speaking with compliance counsel about the advertisements. These changes were made as part of the typical review undertaken by Telebrands prior to the full rollout of any product marketing campaign.

Although the test advertisement results were limited,³ they were deemed successful by Telebrands, which decided to rollout the product to the public in a nationwide campaign. Before undertaking the rollout however, and consistent with Telebrands' general practice, (Khubani Tr. 440- 443), Telebrands engaged in a detailed review of the Ab Force product and advertising, including everything from a review of all intellectual property associated with the product to legal review to ensure compliance with all applicable laws and regulations. (Khubani Tr. 495).

As a result of that process, in early January 2002, a number of minor changes were made to the radio and television advertisements. (Khubani Tr. 495). First, the television scripts were revised to change the phrase “latest fitness craze” to “latest craze.” (Khubani Tr. 495; compare JX-2 with JX-4; JX-3 with JX-5). This language is similar to that found in the print advertisement, and does not contain a reference to fitness or exercise. (Compare CX-34 and JX-4). Mr. Khubani testified that the introductory language of both ads was intended to introduce points of reference for the consumers. (Khubani Tr. 485 - 496).

Second, the phrase “just as powerful and effective” was changed to “uses the same powerful technology as.” (Compare JX-2 with JX-4; JX-3 with JX-5). Mr. Khubani testified that this language in both ads were intended as references to the fact that Ab Force used the same technology as other EMS ab products on the market. (Khubani Tr. 497).

³ Consumers placed 2,392 orders for the Ab Force by using the telephone number found in the 60-second test commercial. (JX-1, ¶ 27). Consumers also placed 2,238 orders for the Ab Force by using the telephone number found in the 120-second test commercial. (JX-1, ¶ 28; RX-61). The total number of orders placed through the test commercials was approximately 1.4% of the total number of orders placed for the Ab Force during the entire campaign. (Khubani Tr. 493 – 494; JX-1 ¶¶ 26 – 28; RX-61).

Finally, a superscript was imposed on the commercial, providing a visual reference to “RELAXING MASSAGE.” (Compare JX-2 with JX-4; JX-3 with JX-5).

Moreover, the radio advertisement was revised to remove the entire opening statement about other ab belts “promising to get our abs into great shape fast without exercise.” (Compare CX-1H and RX-49). No other changes were made to any of the print advertising.

Even before these minor changes were made, that overwhelming message conveyed by the Ab Force ads was a comparative advertising message that drew a comparison between the Ab Force and other EMS ab products on technology, and distinguished them on price. The evolution of the advertising away from the language most strenuously challenged by Complaint Counsel demonstrates that, at the very least, Respondents intended to avoid the claims asserted and present the products using a "compare and save" strategy.

IV. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CHALLENGED CLAIMS WERE MADE ON THE FACE OF THE AB FORCE ADVERTISEMENTS.

Complaint Counsel have repeatedly asserted that the Ab Force commercials caused consumers to associate the Ab Force with three previously broadcast infomercials for AbTronic, Ab Energizer and Fast Abs, and that this caused consumers to believe that the Ab Force ads made the challenged implied claims. In order to prove this theory, which Respondents have referred to throughout this matter as the "importation theory," Complaint Counsel offered the facial analysis of Michael B. Mazis, Ph.D. But Dr. Mazis' conclusion that consumers would associate the Ab Force with certain "category beliefs" they had formed from seeing the AbTronic, Ab Energizer and Fast Abs ads and from other sources, is based on a series of unsupported assumptions.

A. UNDER THE STANDARDS ESTABLISHED BY THE COMMISSION TO SUPPORT A FACIAL ANALYSIS, THE ADVERTISING CLAIMS MUST BE CLEAR ON THE FACE OF THE ADVERTISEMENTS AT ISSUE.

The Commission has clearly held that the primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself. *Kraft*, 114 F.T.C. at 121. The Commission has stated that it is often able to conclude that an advertisement contains an implied claim by evaluating the advertisement and the circumstances surrounding it. *Id.* (citing Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 176 – 177 (1984)(“Deception Statement”).

But, implied claims may only be found where it may be determined with confidence, after examining all of the constituent elements of the advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad. *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 777 (1994) (citing *Kraft*, 970 F.2d at 318); *Thompson Medical*, 104 F.T.C. at 320.

Moreover, the facial interpretation may not be based on a few parsed elements taken out of context. Instead, the Commission must consider the overall net impression of the advertisement, taken as a whole. *Stouffer*, 118 F.T.C. at 777 (citing *Kraft*, 970 F.2d at 314, 319). The determination must be made based on the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. *Stouffer*, 118 F.T.C. at 177 (citing *Thompson Medical*, 104 F.T.C. 648). A facial analysis does not involve the effect of individual words, phrases or visual images. *Thompson Medical*, 104 F.T.C. at 793. Indeed, individual words, phrases or visual images in an advertisement can effectively counter other words, phrases or visual images also contained in that advertisement. *Stouffer*, 118 F.T.C. at 789, n. 1.

However, if, based on the initial review of the evidence from the advertisement itself, the Commission cannot conclude with confidence that an advertisement cannot reasonably be read to contain a particular implied message, the Commission will not find the ad to have made the claim unless extrinsic evidence allows the Commission to conclude that such a reading of the ad is reasonable. *Kraft*, 114 F.T.C. at 121 (citing *Thompson Medical*, 104 F.T.C. at 789; *In re Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

B. BECAUSE THE CHALLENGED CLAIMS ARE NOT CLEARLY PRESENT ON THE FACE OF THE AB FORCE ADS, A FACIAL ANALYSIS OFFERS NO SUPPORT FOR THE ALLEGATIONS OF THE COMPLAINT.

At the trial in this matter, Dr. Mazis offered a facial analysis of the four Ab Force television commercial at issue, which were shown to Dr. Mazis in Court. (Mazis, Tr. 47 - 67). Dr. Mazis offered the opinion that certain visual and verbal elements in the Ab Force ads would have two effects on consumers.

The first is, as Dr. Mazis described it, an “indirect effect.” (Mazis, Tr. 66 - 67). Specifically, Dr. Mazis concluded that elements of the Ab Force ad would cause consumers to make an association between the Ab Force product and the ads for AbTronic, Ab Energizer and Fast Abs, thus causing consumers to believe (1) that the Ab Force caused well-developed abs and (2) a loss of inches around the waist. (Mazis, Tr. 66 - 67).

The second effect is what Dr. Mazis called a “direct effect.” Dr. Mazis concluded that even if consumers had never seen any other ab belt advertisement, elements within the four corners of the Ab Force ads would convey to consumers the idea that the Ab Force causes weight loss and was a substitute for exercise. (Mazis, Tr. 61 – 62, 66 - 67).

As discussed below, neither of these "effects" are supported in any way by the evidence in this case, and Dr. Mazis cannot reliably determine, from a review of the Ab Force advertising, that the Ab Force ads have the effect on consumers he claims they do.

1. Indirect Effects

- a. Dr. Mazis testified that consumers would likely perceive weight loss and exercise claims from the Ab Force ads as a result of the "association" between the Ab Force and the ads for AbTronic, Ab Energizer and Fast Abs.**

Dr. Mazis offered the opinion, based solely on a review of the Ab Force ads and the ads for AbTronic, Ab Energizer and Fast Abs, that consumers seeing the Ab Force ads may perceive weight loss and exercise claims because they would likely associate the Ab Force with ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 61 - 62).

Specifically, Dr. Mazis testified that consumers may perceive that Ab Force is being offered as a substitute for exercise not because that claim is made in the Ab Force ads, but because of consumers' knowledge of the ads for AbTronic, Ab Energizer and Fast Abs:

“Now, it doesn't actually say that or even show that in the ads, but because of the association with this ab belt category, people may perceive that.”

(Mazis, Tr. 61)(emphasis added). Another claim Dr. Mazis testified consumers may perceive as a result of this association is a claim of weight loss. He stated that while this claim is not made on the face of the Ab Force ads, consumers familiar with ads for AbTronic, Ab Energizer and Fast Abs could perceive a weight loss claim based on their familiarity with those other ads:

“Again, it doesn't say anything explicitly about losing weight, but because of the association with previous ab belt ads, that other ab belt companies—their infomercials made those claims, people may perceive that those characteristics also associate with Ab Force.”

(Mazis, Tr. 61 - 62)(emphasis added).

In making his facial analysis, Dr. Mazis identified four “key elements” in the Ab Force ads that he considered as likely to have an impact on consumers. (Mazis, Tr. 59 - 60). Three of these elements he identified were elements that would, in his estimation, cause consumers to make an association between the Ab Force product and the advertisements for AbTronic, Ab Energizer and Fast Abs and conclude that the Ab Force product caused well-defined abdominals and loss of inches. (Mazis, Tr. 59 - 62).

First, Dr. Mazis noted the “linkage of the Ab Force product to the other ab belts.” (Mazis, Tr. 59). Specifically, Dr. Mazis testified that the two Ab Force commercials he reviewed made two references to other ab belt advertising consumers may have seen on television. (Mazis, Tr. 59). He stated that the purpose of this element appeared to him to be a mechanism to cause people to think about their preconceptions about ab belts, what he described as “category beliefs.” (Mazis, Tr. 59).

