UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

Commissioners: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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

COMPLAINT COUNSEL'S ANSWERING BRIEF AND CROSS- APPEAL BRIEF

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I. COUNTER STATEMENT OF CASE[1]

A. Introduction

The evidence shows that Telebrands, Inc., TV Savings, Inc., and Ajit Khubani intentionally, falsely, and without substantiation, claimed in nationwide advertising that the Ab Force ab belt causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. Accordingly, Chief Administrative Law Judge Stephen McGuire properly found that the Respondents violated Section 5 of the FTC Act and issued an order prohibiting them from making false or unsubstantiated efficacy or safety claims for any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." Judge McGuire, however, erred when he did not enter the Notice Order, including broader "all claims, all products" coverage and a performance bond for devices as defined in the FTC Act. The ALJ did not err, as the Respondents contend, in concluding that they made the challenged claims, based on a facial analysis of the ads, including the surrounding circumstances, and as corroborated by reliable expert analysis and a methodologically-sound consumer survey. The Commission can conclude that the Respondents made the claims based on the ALJ's facial analysis and the extrinsic evidence, as well as the

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[1] The following abbreviations are used in this brief:

CX:	Complaint Counsel's Exhibit
RX:	Respondents' Exhibit
JX:	Joint Exhibit
Tr.:	Trial Transcript Page
Dep:	Transcript of Deposition
ID:	Initial Decision
IDF:	Initial Decision Finding
CL:	Initial Decision Conclusion of Law
RAB:	Respondents' Appeal Brief

evidence the ALJ did not rely on demonstrating that the Respondents intentionally exploited other ab belt advertising that made deceptive claims and was disseminated prior to and during the Ab Force campaign. The record, therefore, supports the ALJ's conclusion and the broader injunctive relief, including the bond provision, sought by Complaint Counsel.

B. Summary of Argument

The record shows that the Respondents made the challenged claims through depictions and statements in the Ab Force ads. In addition, other evidence regarding the advertising campaign, including evidence of intent and of purposeful, express comparisons to other heavily, and deceptively, advertised ab belts, shows that Respondents made the challenged claims. Expert testimony and a copy test designed to show consumer take-away from Respondents' most frequently aired and successful TV ad, also proves that the Respondents made the challenged claims.

In concluding that the challenged claims were made, Judge McGuire relied on an analysis of the four corners of the campaign's ads, which consisted of radio, print, television, Internet and email ads that were disseminated between December 2001 and April 2002. (IDF 44-51.) He found that the name "Ab Force," which implies it "applies a force to the abdominal muscles and also implies that use of the device will make the abdominal muscles more forceful," played a key role in implying the challenged claims. (ID at 41; IDF 70.) He further found that the visual images, such as visibly pulsating abdominal muscles; use of fit, trim models; and, in two ads, a man doing an exercise crunch, effectively conveyed claims. He found that these images strongly imply that the Ab Force is designed to provide health, weight loss, fitness, or exercise benefits. (ID at 41-42; IDF 161-162.) He further found that the Ab Force campaign

made the challenged claims through oral and written statements that occur in various ads, such as "abs into great shape fast - without exercise," "latest fitness craze," "latest craze," "powerful technology," and "powerful and effective." He found that these phrases "strongly and clearly imply that the Ab Force is...designed to provide health, weight loss, fitness, or exercise benefits." (ID at 42; *see also* IDF 86-102.)

Judge McGuire also looked to what was **not** in the ads – an expressly stated purpose for the Ab Force device. (IDF 65-109.) He found that absence of an identified purpose may be considered in determining the overall net impression of the ads. (ID at 43.)

Judge McGuire then looked to surrounding circumstances, including Respondent Khubani's intent.[2] In finding Khubani intended to make the alleged claims, Judge McGuire looked at how the campaign started and evolved. (ID at 44.) Although he changed the ads over time, Khubani admitted they all conveyed the same message. (IDF 89.) Judge McGuire also noted that the "surrounding circumstances" included the existence of advertising for other ab belts, although he found the impact on consumers insufficiently clear to consider in a facial analysis. (ID at 44.) Nonetheless, he found that ads for three belts - Ab Tronic, Ab Energizer, and Fast Abs - were heavily aired prior to and during the Ab Force campaign and made express and strongly implied claims that consumers would lose weight, fat, and inches; gain well-developed muscles, and achieve results without the need for exercise. (IDF 114-136.)

Next, Judge McGuire reviewed the extrinsic evidence, including expert testimony and the

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[2] Judge McGuire also looked at what he perceived was the timing of the marketing campaign for a second Telebrands' ab belt, Ab Pulse. Complaint Counsel agrees with Respondents that the Ab Pulse campaign began after the Ab Force campaign (RAB 27) and the Court misunderstood the timing of the two campaigns. Complaint Counsel does not object to clarifying the record accordingly.

copy test. Judge McGuire found that Dr. Michael Mazis' expert testimony, provided valuable and well-supported analysis of claims consumers would take away from the four corners of the advertising. (ID at 48.) Dr. Mazis' opinion largely corroborated the Court's own analysis. Judge McGuire also concluded that Dr. Mazis' copy test was credible and reliable, and demonstrated that a "significant number of participants took away the alleged claims." (ID at 57-59.)

Accordingly, he issued an order requiring the Respondents to possess and rely upon competent and reliable scientific evidence for efficacy or safety claims for any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." (Order at IV.)

1. Respondents' Appeal

Respondents appeal Judge McGuire's determination that the Ab Force campaign made the challenged claims.[3] They assert that the case rests completely on what they call a "novel" legal theory of liability - whether other, deceptive advertising can create a definition of the term "ab belt" that influences consumer perception of Respondents' advertising campaign. Judge McGuire's conclusions show this is simply not the case. The evidence shows that the overall net impression of the campaign, which was confirmed by extrinsic evidence, was that the Ab Force caused well-defined abs and loss of weight, inches, and pounds and was an alternative to exercise.

Even if this were not the case, however, the Respondents could be held liable for

[3] Respondents do not appeal his finding that the alleged claims are material, nor do they, based on the arguments in their brief, appeal the finding that the alleged claims are false, misleading, and unsubstantiated.

purposefully preying upon preexisting beliefs. The Commission already has indicated its views on this issue, stating that "respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs." *Stouffer Foods Corp.* 118 F.T.C. 746, 810 n.31 (1994).

Indeed, the record contains extensive evidence that Respondents **were** exploiting preexisiting beliefs created by the other, deceptive ab belt infomercials. Respondents, in their multi-million dollar national advertising campaign, relentlessly compared the Ab Force to **"those fantastic electronic ab belt infomercials on TV."** Although ads within the campaign varied somewhat, each ad made compared the Ab Force to **"those fantastic electronic ab belt infomercials on TV"** or to **"ab belts sold by other companies on infomercials."** (IDF 114.) And, as noted above, Judge McGuire found that the AbTronic, Ab Energizer, and Fast Abs ab belts were heavily advertised through infomercials prior to and during the Ab Force campaign. (IDF 118.) The record shows that, orally and through images and graphics nearly identical to those used in the infomercials for the three other ab belts, Respondents asked consumers to recall the core claims about what ab belts do and to believe the Ab Force was just like them, but cheaper.

The ALJ did **not**, however, base his decision on the fact that the Ab Force ads explicitly referred to infomercials for other ab belts. Although Complaint Counsel does not appeal this aspect of the Initial Decision because it has no effect on Judge McGuire's Order, findings related to Respondents' intentional referencing of the TV infomercials for other ab belts can and should provide an additional basis for finding liability and for the scope of the final order in this case.[4]

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[4] Even though Complaint Counsel did not appeal Judge McGuire's failure to base his Initial Decision, in part, on Respondents' exploitation of deceptive preexisiting beliefs, the Commission has jurisdiction to review the entirety of the record based on the scope of Respondents' appeal.

Thus, we urge the Commission to revise the findings to note that the Ab Force ads explicitly and purposefully invoked the ads and core claims for the other ab belts.

Respondents also challenge Judge McGuire's facial analysis as unsupported and in violation of the First Amendment. Respondents attempt to gloss over the fact that they disseminated what they repeatedly call "test ads" (hoping the Commission will think the 'test ads" never aired or sold ab belts) that made **express** references to exercise, fitness, and "getting in shape." These "test ads," which aired and sold ab belts, are a basis for liability.

In addition, Respondents suggest that the Commission must look at each ad in isolation, ignoring the surrounding circumstances and other factors, such as how the evolution of an ad campaign can demonstrate intent to make a claim. This "isolationist" approach flies in the face of Commission precedent that stresses the overall net impression of the ads. *Stouffer Foods Corp.,* 118 F.T.C. at 799; *Kraft, Inc*., 114 F.T.C. 40, 122 (1991), *aff'd,* 970 F.2d 311 (7th Cir. 1992), *cert. denied,* 507 U.S. 909 (1993); *see American Home Prods. Corp*., 695 F.2d 681, 688 (3d Cir. 1994); *FTC Policy Statement on Deception ("Deception Statement")*, appended to *Cliffdale Assocs*., 103 F.T.C. 174, 179 & n.32 (1984). Commission precedent also exists for looking at the effect of an **advertising campaign,** and not just each ad in isolation, when assessing whether the challenged advertising created or reinforced a false belief, even when some ads within the campaign did not contain all of the elements that created the claim. *See*

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16 C.F.R. § 3.54. *Trans Union Corp.* (D-9255), 2000 FTC LEXIS 23, *8-9 ("The Commission reviews the decision of the ALJ under a de novo standard. FTC Rules of Practice, Rule 3.54(a)." Respondents appealed "(1) so much of the Initial Decision [sic] concludes that advertising for the Ab Force conveyed claims that the use of the Ab Force by consumers causes loss of weight, inches, and fat; causes well-defined abs; and is an effective alternative to exercise; and (2) so much of the findings of fact and conclusions of law as find or conclude that the advertising for the Ab Force was false or misleading."