Second, Dr. Mazis identified the “physical appearance of the product” as an element impacting consumers’ perceptions. (Mazis, Tr. 60). He testified that the Ab Force was similar in appearance to the AbTronic, Ab Energizer and Fast Abs products, and that “if people were familiar with those other ab belts, they would associate the Ab Force as being another type of ab belt, again conjuring up this category, this ab belt category.” (Mazis, Tr. 60).

Third, Dr. Mazis testified that the name “Ab Force” was an element having an impact on consumers’ perceptions. (Mazis, Tr. 60). He again referenced the advertisements for the AbTronic, Ab Energizer and Fast Abs products, and concluded that the fact they all have “ab” in their name was significant, but did not explain why. (Mazis, Tr. 60). He also testified that the word “force” was significant because it applies force by stimulation, and because the word “force” conveys the idea that it “makes your abs a force.” (Mazis, Tr. 60).

- b. Dr. Mazis relied on several unproven or false assumptions to reach his opinions that consumers may associate the Ab Force with claims made in the ads for AbTronic, Ab Energizer and Fast Abs, and disregarded other information pertinent to that opinion.**

Dr. Mazis' "facial analysis" is a complicated and unsupportable construct. In essence, Dr. Mazis concludes, from looking at the Ab Force ads, that consumers seeing the Ab Force ads would recall certain beliefs they formed about EMS ab belts that they derived from ads and packaging for and word-of-mouth communication about the AbTronic, Ab Energizer and Fast Abs products. As a result of this recall of preexisting beliefs, opines Dr. Mazis, consumers are likely to believe that the Ab Force ad is making the same promises contained in the ads for AbTronic, Ab Energizer and Fast Abs. This far-reaching conclusion, however, relies entirely on a series of interconnected, and wholly unsupported assumptions.

First. Dr. Mazis assumes that people who saw the infomercials for AbTronic, Ab Energizer and Fast Abs formed certain category beliefs about EMS ab belts. As Dr. Jacob Jacoby testified, this is mere speculation on the part of Dr. Mazis, because there is no basis for believing that consumers who saw those ads comprehended or retained any claims conveyed by those ads. Moreover, there were a number of EMS ab products that were being advertised at the time that Dr. Mazis never considered (or, indeed, even knew about) many of which made none of the claims challenged in this case. Without considering the advertising for these other products, Dr. Mazis simply cannot reliably say that consumers would have formed category beliefs based upon viewing the ads for AbTronic, Ab Energizer and Fast Abs.

Second. Dr. Mazis assumes that people who saw the Ab Force ads also saw the ads for AbTronic, Ab Energizer and Fast Abs. This assumption is predicated on the unsupported belief by Dr. Mazis that the ads for AbTronic, Ab Energizer and Fast Abs were "among the most

frequently aired infomercials in the nation." But there is no basis for this assumption. Dr. Mazis based this opinion on the number of times the ads for AbTronic, Ab Energizer and Fast Abs aired, but he has no idea how those numbers compare with airings for other EMS ab products. Nor is there any evidence in the record that these three ads were so ubiquitous that someone seeing the Ab Force ads would have seen one or all of the ads for AbTronic, Ab Energizer and Fast Abs. This assumption is nothing more than unfounded speculation.

Third, even if consumers who saw the ads for the Ab Force also saw ads for AbTronic, Ab Energizer and Fast Abs, there is no reliable basis for the assertion that these consumers would have necessarily made the association between the Ab Force and the ads for those other products. As Dr. Jacoby testified, without evidence that consumers comprehended or retained category beliefs about those other products, there is no evidence that consumers made the association between Ab Force and the ads for AbTronic, Ab Energizer and Fast Abs.

And that gets to the heart of the problem with Dr. Mazis' testimony in this regard. These assumptions were asserted in the context of a facial analysis. No amount of experience on the part of Dr. Mazis in the area of consumer behavior would permit him to reliably conclude that the Ab Force advertising, on its face and without any supporting evidence, makes the challenged implied claims because of an association formed on the part of the consumers between the Ab Force on the one hand and the ads for AbTronic, Ab Energizer and Fast Abs on the other. This goes far beyond an interpretation and analysis of the statements made within the four corners of the advertising itself, and examines connections and assumptions that can only be determined true through extrinsic evidence. As discussed below, these assumptions are either false or unfounded.

1) Dr. Mazis completely ignored what impact advertisements for other EMS ab products would have on consumers

At trial, Dr. Mazis was shown portions of infomercial advertisements for the AbTronic, Ab Energizer and Fast Abs products. (Mazis, Tr. 42 – 47; JX-7; JX-8; JX-9). He offered his opinion that the advertising for the Ab Energizer, AbTronic and Fast Abs products conveyed four claims: (1) that use of these products will result in “well-developed abs” or “six-pack abs”; (2) that use of these products “reduces inches off the waist”; (3) that use of these products could cause weight loss; and (4) that these products “are an alternative to exercise.” (Mazis, Tr. 47 - 48).

Even if Dr. Mazis is correct that the ads for AbTronic, Ab Energizer and Fast Abs contain these claims, his opinion wrongly assumes that consumers seeing the Ab Force ads would only associate these three ads and these four claims with Ab Force, and would not associate the Ab Force with ads for any of the other EMS ab product being sold at the time, and which made none of the claims asserted.

As discussed above, there were a significant number of EMS devices on the market prior to and at the time the Ab Force was advertised. Complaint Counsel has acknowledged that there were at least 18 EMS devices on the market at the time, and has acknowledged that 19 others may have been on the market at the time. Mr. Khubani identified numerous EMS ab products that were being marketed on television and in stores and catalogues before the Ab Force was advertised. (Khubani Tr. 445-474). Unlike the advertisements for the AbTronic, Ab Energizer and Fast Abs products, many of these advertisements (*e.g.*, the IGIA line of products) made none of the challenged claims asserted in this case. (Compare RX-72; RX-73; RX-74; RX-77 and JX-7, JX-8 and JX-9).

Despite the existence of these other EMS ab belt product advertisements, Dr. Mazis considered none of them. (Mazis, Tr. 123 - 124, 134). Dr. Mazis was not even aware that there were other EMS ab products being marketed prior to or before the marketing of the Ab Force. (Mazis, Tr. 123-124; 134). He was never provided with any other advertisements or products, nor did he review advertisements or retail packaging for any other EMS ab product. (Mazis, Tr. 123, 134). Instead, his review was limited to a review of (1) the Complaint in this matter, and exhibits, (2) transcripts and videotapes of the infomercials for AbTronic, Ab Energizer and Fast Abs, and (3) infomercial ranking reports for the AbTronic, Ab Energizer and Fast Abs products. (Mazis, Tr. 120 – 121; CX-58, ¶ 9). He was never provided by Complaint Counsel with any information regarding the existence of any other EMS ab product on the market. (Mazis, Tr. 123).

Dr. Mazis attempted to defend his failure to investigate or consider the possible impact the existence of other EMS ab product advertisements and products would have on consumers perceptions of EMS ab products. He testified that while consumers would form a category belief based on seeing EMS ab belts, they would not include in that category other EMS ab products unless they were “relatively similar” in appearance. (Mazis, Tr. 135 - 136).

However, Dr. Mazis admitted that this opinion was just “a theory” that he did not test. (Mazis, Tr. 136 - 137). Indeed, when asked whether products with a number of patches as opposed to one patch, and which made similar claims, could be considered in the category, Dr. Mazis admitted that he would need to examine the product and the ads before he could reach any opinion: “It would be one of those things where I would have to see the product and look at the—look at the advertisements. I just -- answering it hypothetically is basically impossible.” (Mazis, Tr. 136).

There is no question that from Respondents' point of view as advertisers and marketers of the Ab Force, a number of these other EMS ab products were viewed as competitive products. (Khubani Tr. 449-460; RX-72; RX-73; RX-74; RX-77). Mr. Khubani testified that he considered those EMS ab products to be within the same marketing category as EMS ab belts because they used the same electrical muscle stimulation technology, were advertised using similar claims and visuals, and were on the market at the same time as other ab belts. (Khubani Tr. 451-474). There was never any evidence in rebuttal to this testimony, and consequently there is no evidence in the record to rebut Mr. Khubani's understanding that these products were all, in the advertising context, part of the same category.

The impact of Dr. Mazis' failure to consider these other products is enormous. By failing to consider other EMS ab belts or EMS ab products, Dr. Mazis limited his facial analysis to a universe consisting entirely of the Ab Force commercials, and the infomercials for AbTronic, Ab Energizer and Fast Abs. He has no way of knowing whether the ads for AbTronic, Ab Energizer and Fast Abs predominated in the minds of consumers, or whether they were drowned out by the noise of ads, packages and word-of-mouth for other EMS ab products, many of which did not make the challenged claims and would not have contributed to consumers' preexisting beliefs that ab belts promised weight loss and exercise benefits. Without considering these other products, all of his assumptions are brought into serious question.

Because Dr. Mazis' categorization theory and indirect effects analysis required him to look beyond the four corners of the Ab Force advertising, the fact that he was limited in his review in this manner is sufficient, standing alone, to render his facial analysis not meaningfully probative of any issue in this matter.

2) Not only did Dr. Mazis fail to consider other EMS ab products, he failed to explain how other sources could or would influence the development of preexisting beliefs.

In addition to television advertising for AbTronic, Ab Energizer and Fast Abs, Dr. Mazis identified two other elements that would influence consumer preconceptions about EMS ab belts. (Mazis, Tr. 64 – 66). He opined that consumers would form preexisting beliefs based on word-of-mouth communication about the AbTronic, Ab Energizer and Fast Abs products, and based on retail packaging for those products. By failing to consider other EMS ab products, Dr. Mazis also failed to consider the word-of-mouth about those products, and he failed to consider what impact, if any, retail packaging for other EMS ab products would have on the formation of preexisting beliefs. These sources of preexisting beliefs could have effectively filled the air with so much "noise" about EMS ab products that it would have been impossible for consumers to understand or appreciate the ads for AbTronic, Ab Energizer and Fast Abs.

First, Dr. Mazis testified that “word-of-mouth” communication was also a factor because seeing ab belt advertisements and purchasing ab belt products are likely to create word-of-mouth communication by purchasers who want to talk about it with others or even demonstrate it for others to see. (Mazis, Tr. 64 - 65). He stated that consumers could hear about the products, see the products in use, and that such information could create category beliefs. (Mazis, Tr. 65). But Dr. Mazis admitted that while “other messages” could be conveyed by word-of-mouth, he was “only focusing on the messages of interest in this case.” (Mazis, Tr. 169).

But Dr. Jacoby testified that Dr. Mazis had no way of knowing what word-of-mouth, if any, was being generated about AbTronic, Ab Energizer and Fast Abs, or any other EMS ab product. (Jacoby Tr. 347 - 348). As Dr. Jacoby noted, Dr. Mazis could have tested the impact of word-of-mouth communication and other indirect effects on consumer perceptions about ab belts

generally and the Ab Force specifically. (Jacoby Tr. 349 – 351). He did not, and instead impermissibly relied on unproven assumptions about the effect of word-of-mouth communication. (Jacoby Tr. 349 - 351).

Second, Dr. Mazis testified that “a number of these products were sold at retail,” and that consumers seeing the products on store shelves could affect category beliefs held by consumers about ab belts. (Mazis, Tr. 65). Although Dr. Mazis testified he reviewed the retail packages for the AbTronic, Ab Energizer and Fast Abs products, he did not review retail packages for other EMS ab products. (Mazis, Tr. 125 - 126). Moreover, Dr. Mazis admitted that he had no idea what the level of take-away was for consumers who saw retail packaging.

However, as Dr. Jacoby noted, it was conjecture on Dr. Mazis’ part to assume that consumers would discriminate among thousands and thousands of retail packages in stores to review the packaging and develop beliefs about EMS ab products. (Jacoby Tr. 348). Consumers may not even notice them. (Jacoby Tr. 348). As Dr. Jacoby testified, while Dr. Mazis is correct that consumers may develop preconceptions about ab belt products through word-of-mouth communication or retail packaging, his opinion that these elements had shaped consumer perceptions was another matter entirely. (Jacoby Tr. 349).

3) Dr. Mazis assumed, without support, that the ads for AbTronic, Ab Energizer and Fast Abs were among the most frequently aired

A threshold assumption made by Dr. Mazis that finds no support in the evidence introduced at trial is the assumption that

“Thirty-minute infomercials were aired for AbTronic, Ab Energizer and Fast Abs. These infomercials were among the most frequently aired infomercials in the nation.”

(CX-58, ¶ 15). For Complaint Counsel to prove that consumers who saw the Ab Force also saw ads for AbTronic, Ab Energizer and Fast Abs, this assumption must be true. Of course, as Dr.

Jacoby noted at trial, there would be no need for Complaint Counsel to hang its hat on this thin assumption if Dr. Mazis had asked participants in the copy test whether they had seen the ads for AbTronic, Ab Energizer and Fast Abs, but such is not the case. Without that evidence, an assumption is the only thing available.

In support of this assumption, Dr. Mazis relies on (1) the number of airings of each ad, (2) reports from an unknown service that "rated infomercial frequency" and (3) advertising budgets for each product.

With regard to number of airings, Dr. Mazis stated that "an infomercial for the AbTronic...was aired more than 2,000 times (30-minute and two-minute versions) from April 2001 through February 2002." (CX-58, ¶ 15). He also stated that "an infomercial for Ab Energizer was aired more than 1,650 times between October, 2001 and February 2002." (CX-58, ¶ 15). And he asserted that "an infomercial for Fast Abs...appeared more than 1,200 times from November, 2001 through February 22, 2002." (CX-58, ¶ 15).

At trial, however, Dr. Mazis admitted that he did not independently confirm any of these figures, but confessed that he had been provided this information through a review of the Complaint issued by the Commission against the advertisers of AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr.120). Indeed, Dr. Mazis' Report suggests that he relied solely on the Complaints filed by the Commission. (CX-58, ¶ 15, n. 1 – 3). But those Complaints were rejected as evidence by this Court.

Even if those figures were true, simply knowing the number of times a commercial aired does not support the claim that these ads "were among the most frequently aired infomercials in the nation." Dr. Mazis simply does not have a reference point for that assertion. He does not know, for example, whether these were aired more or fewer times than the Electrosage,

Accusage, or ElectroGym ads. If the airing totals for AbTronic, Ab Energizer and Fast Abs were dwarfed by the airing totals for those other products, then there would be additional noise that may diminish the impact of the ads for AbTronic, Ab Energizer and Fast Abs, if indeed there was any impact on consumers. Simply put, knowing the number of airings alone provided Dr. Mazis with no reliable basis to conclude that the ads for AbTronic, Ab Energizer and Fast Abs "were among the most frequently aired infomercials in the nation."

Next, Dr. Mazis testified that he based his statement that these infomercials "were among the most frequently aired infomercials in the nation" on reports by "some service that rated infomercial frequency." (Mazis, Tr. 119 - 120). But he did not know the name of the reporting service, nor did he know what "the underlying methodology was and so on" used by the reporting service. (Mazis, Tr. 120). Instead, he assumed that the reports were accurate:

"they were relied on by the FTC in its complaints against those three companies [the AbTronic, Ab Energizer and Fast Abs advertisers], so I assume that the data were reliable, but that's—that's all the information I have on those—on that service."

(Mazis, Tr. 120).

Consequently, at the time he made his facial analysis, Dr. Mazis based his opinion on a false or, at the very least, unreliable assumption that the AbTronic, Ab Energizer and Fast Abs infomercials were "among the most frequently aired infomercials in the nation." (Mazis, Tr. 120). Indeed, even through trial, Dr. Mazis had no way of knowing whether that assumption was true.

Finally, Dr. Mazis asserted that support for his assertion that the infomercials for the AbTronic, Ab Energizer and Fast Abs "were among the most frequently aired infomercials in the nation" could be found in the advertising budgets for each of those products. (CX-58, ¶ 15). Dr.

Mazis stated at trial that the total amount spent to air these advertisements was approximately \$38 million. (Mazis, Tr. 127 - 128).

But Dr. Mazis admitted that he did not know the total value of all infomercial time sold in the United States on a yearly basis. (Mazis, Tr. 128). Nor did he know how many television stations there were in the United States. (Mazis, Tr. 127). Dr. Mazis offered no testimony on how many airings or how many stations the amount spent on AbTronic, Ab Energizer and Fast Abs would include.

Consequently, Dr. Mazis had no reference point to know whether the amount of money spent to air the ads for AbTronic, Ab Energizer and Fast Abs was significant compared to other advertising amounts spent in advertising generally, or in the DRTV industry specifically. Apparently conceding this point, Dr. Mazis acknowledged that he did not know whether \$38 million saturated the airwaves with ads for AbTronic, Ab Energizer and Fast Abs, as Complaint Counsel argued in their Pre-Trial Brief. (Mazis, Tr. 126 - 127). He simply did not know what relationship advertising budgets totaling \$38 million would have to infomercial airings or what impact those advertising dollars would have on consumers because he had not “studied that issue in detail.” (Mazis, Tr. 126 - 127).

Dr. Jacoby, however, had looked into the issue in some detail, and Mr. Khubani was familiar with the annual general advertising spending in the United States, and of the total value of available infomercial time specifically. Dr. Jacoby testified that the annual amount of advertising spent in the United States is \$150 billion per year, a figure corroborated by Mr. Khubani. (Jacoby Tr. 393; Khubani Tr. 507 - 508). The annual value of all television time available to air infomercials is approximately \$900 million. (Khubani Tr. 507-508). Given the enormous amount of advertising dollars spent annually, it is unlikely that the \$38 million spent to

advertise AbTronic, Ab Energizer and Fast Abs infomercials had any effect of “saturating” the market. (Jacoby Tr. 393). Indeed, as Dr. Jacoby noted by way of example, Gillette’s advertising budget for the Mach 3 razor, which topped \$3 billion dollars for that one product alone, did not result in "saturation" of that advertising in the media. (Jacoby Tr. 393).