Novartis Corp., 127 F.T.C. 580, 702-07 (1999), *aff'd,* 223 F.3d 783 (D.C. Cir. 2000).

Respondents also challenge Judge McGuire's reliance, as corroboration to his own facial analysis, on Dr. Mazis' expert opinion, notwithstanding established Commission precedent validating the use of such extrinsic evidence. They failed to introduce any contradictory expert analysis of their campaign.[5] Rather, they attempt to dismiss the probative value of Dr. Mazis' testimony by characterizing it as "say so" testimony. As the Court noted, however, Dr. Mazis' testimony on the direct effects consumers would take away from the four corners of the ads was valuable because it was based on his knowledge and experience of consumer perceptions, not his personal opinion. (ID at 48.)

Dr. Mazis' testimony regarding the effects of the ads for other ab belts, which he described as "indirect effects," also was valuable and Judge McGuire erred when he did not give any weight to this testimony. He made this error because be believed there was no evidence consumers had seen those ads. But Respondents, experts in direct response marketing, based their ad campaign on a belief that the ads for the other ab belts had been seen by many consumers, as indicated by every TV ad purposefully saying: **"I'm sure you've seen those fantastic electronic ab belt infomercials on TV."**

Respondents further argue that the flaws in Dr. Mazis' copy test make it unreliable because it did not identify whether consumers had preexisting beliefs from the other ab belt infomercials. Their argument ignores the fact that determining the impact of the other

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[5] Respondents' expert, Dr. Jacoby, did not provide any analysis of his own to support Respondents' assertion it made no claims other than "compare and save." Dr. Jacoby merely opined that the ads relied on a "bandwagon effect" - *i.e.*, an attempt to create a buzz so **some** consumers would buy the product without knowing its purpose. (Tr. at 373-75.) Such testimony does not contradict Dr. Mazis' testimony.

infomercials was not the purpose of the copy test. The purpose of the copy test was to assess consumer takeaway from the Ab Force ad. Thus, failing to control specifically for preexisting beliefs is not fatal, especially if, as Respondents argue, there was no proof of preexisting beliefs. Moreover, if the Commission finds, as Complaint Counsel argues, that Respondents intentionally used their advertising to exploit those beliefs, it is neither necessary nor appropriate to control for preexisting beliefs.

Further, contrary to Respondents' assertions other so-called flaws in the copy test do not make it unreliable. The ALJ concluded the testing procedures Dr. Mazis followed were methodologically sound and consistent with recognized practices and reasonably reliable and probative. The results clearly demonstrate that a significant number of participants took away the alleged claims from the Ab Force ad.

2. Complaint Counsel's Cross-appeal

Complaint Counsel cross-appeal with respect to the scope of Judge McGuire's order, which requires that Respondents possess and rely on competent and reliable scientific evidence for efficacy or safety claims for any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." Given the seriousness and deliberateness of Respondents' violations, their ready transferability to other claims, and Respondents' history of giving the Commission reason to believe they have violated the law, the order should be broadened to cover misrepresentations of any efficacy or safety claims for **any** product, service, or program.

In addition, Judge McGuire did not include a bond in his order, stating that a bond had never been ordered in a Part III matter. Part V of the Notice Order would have required

Respondent Khubani to secure a $1,000,000 performance bond before marketing or selling any device, as that term is defined in the FTC Act. Complaint counsel appeal the denial of a bond. The Commission should exercise its discretion to order appropriate fencing-in relief and impose a bond requirement because of the serious nature of the violations and because Respondent Khubani has repeatedly given the Commission reason to believe he violated the FTC Act, including through previously marketing a device (a hearing enhancement aid) with allegedly deceptive claims.

3. Amicus Brief

The National Association of Chain Drug Stores ("NACDS") filed an amicus brief in this matter asking the Commission to establish a "clear standard" (1) as to when extrinsic evidence is needed to establish an implied claim; and (2) that sponsors of "compare and save" advertising are not liable for deceptive claims made in the ads for product to which they are comparing themselves. The Commission already, through its case law, has established when it can rely on its facial analysis without the need for extrinsic evidence. Because the Commission can conclude with confidence that the Ab Force ads communicated the alleged claims, based on the ads and the surrounding circumstances, there is no need to discuss, in the abstract, a hypothetical situation.

Further, a safe harbor for "compare and save" ads is neither needed nor appropriate. It is well established that anyone who participates in creating deceptive claims or who repeats them is potentially liable. Historically, the Commission considers the claims in ads and their surrounding circumstances on a case-by-case basis and determines whether the seller should be held liable. A safe harbor that would allow sellers to avoid all responsibility for the efficacy

claims of the products they represent as the same as more well-known brands would encourage irresponsible behavior. Instead, the Commission can and does exercise its prosecutorial discretion as appropriate, and should not impose any limitations on itself.

C. Questions Presented on Appeal

1. Was Judge McGuire correct in his conclusion that the challenged ads conveyed the alleged claims to reasonable consumers, based on a facial analysis, including the surrounding circumstances, and extrinsic evidence?

2. Did Judge McGuire err when he failed to based his conclusion that the alleged claims were made on Respondents' intentional references to the other ab belts seen in infomercials?

3. Did Judge McGuire err in not issuing an "all products, all claims" order or a bond?

II. STATEMENT OF RELEVANT FACTS

A. Respondents Sold the Ab Force Through a "Compare and Save" Strategy, Explicitly Stating That it Is an Ab Belt and Implying That it Could Do the Same Things That Ab Belts Do at a Lower Price

Respondents assert that they used a "compare and save" strategy with other ab belts infomercials as a point of reference to the consumer, and otherwise not offering any purpose for the product. (RAB at 6-7). The very nature of "compare and save advertising," however, is to offer a product that can perform the **core functions** of the "reference" product but at a cheaper price. Thus, the Ab Force ads were offering a cheaper alternative to other ab belts. The ALJ found that the Ab Force ads did not explicitly offer a purpose for the Ab Force and therefore consumers were forced to glean the purpose from what the ads implied. (ID at 45.) He found that the ads, in and of themselves, offered a definition of what an ab belt is and does, by means

of the depictions in the ads of slim models and pulsating abdominal muscles, by the very name "Ab Force," and by certain statements. In addition, the evidence shows that the ads offered a definition of what an ab belt is by referring specifically to other ab belts advertised on TV infomercials.

1. The Purpose of an Ab Belt as Described in the Ab Force Ads[6]

Although Respondents argue that the Ab Force ads offered no purpose for Ab Force itself, (RAB at 7-8), they do set forth the purpose of an ab belt: loss of weight, inches or fat; well-defined abdominal muscles; and an alternative to regular exercise. For example, the first Ab Force radio ad (CX 1-H), states:

> Have you seen those fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs into great shape fast—without exercise! They're the latest fitness craze to sweep the country. But, they're expensive, selling for up to 120 dollars each! But what if you could get a high quality electronic ab belt for just 10 dollars? That's right, just 10 dollars! . . . . The Ab Force is just as powerful and effective as the expensive ab belts on TV—designed to send just the right amount of electronic stimulation to your abdominal area. . . . Don't miss out. Get the amazing electronic Ab [F]orce belt—the latest fitness craze for just $10.

Respondents argue that the statement "They're amazing...promising to get our abs into great shape fast -- without exercise!" simply refers to "ads for <u>other</u> ab belts."[7] (RAB at 8.) They are apparently asking the Commission to believe that consumers would think the statement has no relevance to the Ab Force, when the ad goes on to say the Ab Force "is just as powerful

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[6] The ads are discussed in the order in which Respondents discussed them in their appeal brief. (RAB at 8-10). Respondents discuss seven of the ten ads: the two radio ads, four TV ads, and the print ad. They do not discuss the Internet ad or the two email ads. (RAB at 8-10.)

[7] Mr. Khubani acknowledges that he was thinking of the AbTronic, Fast Abs and AB Energizer ab belts, among others, when he wrote this statement. (Tr. at 273.) He also acknowledged that the AbTronic sold for $120 and was the $120 ab belt to which he was referring.

and effective as the expensive ab belts on TV." The ad also describes ab belts as "the latest fitness craze to sweep the country." Presumably Respondents would ask the Commission to believe that the ad says that other ab belts help with fitness, but the Ab Force does not. Although the second radio ad omitted the reference to "promising to get our abs into great shape fast—without exercise" and the "latest fitness craze," it continued the emphasis on those fantastic and amazing "electronic ab belt infomercials on TV," which were described as the "latest craze." It noted that the Ab Force "uses the same powerful technology as those expensive Ab Belts." (RX 49.)

The print ad contained a depiction of a thin and well-muscled male torso wearing the Ab Force, and began by stating, "I'm sure you've seen those fantastic ab belt infomercials on TV." It noted that the Ab Force "uses the same powerful technology as those Ab Belts sold by other companies on infomercials" which were "selling for up to $120 each." It continued the emphasis on "compare and save," asking "why would you want to buy a more expensive ab belt from the competition when the Ab Force is as low as just $10?" The obvious implication is that the Ab Force performs the same functions as those expensive ab belts, an implication reinforced in the conclusion, which stated, "Now you can enjoy a great quality Ab Belt AND save a lot of money." (CX 1-G.).