The unanswered questions raised by Dr. Mazis' naked assumption that the ads for AbTronic, Ab Energizer and Fast Abs were among the most frequently aired demonstrate just how far afield from the four corners of the Fast Abs advertising Complaint Counsel must travel in pressing a finding that the challenged claims can somehow be found in the Ab Force ads. Because there is serious doubt regarding the threshold assumption that the ads for AbTronic, Ab Energizer and Fast Abs were so ubiquitous that consumers who saw the ads for Ab Force also saw the ads for AbTronic, Ab Energizer and Fast Abs, the Court should reject Complaint Counsel's assertion that this somehow fits into the facial analysis framework laid out by the Commission.

4) Dr. Mazis falsely assumed that consumers who saw the Ab Force ad also saw the ads for AbTronic, Ab Energizer and Fast Abs

Except for the statements in his Report concerning the number of airings and advertising dollars spent on the ads for the AbTronic, Ab Energizer and Fast Abs, Dr. Mazis had no other information to support his view that the ads for AbTronic, Ab Energizer and Fast Abs “were among the most frequently aired infomercials in the nation.” (CX-58, ¶ 15).

Dr. Mazis was generally familiar with the fact that infomercials and spots may air at different times. Specifically, he testified, as did Mr. Khubani (Khubani Tr. 512), that infomercials are not typically shown in prime time on broadcast stations. (Mazis, Tr. 129). He also stated that infomercials typically would be broadcast in non-peak times during the week,

which he defined as before 7:00 p.m. and after 10:00 p.m., and would include the overnight hours of midnight to 6:00 a.m. (Mazis, Tr. 129 – 130). They typically would also be shown at anytime during the weekend. (Mazis, Tr. 129 – 130).

He also understood that this schedule did not apply to spot advertising. For example, networks such as CNN and MSNBC and CNBC, which would ordinarily not take infomercial advertising, do accept spot advertising. (Mazis, Tr. 131 - 132).

But Dr. Mazis was unfamiliar with any specifics concerning the dissemination and broadcasting of any of the advertisements at issue. He testified that he did not know the times of day that the ads for AbTronic, Ab Energizer and Fast Abs were shown. (Mazis, Tr. 128). He also testified that he did not know how frequently, if at all, the infomercials for AbTronic, Ab Energizer and Fast Abs overlapped in terms of time slots with airing of the Ab Force. (Mazis, Tr. 132 – 133).

Although Dr. Mazis acknowledged, for example, that an airing on a local station at 2:00 a.m. in Dubuque, Iowa and an airing nationally on the Lifetime cable network would each count as one airing, (Mazis, Tr. 128 - 129), he did not know how many times the ads for AbTronic, Ab Energizer and Fast Abs aired locally or nationally. (Mazis, Tr. 129). Dr. Mazis also did not know how many of the ads for AbTronic, Ab Energizer and Fast Abs aired on cable or broadcast. (Mazis, Tr. 129).

Most importantly, Dr. Mazis testified that he did not know how many consumers would have been exposed to the ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 128, 182 - 183). Indeed, he had no opinion about the likelihood that somebody who saw that the Ab Force commercials would also have seen one of the ads for AbTronic, Ab Energizer and Fast Abs, because he had “no information on that.” (Mazis, Tr. 172).

Instead, he relied on his “assumption that there’s a lot of exposure to a lot of different products,” because these infomercials ran “on weekends, late nights and so on, when there aren’t a lot of programming choices out there.” (Mazis, Tr. 172 - 173). This assumption, however, ignores his testimony that spot advertising may not necessarily run at the same time or on the same stations to which infomercials are limited. (Mazis, Tr. 131 - 132). Indeed, this assumption is flatly contradicted by Mr. Khubani’s testimony that only 10% of the Ab Force spots aired during day parts when infomercials would typically be shown. (Khubani Tr. 513-515).

Even if there was significant overlap between the Ab Force ad viewership and the viewership for AbTronic, Ab Energizer and Fast Abs infomercials, and none has been demonstrated by any evidence in this case, Dr. Mazis admitted that it was not certain that the viewers who were exposed to the ads would have necessarily retained or even comprehended the ads. (Mazis, Tr. 172). He testified that retention and comprehension would depend on “a lot of factors that go into that,” none of which he described or demonstrated applied in this case. (Mazis, Tr. 172).

Finally, he admitted that he had seen no empirical data about the ability of viewers to remember what they saw in the infomercials for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 184). He conceded that his opinions “about the take-away from those ads are just based on my facial analysis of those ads.” (Mazis, Tr. 184). However, unlike consumers who just “surf in and out” of those infomercials, Dr. Mazis reached his facial analysis after identifying the claims alleged in the Complaint and seeing the infomercials several times. (Mazis, Tr. 141 – 142, 184). As Dr. Jacoby testified, the fact that Dr. Mazis reviewed the Complaint and the allegations therein had the effect of biasing Dr. Mazis’ facial analysis. (Jacoby Tr. 343 - 344).

Despite having no reliable information regarding how frequently any one advertisement at issue had aired, and no information identifying the stations, days or times those ads aired, Dr. Mazis stood by his belief that “many consumers would have been exposed to these ads.” (Mazis, Tr. 166). This is not credible testimony supported by any reliable evidence in the record.

At bottom, Dr. Mazis’ assumption that consumers who saw the Ab Force commercial also likely saw the ads for AbTronic, Ab Energizer and Fast Abs is based on no reliable evidence whatsoever, and constitutes little more than speculation or conjecture on his part. (Jacoby Tr. 348 - 349). Moreover, Dr. Mazis provided no evidence those Ab Force ad viewers who did happen to see the ads for AbTronic, Ab Energizer and Fast Abs would retain or even comprehend that information. (Mazis, Tr. 184).

Again, the reliance on a series of convoluted and unsupported assumptions by Complaint Counsel hardly meets the standard that the claims be “conspicuous, self-evident, or reasonably clear on the face of the ad.” *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 777 (1994) (citing *Kraft*, 970 F.2d at 318); *Thompson Medical*, 104 F.T.C. at 320. By resorting to these assumptions in order to support its case, Complaint Counsel has tacitly acknowledged that a facial analysis is impossible in this case, and that more objective extrinsic evidence is needed in order to prevail.

5) Dr. Mazis incorrectly assumed that "categorization theory" provided rationale for his association opinion.

In his Report, Dr. Mazis offered the opinion that “the Ab Force advertising exploits consumers’ awareness of the advertising for the other EMS ab belts,” specifically AbTronic, Ab Energizer and Fast Abs. (CX-58, ¶ 11). He also opined that “the Ab Force is ‘free-riding’ on the claims made for other EMS ab belts.” (CX-58, ¶ 19).

At trial, Dr. Mazis elaborated on this opinion, testifying that the advertisements for the AbTronic, Ab Energizer and Fast Abs “would play a role in consumers’ perceptions of ab belts, that people over time—these ads that play a part in the fact that people form what’s sometimes referred to as a category, an ab belt category, by seeing the ads is one input into forming this so-called ab belt category, or beliefs about ab belts.” (Mazis, Tr. 48).

Dr. Mazis purportedly based this conclusion on a consumer behavior theory known as categorization theory. (Mazis, Tr. 49). Dr. Mazis described this theory as “the idea that people take objects such as products and put them together based on their similarity.” (Mazis, Tr. 49). According to Dr. Mazis, once consumers saw the Ab Force ads, there was a “transference” of those beliefs over to Ab Force. (Mazis, Tr. 61, 167).

But, again, there is no support for these assumptions. Dr. Mazis made no effort to determine what influences, other than the ads and retail packaging for AbTronic, Ab Energizer and Fast Abs, actually shaped those beliefs. He only focused on the messages that were contained in the ads for AbTronic, Ab Energizer and Fast Abs. (Mazis, Tr. 169 - 170). He did not know what messages were being conveyed by advertisements or packaging for other EMS ab products. (Mazis, Tr. 167 - 171). He did not know what messages were being conveyed by word-of-mouth communication. (Mazis, Tr. 169 - 170). He did not know what other print or radio advertisements were being disseminated. (Mazis, Tr. 181 - 182). Indeed, Dr. Mazis admitted that when he referred to category beliefs, he was referring only to “ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer and Fast Abs].” (Mazis, Tr. 171 - 172).

Dr. Mazis' reliance on the Sujun article is misplaced. (Mazis, Tr. 49; CX-57).

Dr. Jacoby testified that categorization theory, which derives from the field of psychology, theorizes that consumers will form an understanding of categories and will place things into categories, and thus will interpret and infer things about those things. (Jacoby Tr. 344).

Dr. Jacoby identified at least two fundamental flaws with Dr. Mazis' opinion that categorization theory applied.

First, Dr. Mazis simply assumes that consumers have formed categories based on exposure to AbTronic, Ab Energizer and Fast Abs infomercials, but never tested that assumption. Dr. Jacoby testified that in order to form categories about certain things, in this case EMS ab products, the consumer must have prior experience with exemplars from that category. (Jacoby Tr. 344 - 345). He testified that Dr. Mazis, in conducting his research, had failed to confirm that consumers were exposed to or recalled the exemplars (e.g. the ads for AbTronic, Ab Energizer and Fast Abs) that may have led to the formation of category beliefs. (Jacoby Tr. 345).

Dr. Jacoby has reviewed and is familiar with the Sujana article cited by Dr. Mazis, and testified that Sujana had incorporated research performed in the field of basic cognitive psychology and demonstrated how it could apply in consumer psychology and behavior. (Jacoby Tr. 345).

The Sujana article, while supporting Dr. Mazis' opinion that consumers form category beliefs, does not support the use of assumptions in determining that consumers have formed category beliefs about, in the case of that research, single-lens reflex cameras. (Jacoby Tr. 345; CX-57). In that case, Sujana actually sought to determine if and how novice and expert consumers processed information regarding one category of cameras in relation to another. (CX-57). In reaching a conclusion, Sujana designed an experiment whereby two descriptions were given in simulated print ads and were used to match or mismatch conditions to eliminate the

confound between the manipulation of information match/mismatch and the actual content of the information. (CX-57, p. 35). Test participants were asked to recall the type of camera about which they had received information in order to ensure that they had the relevant category available in memory. (CX-57, p. 38). In short, Sujana made sure that the participants in the survey actually had formed a category.

As Dr. Jacoby testified, although there were many and different ways in which Dr. Mazis could confirm that consumers had a category in mind, he took no such steps. (Jacoby Tr. 345). For example, Dr. Mazis could have shown surveyed consumers one or more of the ads for AbTronic, Ab Energizer and Fast Abs before showing them and testing them on the Ab Force commercial, or by asking questions to determine whether they had seen such commercials prior to participating in the survey. (RX-40, ¶ 23). Dr. Jacoby testified that Dr. Mazis also could have used questioning after other portions of a survey had been conducted to test consumers' preconceptions. (Jacoby Tr. 349 - 351).

Dr. Jacoby said that a use of such a manipulation check could have been used by showing consumers in one group relevant portions of the ads for AbTronic, Ab Energizer and Fast Abs, and consumers in another group none. (Jacoby Tr. 350). Post-survey questioning could have then been used to identify participants' knowledge of the ads for AbTronic, Ab Energizer and Fast Abs. (Jacoby Tr. 350 - 351).

Second. Dr. Mazis simply assumed that the reference in the Ab Force ads to other ab belts and other "key elements" were sufficient to trigger consumers' category beliefs. (Mazis, Tr. 60 - 61). But a communication to consumers (e.g., by referencing "other ab belts" or presenting other elements) does not necessarily mean that the communication was sufficient to have an impact on consumers' beliefs and behaviors. (Jacoby Tr. 369). Simply because a

source conveys information does not necessarily mean it has an impact on the receiver exposed to it, or that the communication has an impact to a significant degree. (Jacoby Tr. 369). In other words, a mere reference to “other ab belts” or the physical appearance of the product or other elements may not be sufficient to trigger any category beliefs that consumers may have. (Jacoby Tr. 367).

Instead, whether there was an impact and what impact the message had must be determined through empirical testing. Dr. Jacoby cited early research in this area by Janish and Fesbach in a 1953 Yale study concerning the impact of fear on consumer behavior. (Jacoby Tr. 369 - 370). He indicated that in order to determine whether there was an impact on consumers, a manipulation check should be performed to determine whether the communication had the intended effect. (Jacoby Tr. 370 - 371). This manipulation check may be conducted through a series of post survey questions put to respondents to determine what effect certain elements had on their response to that advertising. (Jacoby Tr. 370 - 371).

Dr. Mazis conducted no manipulation check in his survey to determine whether consumers’ category beliefs, if they even existed at all, were triggered by the elements cited by Dr. Mazis as having an impact on consumers. (Mazis, Tr. 59). Because he failed to test the theory that consumers necessarily formed or retained categorization beliefs about EMS ab products prior to viewing the Ab Force ads, or whether they even saw any of the ads for AbTronic, Ab Energizer and Fast Abs prior to seeing the Ab Force ads, Dr. Mazis’ opinion that there was categorization by consumers is merely speculation, not evidence of the association. (Jacoby Tr. 347 - 351).

2. Direct Effects

In addition to the opinion that indirect effects that would cause consumers to make an association between Ab Force and AbTronic, Ab Energizer and Fast Abs, Dr. Mazis also testified that there were elements that had “direct effects” that could shape category beliefs about ab belts. (Mazis, Tr. 66). These “direct effects” would shape consumers’ perceptions regardless of whether they had ever seen an ab belt ad before. (Mazis, Tr. 66). He testified that consumers could “make inferences because there’s certain implied claims in the ads, because of seeing the models and seeing the pulsating effect of the vibrations of the—of the ab belt, and these people look very fit, very trim, and it has the name Ab Force.” (Mazis, Tr. 66).

Dr. Mazis offered his view that this “visual imagery” within the four corners of the Ab Force ads conveyed two claims, which he described as the most prominent: (1) that use of the Ab Force will cause well-developed abdominal muscles, and (2) that use will result in loss of inches around the waist. (Mazis, Tr. 61).

With regard to the use of trim models in the advertising, Dr. Mazis’ entire opinion on that element is as follows: “The second element that I think that’s important is that the models shown in the ads—I always have the belief that visual images are really more important than the verbal messages, because they really remain in people’s memories. So, there were all these models that had these well-developed abs and slim bodies and you know, these various characteristics.” (Mazis, Tr. 60). There is no evidence that this opinion is based on any reliable foundation or expertise, but rather on the personal impression held by Dr. Mazis.

Although he did not explain how these images affected perceptions, Dr. Mazis did acknowledge in his testimony that he had agreed that there was a legitimate reason to use people with relatively little fat: so viewers “could see the product vibrating more or something...”

(Mazis, Tr. 149 - 150). Indeed, Dr. Mazis agreed that in viewing the advertisement for the Ab Force, he could see the product causing the muscles to twitch on the models used in the ads.

(Mazis, Tr. 150). This testimony corroborates Mr. Khubani's testimony that the only way to visually illustrate the product working was to demonstrate the product on slim models. (Khubani Tr. 518).

With respect to the use of the name "Ab Force," Dr. Mazis offered his opinion that the name conjured up an association between Ab Force and AbTronic, Ab Energizer and Fast Abs due to the use of the word "ab" in the name. His analysis of the meaning of the name was as follows: "I think the name is—the brand name is actually quite interesting, that they use Ab Force, meaning – I mean, I guess you could say it's a double meaning. On the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words, it makes your abs noticeable, that they—that they are really well-developed." (Mazis, Tr. 60).

Dr. Jacoby, on the other hand, testified that the words "ab" and "force" may have several meanings that consumers would take away, but he could not identify any particular meaning that consumers would take away. (Jacoby Tr. 405 - 406). Mr. Khubani has testified that the name of the product was selected as a play on the term "Air Force." (Khubani Tr. 474-478). Whatever the intent, Dr. Mazis has provided the Court with no reliable rationale why consumers would take away the meanings he has attributed to the name Ab Force.

C. COMMISSION PRECEDENT PRECLUDES APPLICATION OF "FACIAL ANALYSIS" IN THIS CASE.

Because the Commission wants to ensure that "advertisers will not be deterred from conveying useful, accurate information to consumers," it will conclude that an advertisement contains implied claims in advertisements only where the "language or depictions are clear

enough to permit [it] to conclude with confidence, after examination of the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances." *Id.* (citing *Thompson Medical*, 104 FTC at 789). If, "based on [an] initial review of the evidence from the advertisement itself, [the Commission] cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable." *Id.* (citing *Thompson Medical*, 104 FTC at 789; *In re Bristol-Myers Co.*, 102 FTC 21, 319 (1983), *aff'd*, 783 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

The cautionary notes sounded by the Commission against making overreaching facial interpretations are of particular importance in this case. Complaint Counsel is seeking a cease and desist order against Respondents not because of what was conveyed directly by the Ab Force advertisement, but because of claims made in other advertisements. Complaint Counsel have argued that this Court can make a facial analysis based on selected, parsed elements culled from the Ab Force advertising. But the testimony and evidence offered by Complaint Counsel have as their linch pin the infomercials for the Ab Energizer, Fast Abs and AbTronic products, drawing comparisons between those advertisements and the Ab Force advertisements. Because Complaint Counsel's arguments rely heavily on the advertisements for the commercials for those three other advertisements, a facial analysis would go far beyond what has been held in other Commission cases.

This case simply is not *Kraft*, nor is it *In re Stouffer Foods Corp.*, 118 FTC 746 (1994). In both of those cases, the Commission found that the advertisements could be facially

interpreted as making the challenged implied claims. But in both cases, the Commission acknowledged that the elements building to that interpretation could be gleaned from the four corners of the advertising itself. *See, Stouffer*, 118 FTC at 801, 803 (focusing on several elements of the ads, including statements comparing "less than 1 gram" and "1000 milligrams," which were contained in the same ad, and holding that the challenged claims were made within the advertising); *Kraft*, 114 FTC at 123 – 125 (finding that the advertisement "viewed as a whole" made the challenged claims, based on a review of the language and elements contained in the challenged advertising). In the present case, Complaint Counsel's argument depends on looking to the advertisements for Ab Energizer, Fast Abs, and AbTronic. Complaint Counsel have attempted to focus on those three ads, to the exclusion of the other ads that were on the market that included many of the same elements, but which did not make the challenged claims in this case. Because Complaint Counsel's argument depends on reference to the three other ads, and because that argument depends on an untested finding that consumers would make a connection between the Ab Force ads and the ads for those three other products, the Court should not find that the challenged claims were made on the face of the advertising.