All the Ab Force television ads (discussed in RAB at 9), featured two female models and one male model, who were thin with well-defined abdominal muscles. (IDF 74, 75.) They were wearing Ab Force ab belts on otherwise bare abdomens, and there are over a dozen depictions of them experiencing abdominal muscle contractions. (IDF 76.) The ads also include close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles.

(IDF 83.) In addition, the two longer (120 second) TV ads include a close-up image of a bare-chested, thin, well-muscled man performing a crunch on an exercise bench. (IDF 83.)

The first 60-second television commercial for the Ab Force contained the following statements:

> 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. Well, that's why we developed the Ab Force that you can buy right now for just $10. . . . The Ab Force is just as powerful and effective as those expensive ab belts sold by others - - - - designed to send just the right amount of electronic stimulation to your abdominal area! . . .Don't miss out on this opportunity to join the latest fitness craze." (JX 2; Tr. at 51-52.)

The first 120-second TV ad continued the theme of comparing the Ab Force to the "latest fitness craze," those "fantastic electronic ab belt infomercials on TV," and noted that the Ab Force was "just as powerful and effective as those ab belts sold by other companies on infomercials." (JX 3; Tr. at 54-56.)

Both the second 60-second and 120-second television commercials for the Ab Force continued this theme. They compared the Ab Force to those fantastic and amazing "electronic ab belt infomercials on TV," noting that it used "the same powerful technology as those ab belts sold by other companies on infomercials" but was $20 instead of $120. (JX 4, JX 5; Tr. at 55-59.)

Respondents also disseminated Internet advertising and e-mail advertising (JX 1, ¶ 33), not discussed in their appeal brief. These ads also compared the Ab Force to ab belts sold by others through infomercials, again implying that it was the same but cheaper. The Internet ad contained the following statements:

> I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing! They're the latest craze to sweep the country and everyone wants one. The

> thing is they're expensive selling for up to $120 each. That's why we developed the Ab Force that you can buy right now for just $20. (RX 52.)

One Ab Force email advertisement contained the following statements:

> Don't be Fooled by the Price! The Ab Force uses the same powerful technology as those Ab Belts sold by other companies on infomercials. The Ab Force is truly a high quality product. (RX 50.)

A second Ab Force email advertisement contained the following statements:

> They're Amazing! I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing! They're the latest craze to sweep the country and everyone wants one. The thing is they're expensive selling for up to $120 each. That's why we developed the Ab Force that you can buy right now for just $20.

Next to these statements is an image of a well-muscled man wearing an Ab Force belt. (RX 51.)

Respondents sold 747,812 units of the Ab Force, and consumers placed a total of 330,510 orders for the Ab Force. (JX 1 ¶ 25-26.) Although the first 60 second and the first 120 second TV ad are denominated "test" ads, each of the ads was disseminated and generated consumer orders for the Ab Force. (JX 1 ¶ 25-26.)

2. The Ab Force Was Compared to Other Ab Belts, Not to EMS Devices

Respondents admit that they marketed the Ab Force using a "compare and save" strategy, but they assert they were comparing the Ab Force to "EMS ab products."[8] In fact, however, Respondents' marketing strategy was to identify the Ab Force explicitly as an **"ab belt"** and compare it to the ab belts then being marketed on TV infomercials. Neither the phrase "electrical muscle stimulation" nor the phrase "EMS" **ever** appears in **any** Ab Force ad. (IDF 109.) In contrast, the phrase "ab belt" appears numerous times in every Ab Force ad, and every Ab Force ad contains a reference to television infomercials for ab belts. In short, the comparison

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[8] RAB at 5, 6, 14 (2 times), 15, 30, 31-36, 37 (2 times), 41 (2 times), 54, 56, 57, 59 (3 times).

in the Ab Force ads was with **ab belts**, and specifically with ab belts currently being advertised in TV infomercials.

Respondent Khubani stated that, in “compare and save” advertising, there must be a point of reference for comparison; otherwise the consumer doesn’t know “what you're comparing to.” (Tr. at 487). In the four Ab Force television ads (JX 2-5; Tr. 51-52, 54-59), the two radio ads (CX 1-H and RX 49), the single print ad (CX 1-G), the single Internet ad (RX 52), and one of the email ads (RX 51), that point of reference was to those **“fantastic electronic Ab Belt infomercials on TV.”** The second Ab Force email ad referred to “**Ab belts** sold by other companies on **infomercials**.” (RX 50).

3. The Ads Compared the Ab Force to Popular Ab Belts Advertised in TV Infomercials and Implied it Served the Same Purpose as Those Ab Belts

The Ab Force ads also set forth the purpose of an ab belt indirectly. Respondents have stated that Mr. Khubani did not state a purpose for the Ab Force in the ads because “he simply didn’t need to.” (RAB at 7.) As Mr. Khubani himself stated, however, in “compare and save” advertising, there must be a point of reference for comparison; otherwise the consumer doesn’t know “what you're comparing to.” (Tr. at 487.) The comparison in the Ab Force ads was to **“those fantastic electronic ab belt infomercials on TV.”** All the record evidence indicates that ab belts were advertised on TV infomercials as devices that could substitute for regular exercise and help consumers gain well-developed abs, lose inches, weight, or pounds. (IDF 120-124, 142-146.) Respondents chose to compare the Ab Force to these ab belts, and, although they did not explicitly offer a purpose for the Ab Force, they implicitly said it could do what the others did. Moreover, simply by using the term “ab belt,” Respondents were implicitly claiming that

the Ab Force could do what other ab belts were advertised to do.

The AbTronic, the Fast Abs, and the AB Energizer were the ab belts that were most heavily advertised by infomercials in the relevant period. (IDF 134.) Respondents introduced some evidence as to other ab belts ads, but most of the evidence they adduced simply reinforces the conclusion that the core claims for a product known as an ab belt were that it could substitute for regular exercise, help consumers gain well-developed abs, and lose inches, weight, or pounds.

a. AbTronic, AB Energizer, and Fast Abs Belts

Every one of the four Ab Force TV ads opened with the statement, "I'm sure you've seen those fantastic electronic ab belt infomercials on TV," as did the Internet ad and one of the email ads. (JX 2-5; Tr. at 51, 54, 56, 57; RX 52, RX 51.) Respondent Khubani wrote the script for the Ab Force radio ads, print ad, and TV ads (IDF 54, 59), and he was primarily responsible for creation and development of the text for the Internet and email ads. (JX 1 ¶ 11.) In each case, he acknowledged he was attempting to create a "compare and save" advertisement and to establish a point of reference. (Tr. at 490.) The AbTronic, Fast Abs and AB Energizer infomercials were among the ab belt infomercials to which he was referring. (Tr. at 273-274.) The ALJ found that Khubani is a sophisticated and experienced marketer. (ID at 65.) Mr. Khubani's admission, in the Ab Force ads, that many people seeing the ads would have seen TV infomercials for ab belts ("I'm sure you've seen . . . .") is strong evidence, given his sophistication and experience, that a significant number of the people who saw the Ab Force ads had in fact seen TV infomercials for

ab belts.[9]

As noted, infomercials for the AbTronic, AB Energizer, and Fast Abs ab belts were aired shortly before and during much of the Ab Force campaign. (IDF 118.) Ads for these three ab belts made express and strongly implied claims that consumers using them would lose weight, fat, and inches; gain well-defined abs; and achieve these results without exercise. (IDF 120.) Moreover, these three ab belts were substantially similar to the Ab Force in appearance (IDF 119), and their infomercials were similar to the Ab Force ads in that they "contained extensive footage of thin male and female models with well-defined abs wearing the belts over their abdominal areas." (IDF 121.) In addition to the direct verbal comparisons in the Ab Force ads, the fact that the Ab Force ab belt looked like the AbTronic, AB Energizer, and Fast Abs ab belts and the fact that the Ab Force TV ads looked like the TV infomercials for these other ab belts is another factor, that would cause consumers who had seen Ab Force ads and one of the other infomercials to think the ab belts were comparable. (IDF 178, citing testimony of Dr. Mazis.)

Mr. Khubani's admission that many people who saw the Ab Force ads had also seen infomercials for other ab belts is reinforced by data from the *JW Greensheet.* The *JW Greensheet* is a market report that compiles industry data for the direct response TV industry and tabulates the top-ranked direct response commercials (both infomercials and short spots) on a weekly basis. (IDF 125, 127; Tr. at 248, 525.) These rankings and data (based on confidential media budgets and monitoring of national cable) are relied on in the industry. *Response*

[9] In fact, nine of the ten ads (the radio, TV, print, and Internet ads and one of the two email ads) also referenced ab belts that sell for up to $120; Khubani admitted the AbTronic sold for $120 and was the ab belt to which he was referring. (Tr. at 276, 539.) This is evidence that Khubani believed many viewers would have seen the AbTronic infomercials in particular.

Magazine, a publication targeted towards the direct response television industry, reprints the *JW Greensheet* rankings. (Tr. at 245, 249; JX 6 ¶ 1; CX 107 (Liantonio, Dep. at 23-24).) Respondent Telebrands has subscribed to the *JW Greensheet* for about 12 years. (IDF 126.)