IV. THE COPY TEST RELIED ON BY COMPLAINT COUNSEL DOES NOT ESTABLISH THAT THE AB FORCE ADVERTISING MAKES THE CHALLENGED CLAIMS

Other than the "facial analysis" tendered by Dr. Mazis, the only other basis for Complaint Counsel's theory – indeed, the only empirical intrinsic evidence offered by Complaint Counsel regarding consumers' perceptions of the Ab Force advertising – is a Mall-Intercept Study. However, as discussed below and proven at trial, that survey suffers from a number of

fatal flaws that preclude a determination that the survey constitutes a reliable measure of consumers' perceptions of the ads at issue.

A. METHODOLOGICAL FLAWS IN THE COPY TEST RENDER THE RESULTS UNRELIABLE

1. The survey universe was overly broad

The copy test employed a screening questionnaire, which is typically used to identify qualified respondents to participate in the actual test. (Mazis, Tr. 68). The screening questionnaire criteria were designed to identify people who would be potential purchasers of the Ab Force product. (Mazis, Tr. 68). Dr. Mazis testified that he designed the screening questionnaire to capture respondents who would have some propensity to buy the product and to eliminate people who would not be typical consumers of the Ab Force product. (Mazis, Tr. 68).

Dr. Jacoby agreed with Dr. Mazis that it was important to make sure that the study included only those people who would be potential purchasers of the Ab Force product. (Jacoby Tr. 352). He elaborated on Dr. Mazis' statement, explaining that the perceptions of consumers who would not be prospective purchasers would be irrelevant. (Jacoby Tr. 352). Courts agree that, to be probative on the issue of confusion, a survey must rely on responses of prospective purchasers of the products in question. *See Universal City Studios*, 746 F.2d at 118; *Conopco*, 49 F.Supp.2d at 253; *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1273 (S.D.N.Y.1990) (reasoning that those who do not contemplate a purchase may be less aware of relevant source-indicating distinctions).

But Dr. Jacoby differed with Dr. Mazis' opinion that the universe in this case had not been narrowly or over-broadly defined. (Jacoby Tr. 352). Although unconcerned that the first screening criterion was problematic, Dr. Jacoby disagreed that the second criterion -- that participants had, in the past 12 months, purchased a product by calling a toll-free number that

was included in a TV ad, program or infomercial -- was useful in defining the appropriate universe. (Jacoby Tr. 353 –354; CX-58, Exh. C thereto, Question D). As Dr. Jacoby explained, referencing participants:

“You could have purchased any number of things. You could have purchased a real estate course. You could have purchased perfume. You could have purchased flowers, you know, 1-800-FLOWERS...”

(Jacoby Tr. 354). He explained that using this criteria to select participants was not sufficiently tailored and reached a universe that included participants who had no interest in purchasing the Ab Force or a product like it (e.g., someone who purchased Slim Fast at Safeway and jewelry from QVC would have met the criteria). (Jacoby Tr. 355 - 356).

The Federal Judicial Center's 1994 Reference Manual on Scientific Evidence emphasizes that: "Identification of the proper universe is recognized uniformly as a key element in the development of a survey.... A survey that provides information about a wholly irrelevant universe of respondents is itself irrelevant. More commonly, however, either the target population or the sampling frame is underinclusive or overinclusive." *Reference Manual on Scientific Evidence*, 235, n.38 and 236 (Federal Judicial Center 1994). A universe may be improperly over-inclusive by encompassing a group of people that includes those whose perceptions are not relevant, thus skewing the results by introducing irrelevant data. *See, e.g., WGBH Educational Foundation, Inc. v. Penthouse International, Ltd.*, 453 F. Supp. 1347, 203 U.S.P.Q. 432, 435 (S.D.N.Y. 1978), *aff'd without op.*, 598 F.2d 610 (2d Cir. 1979) (Target audience for defendant's publication was persons in the eighteen to thirty-four-year-old range, and plaintiff's television program concerned serious science topics. But survey was not selective as to age or scientific interest. Disparity between the universe in the survey and "some optimal

universe of people to whom such a survey should be directed reduces the evidentiary weight to be accorded its findings.")

The problems with the universe selection criteria here is remarkably similar to the criteria problems addressed in *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 19 U.S.P.Q.2d 1321, 1331 (S.D.N.Y. 1990). In that case, where WEIGHT WATCHERS sued for use of its mark on LEAN CUISINE frozen diet entrees, the court found over-inclusive a survey of women between the ages of eighteen and fifty-five and who had purchased frozen food entrees in the past six months and who tried to lose weight through diet and/or exercise in the past year. The court said that the universe should have been limited to women who had purchased a *diet* frozen entree. *Id.* ("[S]ome of the respondents may not have been in the market for diet food of any kind and the study universe therefore was too broad.").

Similarly, by capturing people who may have never purchased any type of relevant product from a television commercial, the survey criterion requiring purchase within the last year of *any* product was over inclusive. This could easily have been avoided had appropriate selection criteria been used. Appropriate criteria should have excluded those respondents who had not purchased a product to help them lose weight, tone muscles or massage their bodies from a toll-free number that was included in a television ad, program, or infomercial in the past 12 months. (Jacoby Tr. 355).

However, Dr. Mazis' criteria for selection were not sufficiently narrow to capture just those who would potentially purchase an Ab Force. Consequently, there is serious concern that the second criterion led to a universe that was overly broad, because it may have included many people to whom the purchase of something like an ab belt would never have occurred and who would never be inclined to purchase one. (Jacoby Tr. 354 - 355).

2. The main questionnaire employed leading questions

The phrasing of the closed-ended questions raises the likelihood of “yea-saying” by participants. Question 6 of the main questionnaire posed a number of closed-ended questions to survey participants. (CX-58, Exh. D thereto, Question 6). Study respondents were then provided possible answers, in the following order: “YES,” “NO,” or “DON’T KNOW.” (CX-58, Exh. D thereto, Question 6).

Dr. Jacoby testified that these closed-ended questions were leading questions because they were framed only in the affirmative (e.g., “Using Ab Force causes users to lose inches around the waist.”)(Jacoby Tr. 389). He testified that there was substantial scientific literature on “acquiescence response,” also called “yea-saying,” that demonstrated a tendency for people to agree rather than disagree with statements posed to them. (Jacoby Tr. 389 - 390).

Yea-saying has the effect of making it impossible to determine whether responses were provided due to consumer perceptions or because the questions were leading. (Jacoby Tr. 391 - 392). Because of study participants’ tendency to yea-say, Dr. Jacoby explained that participants in Dr. Mazis’ study were likely to have agreed with each statement more often than not as a result of a tendency to yea-say. (Jacoby Tr. 389 - 392).

In order to avoid yea-saying, the questions should have been framed with an emphasis on an affirmative, negative and neutral response equally (e.g., “Would you say that using the Ab Force causes users to lose inches around the waist, does not cause users to lose inches around the waist, did not say that it causes users to lose inches around the waist, or don’t know?”)(Jacoby Tr. 390).

Dr. Jacoby testified that only by giving an equal emphasis to all of the possible response options could the study avoid yea-saying by study participants. (Jacoby Tr. 390 - 391). Because

Dr. Mazis' study only posited leading, affirmatively-worded questions that would have the tendency to result in impermissible yea-saying the results obtained from this question are unreliable.

3. The copy test failed to adequately control for the influence of any preexisting beliefs held by study participants

a. A reliable survey must control for background "noise," including preexisting beliefs.

Courts have widely recognized the need for consumer surveys to adjust for so-called "background noise," i.e., extrinsic factors, pre-existing beliefs, general confusion or other factors, other than the stimulus at issue, that contribute to a survey's results. *See, e.g., Greenpoint Fin. Corp. v. The Sperry & Hutchinson Co., Inc.*, 116 F.Supp.2d 405, 409 (S.D.N.Y.2000). *See also Smith Kline Beecham Consumer Healthcare L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 2001 U.S. Dist. LEXIS 7061 at *38-39 (S.D.N.Y. June 1, 2001).

The amount of background noise can usually only be determined by asking control questions which form a basis for comparison to the key questions. *See Major League Baseball Properties v. Sed Non Olet Denarius, Ltd.*, 817 F. Supp. 1103, 26 U.S.P.Q.2d 1731, 1745 n.13 (S.D.N.Y. 1993), vacated pursuant to settlement, 859 F. Supp. 80 (S.D.N.Y. 1994) (court concluded that surveys were "flawed" because they did not have control questions). Thus, the Federal Judicial Center notes: "It is possible to adjust many survey designs so that causal inferences about the effect of a trademark or an allegedly deceptive commercial become clear and unambiguous. By adding an appropriate control group, the survey expert can test exactly the influence of the stimulus." *Reference Manual on Scientific Evidence*, 250 (Federal Judicial Center 1994).

Consumer surveys are not credible where they fail to properly control for the effect of "noise" such as preconceptions or bias. *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 761-62 (D.N.J.1994) ("It is clear that in a false advertising action survey results must be filtered via an adequate control mechanism...."). Controls are an essential feature of reliable survey evidence because they enable the surveyor to separate the wheat (the effect of the advertisement, alone, on the participant) from the chaff (the effect of "the participant's prior knowledge and/or prior (mis)conceptions"). *See id.* at 749.

Dr. Mazis agrees. When asked whether he typically makes any effort to screen for preexisting beliefs in a study of this type, Dr. Mazis answered that he did:

That's why we use a control group. That's the point of the control group. That's why it was included....The use of the control group is an attempt to essentially remove preexisting beliefs as a possible cause of the results we see.

(Mazis Tr. 157). He also admitted it was possible to screen for preexisting beliefs, even when using a control group. (Mazis Tr. 157). Dr. Jacoby agreed with Dr. Mazis, stating that it is necessary in copy tests to control for preexisting beliefs because the perception of advertising claims may not be based at all on the content of the advertising, but on the preexisting beliefs of the study participant. (Jacoby Tr. 376).

There is no question but that Dr. Mazis believes that there is a strong possibility that survey participants may have had preexisting beliefs about EMS ab products. Indeed, his facial analysis very much depends on the existence of preexisting beliefs on the part of consumers.

Dr. Mazis recognized that there are a lot of sources that could lead to consumer preconceptions about ab belts, and he indicated that all were likely responsible for creating preexisting beliefs in this case. These sources include television advertising, print advertising,

radio advertising, internet advertising, retail packaging, word-of-mouth communication, and news stories. (Mazis, Tr. 153 - 154).

And there is no question that Dr. Mazis believed that these preexisting beliefs would have had a material impact on the reactions of people seeing the test ad for the Ab Force. (Mazis, Tr. 152 - 153). Dr. Mazis admitted that a survey participant's response might also be colored by the fact they purchased an ab belt if, in fact, they had purchased one. (Mazis, Tr. 152).

b. Dr. Mazis admitted his controls were ineffective, but improperly dismissed the failure to control as not "relevant"

Because Dr. Mazis believed consumers would have preexisting beliefs about EMS ab products, he purports to have employed a control ad in his copy test. (CX-105). Surprisingly, however, Dr. Mazis admitted that the control ad was ineffective at controlling for preexisting beliefs. Although the control ad was purportedly "cleansed" of the key elements Dr. Mazis believed would have an impact on consumers, he admitted that the control ad was not effective in controlling preexisting beliefs, as shown by the "relatively high" numbers of participants in the control group who detected the asserted claims. (Mazis, Tr. 108).

Despite this significant admission, Dr. Mazis dismissed any concern about the failure of the control ad to actually control preexisting beliefs by declaring that detecting and controlling for preexisting beliefs was not "relevant" because randomization would ensure that those study participants who held preexisting beliefs would be assigned equally to the test and control groups. (Mazis, Tr. 152-153).

When asked why he did not ask survey participants if they had ever purchased an ab belt or seen the ads for AbTronic, Ab Energizer and Fast Abs those questions, he stated:

"It didn't really—I didn't feel it was relevant, and—because there's a lot of ways people could be influenced, and the assumption is that those people would be randomly

distributed across the two groups, the test and control group. So it didn't seem necessary to me.”

(Mazis, Tr. 152).

Dr. Mazis offered no explanation as to how those participants who had pre-existing beliefs about ab belts would have been sorted evenly by random assignments, but instead offered the conclusory statement that such participants would have been equally divided, thus affecting the results for each group “equally.” (Mazis Tr. 152-153).

Dr. Jacoby testified that this approach failed to control at all for pre-existing beliefs held by consumers. (Jacoby Tr. 376 - 379). Dr. Jacoby testified that reliance on “random assignment” was unfounded, and that there was absolutely no basis for the opinion that random assignment would evenly divide those with preexisting beliefs into the test and control groups. (Jacoby Tr. 378 - 379).

There are significant problems with Dr. Mazis' theory that consumers who held preconceptions would be assigned equally to control and test groups. First, if Dr. Mazis was correct, then random assignment would have ensured that the test and control groups would have been of equal size. (Jacoby Tr. 379 - 380). Instead, there was an uneven split between the test and control group participant numbers (179 participants in the test group, 210 participants in the control group), resulting in an assignment of 46% of the study participants in the test group and 54% in the control group. (Jacoby Tr. 379 - 381).

More significantly, Dr. Mazis proceeded from the false assumption that the impact of preconceptions could be mitigated by random assignment, comparing it to age or gender. (Mazis, Tr. 90). However, as Dr. Jacoby explained, while all participants share age and gender characteristics, it cannot be presumed that all participants would have held preconceptions regarding ab belts. (Jacoby Tr. 378 - 379). Dr. Jacoby explained that it was easily possible that

a larger percentage of test group participants held negative preconceptions about EMS ab products than the control group. (Jacoby Tr. 379). The effect of such a disproportion between the test and control groups would tend to skew the results in favor of detection of the asserted claims. (Jacoby Tr. 378 - 381).

Finally, if Dr. Mazis is correct that the number of respondents (389 total) was sufficiently large to ensure that "random assignment" would "equally divide" those with preexisting beliefs into the test and control groups, then why have control groups at all in surveys? How large a survey population is sufficiently large so that controls are unnecessary? What is the basis for that opinion?

Dr. Mazis' admitted failure to control for preexisting beliefs is even more troubling in light of the fact that he could have done so quite easily. Simple but effective efforts could have been made in this case to control for consumers' preexisting beliefs about ab belts in general and the Ab Force in particular.

Dr. Jacoby testified that questions could have been included in the study to detect consumers' preexisting beliefs about ab belts, and to detect whether particular elements had an effect in causing consumers to perceive certain claims in the Ab Force ads. (Jacoby Tr. 348 – 351; RX-40, ¶ 23). But because Dr. Mazis admittedly made no effort to take such steps, whether there was a numerical disproportion between the test and control groups in terms of participants who held preconceptions, and what impact such disproportional distribution had on the results of this study cannot be known. (Jacoby Tr. 348-351).

c. Nevertheless, Dr. Mazis decided to control for one source of preexisting beliefs while not controlling for others

What is known, however, is that Dr. Mazis made an effort to identify from the results those participants who had seen, read or heard a news story about ab belts within the 30 days

prior to the study, and to exclude those participants who held negative views of ab belts as a result. (Mazis, Tr. 154 - 155).

Specifically, Dr. Mazis asked participants whether, in the 30 days prior to the survey, they had “[s]een, read, or heard a news story about or featuring an abdominal belt device.” (CX-58, Exh. D thereto, Main Questionnaire, Q.7). Survey respondents who answered the question by stating they had seen, read or heard a news story within the past 30 days were asked in Question 8, “[a]s best you can remember, what did the news story or stories say about ab belts?” (Mazis, Tr. 155; CX-58, Exh. D thereto, Main Questionnaire, Q.8). Those who held negative views about ab belts based on those news stories were excluded from the survey. (CX-58, ¶ 41).

Dr. Mazis’ actions in this regard confirm Dr. Jacoby’s concerns about the effectiveness of the study in controlling for preconceptions. If Dr. Mazis is correct that participants with preexisting beliefs would have been distributed evenly between the control and test groups, then there would have been no reason to identify and exclude those who held negative preconceptions based on news stories seen, read or heard about in the 30 days prior to the survey.

Dr. Mazis stated that he was merely being “prudent” in excluding participants with preconceptions formed from such news stories, (Mazis, Tr. 155 – 156; 164), but there is evidence in the record that it was important enough to Dr. Mazis that the study was halted and, on the same day, he revised the main questionnaire to include Questions 7 and 8. (RX-10;RX-11; RX-19; RX-23; RX-24).

Dr. Mazis admitted that even this control had limitations. Dr. Mazis was shown the press release in this very matter issued by the Federal Trade Commission on October 1, 2003, approximately eight weeks before the start of the copy testing. (Mazis, Tr. 158 – 160; RX-83). The press release was entitled “Marketer of Electronic Abdominal Exercise Belt Charged with

Making False Claims.” (RX-83). Dr. Mazis testified he had never seen the press release before the trial. (Mazis, Tr. 159 - 160).

Dr. Mazis was also shown two published news stories. The first was carried by United Press International, dated October 1, 2003, and entitled “FTC: 'Ab Force Belt' Claims are False.” (Mazis, Tr. 160; RX-84). The second was an article published on Consumeraffairs.com, dated October 1, 2003, and entitled “FTC Tightens Noose on Ab Force Belt Promoters.” (Mazis, Tr. 161; RX-85). Dr. Mazis testified he had seen neither news story before trial, and had not taken any steps to determine whether there were any news stories that came out in connection with the Complaint issued against Respondents. (Mazis, Tr. 160 - 161).

Neither Dr. Mazis’ screening questionnaire nor Questions 7 and 8 on the main questionnaire identified any survey respondents who had seen there or any other similar news stories because they were not published within 30 days of the study. (Mazis, Tr. 160). Consequently, participants who sometime prior to 30 days before the study saw, read or heard these news stories about Ab Force, or other news ab belts in general, would have been included in the survey.

If it was prudent for Dr. Mazis to identify and exclude those participants who had preexisting beliefs based on news stories seen, read or heard within 30 days of the study, and Dr. Jacoby testified it was, (Jacoby Tr. 394 - 396), then the same prudence should have been exercised in identifying participants with preexisting beliefs, regardless of the source of those beliefs. (Jacoby Tr. 394 - 397).