AbTronic, AB Energizer, and Fast Abs were the only ab belts that appeared in the *JW Greensheet* Top 50 infomercial rankings between September 2001 and mid-April 2002. (IDF 134.) The AbTronic appeared 24 times in its Top 50 infomercial rankings between September 3, 2001 and March 4, 2002; the AB Energizer appeared 19 times between October 15, 2001 and March 4, 2002; and Fast Abs appeared 15 times between November 19, 2001 and March 4, 2002. (IDF 129, 130, 132.) The *JW Greensheet* indicates that an infomercial for one or more of these three ab belts was in the "top 50" infomercials every week for a 22 week period from September 15, 2001 through March 2, 2002. For ten of these weeks, one of these products was the "#1" infomercial, and for seven of these weeks, one of them was "#2." (CX 62; CX 77-95; CX 126.) From late November 2001 through mid-February 2002, the *J.W. Greensheets* consistently ranked AbTronic, AB Energizer, and Fast Abs among the top fifteen infomercials appearing on national cable and selected broadcast television markets. For the week ending January 12, 2002, they were ranked numbers 1, 2, and 3. (CX 88.)[10]

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[10] Television advertising for the direct TV industry is also monitored by Infomercial Monitoring Service, Inc. ("IMS"). (CX 126; Tr. at 248-49; JX6; CX 107 (Liantonio, Dep. at 24).) IMS detects airings of infomercials and spots and ranks them by frequency; it also publishes reports on what advertisements are widely shown. (CX 126; JX6; CX 107 (Liantonio, Dep. at 24).) The frequency of the infomercials for these three ab belts is corroborated by figures provided by IMS. As of February 22, 2002, IMS had detected 2,082 airings of the AbTronic infomercials, 1,693 airings of the AB Energizer infomercials, and 1,272 airings of the Fast Abs infomercials. (CX 126.) From the week ending January 4, 2002, through the week ending February 8, 2002, IMS ranked one or more of these infomercials in the top ten every week. (CX 126.)

Moreover, two of these three ab belts - the AB Energizer and Fast Abs - were also advertised by short spots. The AB Energizer short spot appeared 19 times in the *JW Greensheet* Top 40 direct response spots (based on media budgets and national cable airings) between October 15, 2001 and March 4, 2002, and the Fast Abs short spot appeared 15 times in the Top 40 between November 19, 2001 and March 4, 2002.

The frequency of the infomercials and short spot TV ads for these three ab belts is corroborated by information provided by persons associated with companies that marketed or distributed them. These sources indicate that the AB Energizer infomercials or short "spot" ads ran at various times of the day, locally and nationally, from September 2001 through April 2002, and that the AB Energizer infomercial was aired over 20,000 times during that period. (JX 6 ¶ 13.) They also indicate that Fast Abs infomercials or spots ran at various times of the day, locally and nationally, from November 8, 2001 through February 24, 2002. The Fast Abs infomercial was aired 8,227 times during that period. (JX 6 ¶ 10.) From such extensive dissemination, it can be inferred that many consumers saw the ads.

The sales information for these products also indicates that the ads were widely seen. A total of 600,000 AbTronic units, 622,131 AB Energizer units, and more than one million Fast Abs units were shipped to **direct response** customers - *i.e.*, to customers who saw and responded to ads for these products. (JX 11 ¶ 4; JX 6 ¶ 15; JX 6 ¶ 11.) In addition, at least 45,000 AbTronic units and 650,000 Fast Abs units were sold in retail stores. (JX 11, ¶ ¶ 3 and 5, JX 6 ¶ 11.)

In short, the record evidence indicates that, before and during the Ab Force campaign, infomercials for AbTronic, AB Energizer, and Fast Abs were among the most frequently-aired

infomercials on television. (IDF 134.) The advertising for the AbTronic, AB Energizer, and Fast Abs ab belts made express and strongly implied claims that consumers using them would lose weight, fat, and inches; gain well-developed abdominal muscles; and achieve all of this without the need for strenuous exercise. (IDF 120-124.) These three ab belts are all substantially similar in appearance to the Ab Force, and are comprised of components substantially similar to those used by the Ab Force. (IDF 118-119.) The television advertising for them was also similar to the Ab Force ads: it contained extensive footage of well-sculpted male and female models wearing the belts over their abdominal areas. (IDF 121.) When Mr. Khubani drafted ads that said, "I'm sure you've seen those fantastic ab belt infomercials on TV," he was correct, and he was reminding consumers of the core claims for ab belts, devices that would help them lose weight, fat, and inches; gain well-developed abdominal muscles; and achieve all of this without the need for strenuous exercise.

b. Advertising for Other Ab Belts Contains Similar "Ab Belt" Claims

Respondents entered into evidence five ads for other ab belts that purportedly were offered for sale during the relevant period of time: (1) Smart Toner, (RX 75); (2) GymFitness, (RX 76); (3) ElectroGym, (RX 77); (4) Slim Tron, (RX 78); and (5) Slendertone Flex. (RX 79.)[11] There is no evidence that three of these - Smart Toner, (RX 75), ElectroGym, (RX 77), and Slendertone Flex, (RX 79) - were advertised by infomercials, the media method the Ab

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[11] Respondents also introduced ads for three products - IGI'A Electrosage (RX 72), Mini Wireless Massage System, (RX 73), and Accusage, (RX 74) - that are not ab belts. (IDF 139, 140, 141.) Obviously ads for products that are not ab belts cannot be used to show what claims were being made for ab belts, the term consistently used in Ab Force ads to describe the Ab Force and the products to which it was being compared.

Force ads reference. The ads submitted for these products were short spots. (IDF 142, 144, 146.) Morever, there is no evidence that these ab belts were as heavily advertised, whether by infomercial or otherwise, at the time the Ab Force was advertised as were the AbTronic, AB Energizer, and Fast Abs. (*See* IDF 142-146.)

Nevertheless, ads for each of these five ab belts contained claims similar to those in the advertisements for the AbTronic, AB Energizer and Fast Abs ab belts. To the extent that advertisements for these other ab belts were seen by consumers, they too reinforce claims that an ab belt would cause well-developed abs and loss of inches, weight, and fat; and was an effective alternative to exercise. The television spot for the Smart Toner calls it "the fast, easy, sexy way to have the slim, sexy body you've always wanted." The commercial further claims, "In fact, we'll guarantee you'll lose two inches from your waist in just two weeks, or your money back." Testimonials in the spot claim loss of 15 pounds, "a big reduction in body fat," and "over two inches lost in the waistline." (IDF 142.) It further states; "With sit-ups, you struggle to pull up most of your body weight. It takes forever. But Smart Toner uses electromagnetic impulses to massage and contract your muscles 100 times per minute. It does all the work for you." (RX 75.)

GymFitness ads also contain numerous claims that the product is an effective substitute for strenuous workouts at the gym. For example:

> Sure, you can go to the beach and see men and women with beautifully conditioned bodies, with the six-pack abs and the sculpted muscles that make other people turn their heads and notice. But how many people can go through that kind of rigorous training? Most of us can't spend hours a day working out. Well, Gym Fitness lets us keep our muscles healthy and well-conditioned even when we can't get to the gym. Simply use it for 10 minutes two or three times a day. You'll feel the difference. (RX 76)

The ad promises that GymFitness will "condition your muscles without working out" and will

"work your abs and condition your muscles, toning them perfectly." It repeatedly states it is for use "when you can't get to the gym." (IDF 143.)

The ad provided by Respondents for the Electrogym ab belt was a short spot, but the Electrogym appeared briefly in an informercial for the IGIA Electrosage, where it was offered as a free gift with the purchase of the Electrosage. (IDF 144.) That infomercial stated that the Electrogym offers "a great workout." (IDF 144.)

The videotape of the Slim Tron spot that Respondents provided starts near the end of the commercial, but the fragment that is available contains the following promise "If you don't lose at least three inches off your waist, send it back for a full refund." (RX 78.) It also says the Slim Tron will "tone your muscles and [you will] get a great looking body." (IDF 145.)

Respondents pointed to one other ab belt ---Slendertone Flex. The recorded Slendertone Flex television spot produced by the Respondents bears the date of November 10, 2003. (Tr. at 447; RX 79.) The ALJ found that TV spots for Slendertone Flex have "very recently appeared." (IDF 146.) Mr. Khubani testified that he saw the Slendertone Flex ab belt advertised on QVC in Fall, 2001, but there is no extrinsic evidence to corroborate or confirm this statement. (Tr. 447). Indeed, there is absolutely no evidence that Slendertone Flex was advertised in infomercials before or during the time period in which Ab Force was advertised and sold.

Mr. Khubani stated that the recent Slendertone Flex television spot was "very similar" to the presentation for Slendertone Flex he saw on QVC. (Tr. 447). The television spot for Slendertone Flex states "You mean I don't have to do sit-ups anymore?" and "9 in 10 users reported firmer, tighter abs." (IDF 146.) If Slendertone Flex is relevant at all to the issues in this proceeding, it is further evidence that all of the ab belt devices identified by the respondents

contained some core claims similar to those in the advertisements for the AbTronic, AB Energizer and Fast Abs ab belts and may thus have contributed to consumers' understanding of the basic properties of an ab belt.

B. Khubani Intended to Convey that the Ab Force Would Do the Same Things That Infomercials and Other Ads for Other Popular Ab Belts Said Ab Belts Would Do

Mr. Khubani intended to make consumers believe that the Ab Force would cause the same results as claimed in the advertisements for the AbTronic, AB Energizer and Fast Abs.

> Given the commercial success of the 'infomercial ab belts' and despite knowing that he did not have substantiation to expressly make the type of health, weight loss, fitness and exercise claims contained in those ads, Khubani nevertheless created commercials for the Ab Force which relied on the name, visual images, and statements to implicitly make those very same false and misleading claims. The absence of an expressly identified purpose of using the Ab Force required consumers to rely on these implied claims. Thus, Khubani's intent seems clear. While Khubani may have removed the express health, weight loss, fitness, and exercise claims, perhaps in an effort to avoid liability, he clearly intended to make those same claims by implication. (ID at 45-46.)

The advertisements for the AbTronic, AB Energizer and Fast Abs ab belts claimed that consumers using these devices "would lose weight, fat, and inches; gain well-defined abdominal muscles; and achieve such results without the need for diet or exercise." (IDF 120.) The Ab Force looked like these three popular ab belts, and it was made of similar components. (IDF 119.) Mr. Khubani testified that he chose the name Ab Force because it was intended to work on the abdominal area. (IDF 69.) The ALJ found that the name Ab Force "implies the device applies a force to the abdominal muscles and also implies that use of the device will make the abdominal muscles more forceful." (IDF 70.)

Respondents argue that "the ALJ's findings and the testimony offered into the record

reflect that Mr. Khubani took affirmative steps" to make sure the asserted claims were not made in the advertising. (RAB at 8). This assertion misstates both the record evidence and the ALJ's findings. In fact, the ALJ stated, "the evidence regarding Respondents' intent as well as the fact that Khubani is a sophisticated and experienced marketer establish that the claims were made deliberately and purposefully." (ID at 64-65). Mr. Khubani knew ab belts were a hot category, (IDF 63), and he wanted a piece of the action.

Mr. Khubani chose to have the Ab Force made by the same manufacturer that manufactured the AbTronic, and it had the same power output. (IDF 38-39.) Mr. Khubani wanted the Ab Force to have the same output "because he wanted to make sure his advertisements were truthful in saying that the Ab Force used the same technology as ab belts which sold 'for as much as $120.' The Ab Tronic sold for $120 and was the ab belt to which Khubani was referring." (IDF 40.)

Additionally, Mr. Khubani chose to use the images in the Ab Force ads that were like those in the other ab belt infomercials, and this too shows that Mr. Khubani intended to make the challenged claims.

Finally, Respondents argue that the asserted claims were found only in the test ads that ran for a very brief period time. (RAB at 10). This argument does not relieve Respondents of liability. They admit that the ads ran with virtually-express deceptive claims. Notably, however, although the ads were slightly different throughout the campaign, the ALJ found, based on Mr. Khubani's testimony, that he intended them all to say the same thing and that his intention did not change from one draft to the other. The ALJ noted:

> Khubani was asked, "there's a reference in the radio ad to no exercise, and the subsequent radio ad did not have that reference. Do you recall the change?" to which he

> answered, "[y]es." (Tr. at 498.) The next question asked "[d]id you intend to change the meaning from one ad to the next?" to which Khubani answered, "[n]o, I didn't." (IDF 88.)

Not only did Mr. Khubani intend all the ads in the Ab Force campaign to convey the same message, he believed the ads *did* convey the message. "Khubani testified that 'all these scripts were the same message' and that the 'message was . . . still the same' even after changes were made to the scripts." (IDF 67.) Mr. Khubani repeatedly testified that he did not believe that the slight word changes in subsequent advertisements altered the message. For example, "[t]he test ads refer to the 'latest fitness craze' while the rollout ads refer to the 'latest craze.' However, Khubani testified that the message was still the same." (IDF 89.) The language "abs into great shape fast without exercise" was eliminated from the later radio ad and not included in any of the other ads, but Mr. Khubani "stated that he felt the print ad and television commercials had the same messages as the radio ad." (IDF 87.)

ARGUMENT

III. THE ALJ'S FACIAL ANALYSIS OF THE ADS IS CORRECT AND SHOULD BE AFFIRMED

"The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself." *Kraft, Inc.*, 114 F.T.C. at 121. When the language of, or depictions in, an ad are clear enough to permit the Commission to conclude with confidence that a claim, whether express or implied, is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. *Id.*, at 120. If, after examining all the elements of an ad and the interaction between them, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis, alone, will permit the Commission to conclude

that the ad contains the claim. *Stouffer,*118 F.T.C. at 798 (citing *Kraft*, 114 F.T.C. at 121 and *Thompson Medical Co.,* 104 F.T.C. 648 at 789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)). Further, the Commission is able to conclude that an ad contains an implied claim, without reviewing extrinsic evidence, by evaluating the content of the ad and the circumstances surrounding it. *Kraft*, 114 F.T.C. at 121 (citing *Thompson Medical*, 104 F.T.C. at 789). This technique is primarily useful in evaluating ads with language or depictions clear enough, after examining all of the elements, that they convey the implied claim to reasonable consumers. *Id.* In determining whether an advertisement conveys a claim, the Commission looks to the overall, net impression created by the advertisement, through the interaction of different elements in the ad, rather than focusing on the individual elements in isolation. *Stouffer*, 118 F.T.C. at 799; *Kraft,* 114 F.T.C. at 122; *see American Home Prods. Corp*, *v. FTC*, 695 F.2d at 688 (3d Cir. 1982); Deception Statement, 103 F.T.C. at 179 & n.32. A product name may play a role implying a claim. *Jacob Siegel v. FTC*, 327 U.S. 608, 609 (1946); *Thompson Medical*, 104 F.T.C. at 793. Visual images also effectively imply a claim. *See, e.g., Kraft*, 114 F.T.C. at 322; *Thompson Medical*, 104 F.T.C. at 793 and 811-12.

In this case, the ALJ determined, after examining all the elements of the Ab Force ads and the interaction between them, that they made implied claims.

> The overall net impression of the product name, visual images, and statements in the four corners of the challenged Ab Force advertisements is conspicuous, self-evident, and reasonably clear so that the Court may conclude with confidence that the advertisements convey the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. This conclusion is based solely upon an assessment of the interaction of all of the constituent elements, or the net impression created by the advertisements, without reference to ads for other ab belts or the need for extrinsic evidence. (ID at 43.)

As we argue below, we believe the ALJ also should have considered the "surrounding

circumstances" pointed to in the ads themselves – **"those fantastic electronic ab belt infomercials on TV."**

A. The ALJ Properly Found That the Depictions and Statements in the Ten Different Ads Make the Challenged Claims

The ALJ found that the Ab Force ads make the challenged claims based on several elements in the ads themselves: the name Ab Force, the visual images, and some statements in the ads. (ID at 43.) Respondents argue that the ALJ's finding must be set aside because he did not analyze each ad separately.[12] In fact, however, although the ALJ's discussion focused primarily on the television ads, one or more of the factors he discussed can be found in each of the ads.

The first factor that the ALJ identified - the name Ab Force - is of course present in every ad.[13] He determined that the name Ab Force "conveys the impression that the device works on the abdominal muscles - either because it applies force to the abs or because it makes the abs more forceful." (ID at 41.) He noted that the Commission and courts have recognized that a product name can imply a claim, citing *Jacob Siegel Co. v. FTC*, 327 U.S. at 609 (name "Alpacuna" implied that product contained vicuna) and *Thompson Medical*, 104 F.T.C. at 793

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[12] The Commission itself did not analyze each ad separately when determining whether Novartis's advertising created or reinforced a false belief, even when some ads did not contain all of the elements. *Novartis Corp.*, 127 F.T.C. 580, 702-07 (1999), *aff'd.,* 223 F.3d 783 (D.C. 2000).

[13] In the short rollout TV ad, the name "Ab Force" is mentioned four times and in the long rollout TV ad it is mentioned 10 times. In both ads, the name appears on the screen at least four times. (IDF 72.) In the short test ad, the name is mentioned three times, and in the long test ad, it is mentioned nine times. In both ads, the name appears on the screen at least four times. (IDF 71.)

(name "Aspercreme" implied that product contains aspirin).[14] Indeed, in *Thompson Medical*, the Commission stated that "the brand name of a product is the most powerful single stimulus in an ad." *Id.* at 803.

The two radio ads: Obviously the radio ads did not contain any visual images, but the first radio ad, (CX 1-H), contained statements that come very close to making explicit exercise and fitness claims. The ALJ noted that it opened by referring to infomercials for other ab belt and their promise "to get our abs into great shape fast—without exercise." (ID at 42.) He also noted that it described ab belts as "the latest fitness craze" and the Ab Force as "just as powerful and effective as the expensive ab belts on TV." *Id.*

Respondents illogically submit that the statement "They're amazing...promising to get our abs into great shape fast -- without exercise!" simply refers to "ads for <u>other</u> ab belts."[15] (RAB at 8). The ALJ found, however, that phrases such as "abs into great shape fast—without exercise," "latest fitness craze," and "powerful and effective" imply that the Ab Force is a fitness or exercise devise and that it is designed to provide health, weight loss, fitness, or exercise benefits. (ID at 42.) Although the second radio ad omitted the reference to "promising to get our abs into great shape fast—without exercise" and the "latest fitness craze," it continued the emphasis on those fantastic and amazing "electronic ab belt infomercials on TV," which were described as

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[14] It is not relevant that Mr. Khubani also chose the name to play on "Air Force." As the ALJ noted (ID at 41), that does not preclude other connotations that may violate the FTC Act. *See, e.g., Kraft*, 114 F.T.C. at 120; *Thompson*, 104 F.T.C. at 789.