Dr. Mazis’ admitted failure to adequately control for preexisting beliefs on the part of study participants raises serious doubts as to his claim that the study results show that a significant number of test group participants perceived misleading claims in the Ab Force

advertising as opposed to perceiving those claims based on previously held conceptions about ab belts generally or the Ab Force in particular. Consequently, the results of the survey are not reliable.

d. The "relatively high" number of control participants who detected misleading claims confirms that the effect of background noise on the results was substantial.

Additional concerns regarding the methodological reliability of the copy test are raised by the fact that the control group had what Dr. Mazis referred to as an unusual, "relatively high" level of detection of misleading claims for well-developed abs and loss of inches. (Mazis, Tr. 107 - 108). Dr. Mazis offered that these high control group numbers were attributable to the fact that "a lot of respondents...knew something about ab belts" and their responses were attributable to "prior beliefs that they walked into the study with." (Mazis, Tr. 108 - 109).

This "relatively high" number of responses from control group participants perceiving the challenged claims serves to highlight the flaws described above in at least two ways. First, it cements the concern that many participants who came into the survey had preexisting beliefs about EMS ab products. That is certainly what Dr. Mazis believes to be the culprit behind these "relatively high" responses for the control group. (Mazis, Tr. 108 - 109). Even if he is correct, this provides additional grounds for finding that the failure to employ an effective control dooms the survey as unreliable.

However, there is significant concern that this "relatively high" number may also be the result of leading questions employed by Dr. Mazis in the study main questionnaire. (Jacoby Tr. 389 - 392). Dr. Jacoby believes that these relatively high numbers may be, at least in part, caused by the leading closed-ended questions used by Dr. Mazis in his survey. If Dr. Jacoby is

correct, grave doubts are raised as to whether answers given to the interviewers accurately reflect consumer perceptions, or are the result of yea-saying.

In either event—whether by leading questions or by preexisting beliefs—even Complaint Counsel's own expert believes that there was a significant level of background noise contributing to the responses. Because he chose not to control for much of this noise, Dr. Mazis' copy test is unreliable and cannot support his opinions with regard to the survey results.

4. Dr. Mazis engaged in a faulty analysis of the results

a. The net difference between the numbers of test and control group participants who perceived misleading claims is the appropriate measure to be examined.

Dr. Mazis' results were reported in total percentages, and then in terms of statistical significance. (CX-58). This is not the relevant focus of inquiry. Rather, the focus should be on the difference between the groups from a point of practical significance. (Jacoby Tr. 398 – 399; RX-40, ¶ 29). Dr. Jacoby testified that the net difference between the groups, and not the statistical significance of the results, are the appropriate numbers to be examined. Courts agree with this approach. *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 27 U.S.P.Q.2d 1758 (7th Cir. 1993) (survey contained a control revealing 7 percent background noise, which was deducted from the raw survey result of 45 percent to result in 38 percent misidentification due to similarities in the marks); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 129 F. Supp. 2d 351, 57 U.S.P.Q.2d 1522 (D.N.J. 2000), *judgment aff'd*, 290 F.3d 578, 62 U.S.P.Q.2d 1757 (3d Cir. 2002) (false advertising survey control group generated 5% noise, which was deducted from 30% gross results to arrive at a 25% of respondents who received the false message from the challenged ad.).

The net difference between the two groups on each response is the appropriate figure to examine in analyzing results. (Jacoby Tr. 399; RX-40, ¶ 29). For example, the net difference between the test group and control group for the open-ended question was 10% (22% for the test group minus 12% for the control group). (RX-40, ¶ 29). This net difference is at the bottom end of results that have been found significant and actionable by the Commission and courts. Such cases include *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir.)(10-15 percent), *cert. denied*, 414 U.S. 1112 (1973); *Benrus Watch Co. v. FTC*, F.2d 313 (8th cir. 1965)(14 percent), *cert. denied*, 384 U.S. 939 (1966); and *Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975)(14 to 33 percent).

b. Dr. Mazis' improper decision to drop 81 study participants substantially affected the results reported.

In Question 2 of the main questionnaire, respondents were asked, “What is the brand name of the product that was advertised in the commercial you just looked at?” (CX-58, Exh. D thereto, Question 2). If the respondent provided a generic product answer, they were then asked Question 2a, which asks, “What is the specific brand name of the product that was just advertised?” (CX-58, Exh. D thereto, Question 2). If the respondent failed to answer “Ab Force,” they were skipped to the end of the questionnaire and their responses excluded from the results. (RX-40, ¶ 56; CX-58, ¶ 41).

Dr. Mazis testified that the failure of 81 participants to fail to recall the name of the product indicated to him that those participants were not paying attention to the ad, which he considered a good reason not to include them in the final result. (Mazis, Tr.147). Consequently he removed from consideration 81 respondents. (Mazis, Tr. 147 – 148).

Dropping respondents who are inattentive is not consistent with accepted principles of consumer perception analysis. (Jacoby Tr. 357). *See, e.g., Paco Sportv. Paco Rabanne*, 86 F.

Supp. 2d 305, 323 n. 17 (S.D.N.Y. 2000)(in determining methodological reliability of two surveys, where one excluded participants who were aware of brand name and one where participants were included if they were not aware of the brand name, court found they had otherwise qualified in the survey universe and should have been included in the results).

As Dr. Jacoby explained, the screening questionnaire is designed to obtain an appropriate universe of participants in the survey. (Jacoby Tr. 357). Study participants who were asked Questions 2 and 2a had already qualified for the study and were an acceptable part of the survey universe. (Jacoby Tr. 357). The fact that participants are inattentive to the brand name of the product does not mean that they are not qualified to form impressions based on viewing the advertising. (Jacoby Tr. 357 - 358). They would not be disqualified from the survey, having passed the screener, nor would they be disqualified from being a potential purchaser of the products at issue. (Jacoby Tr. 358).

The 81 dropped respondents were relevant respondents, and dropping them had the effect, in Dr. Jacoby's words, of "stacking the deck" by artificially raising the purported level of deception found by Dr. Mazis. (Jacoby Tr. 366; RX-40, ¶ 56).

Dr. Jacoby explained that the proper way to treat inattentive respondents who were qualified as part of the relevant universe was to retain them in the denominator of the results, not exclude them. In short, Dr. Jacoby explained that they should be included in the results, (Jacoby Tr. 360), just as Dr. Mazis included respondents who could not be reached to validate their participation after the survey was complete. (CX-58, ¶ 41).

Dr. Jacoby provided the Court with a simple example to explain how exclusion of these purportedly inattentive respondents skewed the results. He addressed a hypothetical in which 100 people were surveyed in a copy test, but 98 of them could not recall the name of the product.

(Jacoby Tr. 360). Of the two that recall the brand name, one extracted a misleading ad claim; the other did not. (Jacoby Tr. 360). Dr. Jacoby testified that under Dr. Mazis' approach, the 98 participants who did not recall the brand name would have been excluded. As a result, and under Dr. Mazis' approach, because one of the two remaining participants did perceive a misleading claim, 50% of the participants would have detected a misleading claim. (Jacoby Tr. 360 - 361). Dr. Jacoby explained that the correct and accepted practice is to include those respondents and report that only 1% detected misleading claims. (Jacoby Tr. 361 - 363).

Dr. Mazis testified that the 81 respondents constituted approximately 15% of the 600 respondents interviewed. (Mazis, Tr. 147 - 148). However, there were 389 respondents who had passed the screener and who were considered part of the relevant universe (with the exception of the 41 respondents dropped for having seen a news story that negatively impacted their view of the Ab Force ads). (CX-58, ¶ 41). As Dr. Jacoby testified, the 81 who were dropped for inattentiveness should have been included in the denominator. (Jacoby Tr. 360). This would have brought the number of respondents who were considered in the results to 470. Consequently, more than 17% of the total number of respondents who had passed the screener were improperly excluded from the survey.

Dr. Jacoby testified that the mathematical effect of not including these 81 respondents resulted in an exaggeration of the difference between the control and test group percentages reported. (Jacoby Tr. 366, 392). Because Dr. Mazis improperly excluded these qualified respondents, the overall difference between the control group and the test group would have been substantially lower than actually reported, so that, for example, the results from the open-ended questions would have been substantially lower than the 10.4% difference reported. (Jacoby Tr. 392).

Excluding these 81 respondents in violation of accepted survey practices had the effect of substantially inflating the results reported by Dr. Mazis. Consequently, those results are unreliable and cannot support Dr. Mazis' opinion that consumers perceived misleading claims for weight loss, loss of inches, well-developed abs and substitute for exercise from the Ab Force commercials.

CONCLUSION

The question in this case is relatively straightforward: have Complaint Counsel proven, by a preponderance of the evidence, that consumers, acting reasonably under the circumstances, would interpret the message of the Ab Force advertisements as making claims of loss of weight, loss of fat, loss of inches and producing six-pack abs? It is clear from the facts surrounding the creation of the television advertising at issue that Mr. Khubani had no intention of making such claims. And neither the "facial analysis" proffered by Dr. Mazis nor the fatally flawed Mall-Intercept Study provide support for Complaint Counsel's case. Consequently, the Complaint should be dismissed.

Respectfully submitted,

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