[15] Mr. Khubani acknowledges that he was thinking of the AbTronic, Fast Abs and AB Energizer ab belts, among others, when he wrote this statement. (Tr. at 273.) He also acknowledged that the AbTronic sold for $120 and was the $120 ab belt to which he was referring. (Tr. 539.)

the “latest craze.” It noted that the Ab Force “uses the same powerful technology as those expensive Ab Belts.” (RX 49.) The ALJ noted that the phrases “powerful technology” and “just as powerful and effective” imply “that the Ab Force does something ‘powerful’ and ‘effective’ to the abdominal muscles.” (ID at 42.) And of course, these statements occur in the context of a product named Ab Force.

The four television ads: The ALJ properly concluded that the visual images in the TV ads “convey the impression that the Ab Force is designed to provide health, weight loss, fitness, or exercise benefits.” (ID at 41-42.) The thin models in each ad were dressed for exercise and were experiencing contractions of their well-defined abs. (ID at 41.) The ALJ also emphasized that each ad contained a close-up image of a bikini-clad woman (who was not wearing an ab belt) showing off her thin waist and well-defined abs, and that the two 120 second ads also contained a close-up of a bare-chested, thin, well-muscled man (who was not wearing an ab belt) performing a crunch on an exercise bench. *Id.* He concluded that the visual images “strongly convey the impression that the Ab Force is desgined to provide health, weight loss, fitness, or exercise benefits.” (ID at 41-42.)

In addition to these visual images, he noted that some of the phrases in the TV ads contributed to the overall impression that the Ab Force provides health, weight loss, fitness, or exercise benefits, citing “the latest fitness craze,” “powerful and effective,” and “powerful technology.” (ID at 42.) He concluded that these phrases, combined with the name “Ab Force” and the visual images, “imply that the Ab Force does something ‘powerful’ and ‘effective’ to the abdominal muscles.” *Id.*

The print ad: The print ad contained a depiction of a well-muscled male torso wearing

the Ab Force.[16] It noted that the Ab Force "uses the same powerful technology as those Ab Belts sold by other companies on infomercials." (CX 1-G.) The Internet ad (RX 52) also featured a visual depiction of a slim and well-muscled male torso, bare except for an ab belt, as did one of the email ads. (RX 51). The second email ad noted that the Ab Force "uses the same powerful technology as those Ab Belts sold by other companies on infomercials." (RX 50.)

B. The Surrounding Circumstances Reinforce the Challenged Claim

1. The ALJ Should Have Considered the Ads for Other Ab Belts in His Facial Analysis

In *Thompson Medical*, the Commission noted that it is "often able to conclude that an advertisement contains an implied claim by evaluating the content of the ad *and the circumstances surrounding it.*" 104 F.T.C. at 789 (emphasis added). The circumstances surrounding the Ab Force campaign include the other deceptive ab belt infomercials aired prior to and during the Ab Force campaign invoked by verbal and visual comparisons in the Ab Force campaign. In *Kraft*, the Commission noted how visual images can be used to make a claim by making a comparison to other products. The statement "imitation slices use hardly any milk" was accompanied by a visual showing "a small amount of milk being poured into the bottom of a glass." 114 F.T.C. at 123. When compared to the image of a full glass of milk for Kraft singles, the Commission found that the comparison of the images made a claim that Kraft has more milk.

In this case, Respondents are not positioning their product as *superior* to competing products, but they are intentionally drawing a visual and verbal comparison to the other ab belts and claiming that their product is essentially the same but cheaper. As their print ad said, " So

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[16] Surprisingly, Respondents state that it "contained none of the visual elements considered in the ALJ's facial analysis." (RAB at 9.)

why would you want to buy a more expensive ab belt from the competition when the Ab Force is as low as just $10?" (CX 1-G.) By asserting that the Ab Force is comparable to other ab belts, the ads are claiming that the Ab Force can perform the same functions that ads for the other ab belts claim their products perform.

Other surrounding circumstances include the evidence of Respondents' intent to make the implied claims. Their intent is evidenced by the evolution of the Ab Force ads and by the Ab Pulse ad.

2. The Express "Compare and Save" Claims in the Ab Force Ads and the "Bandwagon Effect" Intentionally Take Advantage of the Popularity of the Ab Belts That Were Being Sold by Infomercials

In this case, all the advertisements themselves invite scrutiny of the "circumstances surrounding" the ads (*Thompson Medical*, 104 F.T.C at 789) by **referring explicitly to** the surrounding circumstances - *i.e.*, "those fantastic Electronic Ab Belt infomercials on TV." Each of the TV ads then made some comparison of the Ab Force's power and effectiveness to the other ab belts advertised on TV. The two most heavily-aired spots stated that the Ab Force "uses the same powerful technology as those expensive ab belts – capable of directing 10 different intensity levels at your abdominal area." (JX 4; JX 5; CX 1-F at 3-5; Tr. at 55-59). It is not credible that Respondents expressly referenced those other ads and encouraged consumers "jump on the bandwagon" unless they believed many consumers had seen the other ads and would believe the Ab Force does what those other ads claim ab belts can do. After all, people do not buy something without deciding it serves a purpose that would be useful to them.

3. Respondents Admitted That Many People Who Were Exposed to the Ab Force Ads Had Seen TV Infomercials for Ab Belts

The Commission does not need extrinsic evidence to conclude consumers had seen the other ab belt infomercials. Common-sense alone dictates that at least some group of reasonable consumers who purchased the Ab Force saw one or more of the infomercials for other ab belts first. The Commission, however, does not have to rely solely on common sense. The ads themselves constitute an admission that this was likely. ("I'm sure you've seen those fantastic electronic ab belt infomercials on TV.")

The evidence is clear as to the identity of the other products referred to in the Ab Force ads – AbTronic, AB Energizer, and Fast Abs. Infomercials for these products ran before and during the period in which the Ab Force ads ran, (IDF 118), and dominated the direct sales TV marketplace during that period. (CX 62; CX 72-95; CX 126; JX 6 ¶ 10, 13, 14; Tr. at 294-96.) Moreover, the infomercials for those products were permeated with express and strongly implied claims that they caused loss of inches and weight, produced well-defined abdominal muscles, and were effective alternatives to exercise. (IDF 120.) Thus, it is reasonable to conclude that many consumers viewing the Ab Force ads recalled the ads for AbTronic, AB Energizer, and/or Fast Abs and at least some of the core efficacy claims for those products and attributed them to Ab Force. It is appropriate, therefore, to determine that the Ab Force ads conveyed the challenged claims based on a facial analysis of the ads and the surrounding circumstances. *See generally Thompson Medical*, 104 F.T.C. at 789.

4. The ALJ Correctly Found That Respondents Intended to Make the Asserted Claims

Furthermore, in determining the meaning and considering the surrounding circumstances of an ad, the Commission is entitled to consider evidence of intent of the ad's creators. "While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made." *Novartis Corp*., 127 F.T.C. 580, 683 (1999), *aff'd,* 223 F.3d 783 (D.C. Cir. 2000); *see also Thompson Medical*, 104 F.T.C. at 791. The record is replete with evidence that the Respondents intended to refer viewers to the infomercials for AbTronic, AB Energizer and Fast Abs, thus further supporting the finding that the ads conveyed that claim. (Tr. at 255, 259-261, 266, 273-274, 276, 486-87, 489, 490-492, 496, 497, 518, 521, 538-541, 543-544, 550; JX 1 ¶ 11; JX 2-5; JX 6 (Liantonio, Dep. at 26, 30, 32-33, 55, 57, 64-67, 69, 70, 72, 73, 75, 76, 92, 104, 105); CX 1-B; CX 1-G; CX 1-H; CX 4-9; CX 61; CX 80; RX 49-52.) Hence, the *express* references in the Ab Force ads to infomercials for competing ab belts, along with the claims of comparability to those products, compel consumers to think of those infomercials while viewing the Ab Force ads. Through their own action Respondents, therefore, have established those infomercials as part of the circumstances surrounding the Ab Force ads. Consequently, as part of a facial analysis, the ALJ and the Commission can determine what *express or strongly implied claims* the infomercials for these other products contain.

In addition, the evolution of the Ab Force ads demonstrates the Respondents' intent to promote the device to cause inch, weight or fat loss, develop well-sculpted abs, and be an effective alternative to exercise. Respondent Khubani decided to enter the ab belt market after noticing a mention of the AbTronic in industry market reports and after determining that ab

belts, including AbTronic, AB Energizer, and Fast Abs, were "one of the hottest categories to hit the market." His initial radio ad specifically stated "get into great shape fast - without exercise." And two of the TV spots opened with a man exerting himself doing crunches. Both demonstrate Respondents intended consumers to believe their ab belt was a substitute for exercise.[17] Further, Khubani testified that he believed all of the ads conveyed the same message. (IDF 89, ID 45.)

The evolution from the Ab Force to the Ab Pulse campaign also is evidence of Respondents' intent to make the same claims for Ab Force as were being made in infomercials for other ab belts. Respondents correctly point out that the Ab Pulse campaign came after the Ab Force, and the ALJ erred in his description of the timing. Nonetheless, the Ab Pulse campaign is relevant because it demonstrates how Khubani drafted an ad when he **did not want** consumers to think his belt was the same as others. The Ab Pulse ad stated, "Don't confuse the Ab Pulse with an electronic ab belt that you have seen on infomercials" and had a graphic of a red X superimposed on an ab belt with the legend "infomercial ab belt." (IDF 112.)

C. The ALJ's Facial Analysis Complies with the First Amendment

The Commission can conclude with confidence, after reviewing the language and visual depictions in the ads and the surrounding circumstances, that the Respondents made the alleged claims. *Thompson Medical*, 104 F.T.C. at 789; *Kraft*, 114 F.T.C. at 121. Accordingly, the Initial Decision does not violate the First Amendment.

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[17] Respondents cannot assert that the evolution of the ads is evidence that they did not intend to make the alleged claims because they removed the express statements in the later ads. The first TV ads and the first radio ad that include statements such as "latest fitness craze" and "without exercise" were not just an ad agency's concept that did not receive Khubani's approval. The scripts for these ads were written by Khubani, and the ads did air and did prompt orders from consumers for the Ab Force.

Respondents argue that, if the Commission were to conclude, on the basis of a facial analysis of the ads in this case, that implied claims were made, its decision would "threaten to violate the First Amendment protections applicable to commercial speech." (RAB 62.) They state that there is "remarkably little precedent that supports the Commission in finding the existence of implied claims without reliance on extrinsic evidence which provides objective information about consumer understanding," citing, at the Commission level, only *Kraft, Inc.*, 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Stouffer Foods Corp*., 118 F.T.C. 746 (1994); and *Novartis Corp.*, 127 F.T.C. 580 (1999), *aff'd,* 223 F.3d 783 (D.C. Cir. 2000). (RAB 62-63.) In fact, Respondents' contention that the Commission should not be permitted to rely on its own reading of the ads disregards long-settled law. The Commission's ability to interpret ads on their face, without extrinsic evidence such as consumer surveys, has been accepted by the courts for over 50 years.[18]

This approach is wholly consistent with the teachings of the Supreme Court. The Court has recognized that even a non-expert body (*e.g*., a court or bar disciplinary committee) need not rely on survey evidence where an implied claim is "self-evident," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985), and the implied claims at issue here are no less apparent than the implied claim in *Zauderer*, as discussed below. It is well within the Commission's acknowledged expertise to find Respondents' ads misleading on their face, and

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[18] *E.g., Thompson Medical Co., Inc.*, 104 F.T.C. 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *American Home Products Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982); *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *National Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Zenith Radio Corp. v. FTC,* 143 F.2d 29, 31 (7th Cir. 1944) (Commission "not required to sample public opinion," but may determine representations from the ads themselves).

commercial speech is far too hardy to be chilled by the exercise of such authority.[19] As the Commission has repeatedly made clear, however, it will rely solely on its own reading of an ad only where the claim at issue is express or where the claim, although implied, is reasonably apparent from the face of the ad.[20]

Whether an advertisement communicates a deceptive message is determined by the net impression that the ad, taken as a whole, is likely to make upon reasonable members of the viewing public. Thus, literally true statements may be deceptive, and ads reasonably capable of being interpreted in a misleading way are unlawful even if other, non-misleading interpretations are possible.[21] As previously noted, it is well-settled that the Commission may rely on its own reasoned analysis of an ad, without resort to extrinsic evidence, to determine whether that ad may reasonably be understood to convey a particular claim. The Supreme Court has recognized that "it [was not] necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead * * * ." *FTC v. Colgate-Palmolive,* 380 U.S. 374, 391-92 (1965); accord, *Zauderer*, 471 U.S. at 652-53.[22] Hence, the

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[19] *See, e.g., Bose v. Consumers Union*, 466 U.S. 485, 504 n.22 (1984) (commercial speech generally considered less susceptible to chilling effect than other forms of speech).

[20] *See, e.g., Removatron Int'l Corp.*, 111 F.T.C. 206, 292 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Thompson Medical*, 104 F.T.C. 648, 788-89; *Deception Statement,* 103 F.T.C. 176-77 (1984). Of course, the Commission will not ignore extrinsic evidence if presented, but will instead consider it to the extent it is probative. *See Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 587-89 (D.C. Cir. 1970); *Deception Statement,* 103 F.T.C. at 176.

[21] *Thompson Medical*, 791 F.2d at 197; *see, e.g., Removatron*, 884 F.2d at 1496; *American Home*, 695 F.2d at 687.

[22] *Colgate* involved the materiality of an express claim and not the interpretation of an implied claim, but in *Zauderer*, the Supreme Court quoted *Colgate* with approval in concluding that an implied claim apparent on the face of an ad could be found without a consumer survey. *See* 471 U.S. at 652-53. Indeed, it is logical that, if the Commission is able to assess materiality

Commission has repeatedly stated that where, as here, an implied claim is reasonably apparent from the face of the ad itself, the Commission may find the claim without extrinsic evidence.

The Commission also has noted that the ALJ in an administrative proceeding should use "common sense and expertise in setting forth the overall effects and net impressions that the advertisements" convey and that "[s]uch an approach [*i.e.*, the use of common sense and expertise] is not merely permissible, but is required in order to assess whether advertising is 'false' * * * , and the Commission has long been upheld in reading advertising for its total or general impression on the consuming public." *Porter & Dietsch, Inc*., 90 F.T.C. 770, 862 & n.3 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

Respondents correctly note that in *Kraft*, the Commission said it will find an implied claim in an ad only where "the language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances." (RAB 62.) Respondents assert that the "conclude with confidence" test is unacceptable because it is a "subjective measure that looks into the minds of the Commissioners . . . ." (RAB 62.) They concede that the Seventh Circuit upheld the Commission's decision in *Kraft*, stating (at 970 F.2d at 319) that the First Amendment is not violated when the Commission finds implied claims "so long as those claims are reasonably clear from the face of the advertisement." (RAB 63.) Nevertheless, they argue that the "conclude with confidence" test is "questionable in light of the core principle of administrative law that a reviewing court may not base its decision on an

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without extrinsic evidence, it is equally capable of determining for itself whether a reasonably apparent implied claim has been made.

inquiry into the minds and hearts of the agency heads in determining whether or not to uphold their decision." (RAB 64-65.) But in fact the reviewing court can examine the advertising for itself, as the Seventh Circuit did in *Kraft*, and determine whether the claims are "reasonably clear from the face of the advertisement." In reaching this determination, the Seventh Circuit did not inquire into the "minds and hearts" of the Commissioners.

Respondents seem to argue that the reviewing court cannot make a determination as to whether the claims are "reasonably clear from the face of the advertisement" because Section 5(c) of the FTC Act, 15 U.S.C. § 45(c), provides that "the finding of the Commission as to the facts, if supported by evidence, shall be conclusive." They argue that, when the Commission finds an implied claim based on a facial analysis, there is no "evidence" for a reviewing court to examine. (RAB 65.) But obviously the ads themselves are evidence, and the reviewing court can examine them, as it did in *Kraft*. They state that meaningful review of the finding of an implied claim is "impossible," and this presents difficulty "in any but the most extreme cases." (RAB 65.) But, if their hypothesis is that meaningful review is impossible, it is unclear why this would not be a problem in any case in which the Commission found an implied claim on the basis of a facial analysis, regardless of how extreme the case. Nevertheless they state that they "do not suggest that *Colgate-Palmolive* and *Zauderer* are not good law." (RAB 66.) Rather, they claim to be admonishing the Commission that it may not "in every case, dispense with objective evidence of consumer understanding in determining whether an implied claim was made." (RAB 66.) Obviously, the Commission has never taken that position. The question Respondents should have addressed is whether the claims in this case are "reasonably clear from the face of the advertisements."

The Supreme Court's decision in *Zauderer* is particularly instructive as to the interpretation of implied claims. A lawyer had advertised that clients who retained him on a contingent-fee basis would not have to pay legal fees if their lawsuits were unsuccessful, without disclosing that these clients would be charged for costs. In finding that this ad was deceptive by implication, the Court reasoned (471 U.S. at 652-53):

> Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs" -- terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the * * * public before it [may] determine that the [advertisement] had a tendency to mislead." *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 391-92.

The implied claims here are no less apparent than the implied claim the Supreme Court found "self-evident" in *Zauderer*. *Zauderer* establishes that no First Amendment concerns are raised where facially apparent implied claims are found without the use of consumer surveys or other extrinsic evidence. 471 U.S. at 652-53; accord, *American Home*, 695 F.2d at 688 n.10.

Respondents quote the concurring circuit judge in *Kraft*, who stated that "[N]either this case nor *Zauderer* gives the FTC leave to ignore extrinsic evidence in every case . . . .All *Zauderer* tells them is that extrinsic evidence is not needed when the 'possibility of deception is as self-evident as it is in [*Zauderer*]." (RAB 66.) The concurring judge was concerned that the Commission ignored predissemination consumer evidence that the respondent had relied on. 970 F.2d at 308. Of course, in this case extrinsic evidence was not ignored; the ALJ analyzed the extrinsic evidence and concluded it supported his facial analysis.

Although claiming not to be questioning the right of the Commission in an appropriate case to find an implied claim without extrinsic evidence, Respondents discuss several cases that they say "demonstrate the problematic nature of a rule that would have commercial speech burdened based on nothing more than the intuitive judgment of agency decision-makers and without objective record evidence whether a particular claim was implied." (RAB 67.) But for more than 50 years the courts have recognized that the Commission can evaluate ads based on its **expertise**, not on "intuitive judgement." *Cf. Kraft v. FTC,* 970 F.2d at 317 (an FTC finding is "to be given great weight by reviewing courts because it 'rests so heavily on inference and pragmatic judgment' and in light of the frequency with which the Commission handles these cases," citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 385 (1965).)

Respondents also argue that, because regulation of commercial speech must satisfy heightened or "intermediate" scrutiny, "the government must show that the allegedly deceptive speech is either inherently likely to deceive or must provide record evidence that a particular form or method of advertising has in fact been deceptive," citing *In re R.M.J.*, 455 U.S. 191, 202 (1982). (RAB 67.) In fact, however, in *In re R.M.J.*, the Supreme Court simply held that "restrictions upon [advertising of professional services] may be no broader than reasonably necessary to prevent the deception." The Court stated that "the States may not place an absolute prohibition on certain types of potentially misleading information * * * if the information also may be presented in a way that is not deceptive * * * ." *In re R.M.J.* at 203. *See also Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

The present order prohibits only unsubstantiated, and hence, deceptive claims. The order allows Respondents to use any ad claims they choose, provided the claims are substantiated.

Having found that Respondents misrepresented the material attributes of the Ab Force, the ALJ entered an order, requiring Respondents to "cease and desist" from such deceptive practices in the future. The order also prohibits unsubstantiated, and hence deceptive, claims by requiring that such claims be supported by "competent and reliable scientific evidence." Respondents argue that, "where there is a risk that a governmental restriction may snare truthful and non-misleading expressions along with fraudulent or deceptive commercial speech, the agency must demonstrate that its restriction serves a substantial governmental interest and is designed in a reasonable way so that no more commercial speech than necessary is restricted." (RAB 67.) Respondents never explain, however, how an order that requires claims to be substantiated could "snare truthful and non-misleading expressions." In short, Respondents' First Amendment challenge to this order is unfounded.

By limiting its order to prohibiting deceptive claims (*i.e.*, false and unsubstantiated claims), the Commission has not proscribed the dissemination of truthful information. Respondents and NACDS members remain free to disseminate any non-deceptive information they choose. As the Ninth Circuit observed in affirming a Commission order (*Sears Roebuck,* 676 F.2d 385, 399-400 (9th Cir. 1982):

> No serious argument could be advanced that the Commission, by this order, is seeking to 'keep the public ignorant' or otherwise limit the information available to the public. *Virginia Board,* 425 U.S. at 770 * * * . The Commission's findings represent a permissible judgment that petitioner's advertising campaign * * * constitutes 'communication more likely to deceive the public than inform it * * * .' *Central Hudson Gas, 447 U.S. at 563.*

For these and other reasons, courts have uniformly rejected First Amendment attacks like

Respondents' on Commission orders to cease and desist.[23] The same result is warranted here.

NACDS, a trade association of chain pharmacy companies, also raises First Amendment issues about the ALJ's order. (NACDSB 7.) Specifically, it raises two issues:

> 1) When may the existence of an implied claim be ascertained based on so-called "facial analysis" of an advertisement, without resort to extrinsic evidence . . . .
> 2) May an advertiser who markets a product through a "compare and save" advertisement be found derivatively liable . . . for misleading claims that were present in advertisements for products that were part of the target universe for the "compare and save" advertisement? (NACDSB 9.)

NACDS's arguments generally follow the arguments made by Respondents, addressed above. In addition, however, NACDS argues that the Commission should "adopt clear standards to control its decisions and provide appellate courts with meaningful standards against which to review the Commission's decisions." *Id.* It states that "such explicit rules also would serve the important function of providing guidance to chain drug stores and other retailers that advertise products about the principles that will be applied to future advertisements and so that these retailers may conform their conduct to the law." NACDSB 10. Commission precedent already provides the guidance - conspicuous claims clear on their face do not need extrinsic evidence. *Kraft v. FTC*, 970 F.2d at 319-320. Further, as the Seventh Circuit noted in *Kraft,*, implied claims fall on a continuum, making a *per se* rule impractical.

In addition, NACDS argues that the Commission should "clearly articulate the standard that will apply to retailers/advertisers that choose to compete through 'compare and save' advertisements." NACDS 18. It states that retail chain drug stores owned by its members

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[23] *See, e.g., Bristol-Myers Co.*, 738 F.2d at 562; *American Home,* 695 F.2d at 688 n.10; *Litton Indus., Inc.,* 676 F.2d 364, 373-74 (9th Cir. 1982); *Sears Roebuck,* 676 F.2d at 399-400.

> sell large numbers of generic, non-prescription, private label pharmaceutical products -- such as vitamins, pain relievers, cold medicine, and nutritional supplements – virtually all of whose brand-name equivalents make health, efficacy and other claims about the products. In many cases, these generic or private label products are advertised and sold to consumers under so-called "compare and save" advertisements, in which the pharmacies emphasize that these products have the same physical properties as the name-brand product (such as pharmaceutical equivalence) but have substantial price benefits for the consumer. (NACDSB 8.)

NACDS argues, in essence, that its members should not be responsible for false claims made for products "that were part of the target universe for the 'compare and save' advertisement." NACDSB 8-9. It asserts that, under *Porter & Dietsch,* its members might be held liable for such false claims even though they had no knowledge of the falsity. NACDSB 9. But, in order to protect the public, the Commission has long held advertisers responsible for implied claims, as well as explicit claims. It is difficult to understand why NACDS members should have a safe harbor to sell pharmaceutical products by comparing them to brand-name products that "make health, efficacy, and other claims" and making the same claims, albeit implicitly, without having substantiation for those claims. NACDS members are asking the public to compare their products to these brand-name products, emphasizing that their products "have the same physical properties as the name-brand product (such as pharmaceutical equivalence) but have substantial price benefits for the consumer." Surely NACDS members do not believe that they are **not** required to have substantiation for what their products, which they say they advertise as having "pharmaceutical equivalence," do.[24]

NACDS states that "the risk that an advertiser could be held liable on an 'implied claim' basis for a misleading statement made by a manufacturer of a competing product, even if the

[24] *See Walgreen Co.*, 109 F.T.C. 156 (1987), in which the Commission entered an order requiring Walgreen to have substantiation for efficacy claims for certain analgesic drugs.

retailer/advertiser itself did not directly make the claim, would have a chilling effect on 'compare and save' advertising." (NACDSB 18.) But the claims at issue in this case were quite predictable. See *Board of Trustees v. Fox,* 492 U.S. at 481 ("commercial speech * * * less likely to be 'chilled' and not in need of surrogate litigators"). In any event, enormous financial incentives to provide truthful product information render commercial speech far too hardy to be chilled by the Commission's continued use of an interpretative expertise that courts have sustained for over 50 years.[25]

Underlying Respondents' entire argument is the erroneous assumption that consumer surveys provide absolute answers that common sense and administrative experience cannot. But differences of opinion concerning sampling, questionnaire design, methodology, and statistical analysis create their own set of uncertainties.[26] For these and other reasons, the Commission's application of common sense and experience to the interpretation of implied claims remains essential to its effective enforcement of Sections 5(a) and 12 of the FTC Act. Nevertheless, Respondents are incorrect when they imply at several points that the Commission is "ignoring" extrinsic evidence (RAB 66) or "foregoing review of evidence that would directly address the questions of whether an alleged implied claim had been made. . . ." (RAB 68.) Obviously, in this case there is extrinsic evidence - the testimony of a qualified expert as to the meaning of the

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[25] *See, e.g., Kraft v. FTC,* 970 F.2d at 321; *Bose*, 466 U.S. at 504 n.22 ("danger that governmental regulation of false or misleading * * * product advertising will chill accurate and nondeceptive commercial expression" is "minimal"); *Bates v. State Bar of Arizona,* 433 U.S. 350, 383 (1977); *Sears Roebuck*, 676 F.2d at 400.

[26] *See, e.g., Tyco Indus., Inc. v. Lego Systems Inc.,* 5 U.S.P.Q.2d 1023, 1031 (D.N.J. 1987), *aff'd*, 853 F.2d 921 (3d Cir.), *cert. denied*, 408 U.S. 955 (1988).

ads and the results of a survey of consumers who viewed one television ad - that buttresses the ALJ's facial analysis of the ads.

IV. THE EXTRINSIC EVIDENCE CITED IN THE INITIAL DECISION IS RELIABLE AND SUPPORTS THE CONCLUSIONS OF THE ALJ

The record in this matter contains credible extrinsic evidence that reasonable consumers would take away from the Ab Force TV spots claims that Ab Force caused weight, inch, and fat loss, caused users to develop well-defined abs, and was an effective alternative to exercise. As discussed above, the alleged claims are apparent from the facial analysis and surrounding circumstances. Therefore, extrinsic evidence is not necessary. *Kraft, Inc.*, 114 F.T.C. 40 at 121. Complaint Counsel, however, offered extrinsic evidence as corroboration for the facial analysis. The Commission considers such evidence when it is offered, .even if it is not necessary. *Stouffer Foods Corp.*, 118 F.T.C. at 804. Such evidence may include evidence respecting the common usage of terms as well as generally accepted principles drawn from market research and adequately supported opinions of experts as to how an advertisement might reasonably be interpreted. *Kraft*, 114 F.T.C. at 121-22. The Commission considers the opinions of marketing experts to be adequately supported when they "describe empirical research or analyses based upon generally recognized marketing principles or other objective manifestations of professional expertise." *Thompson Medical*, 104 F.T.C. at 790 n.11. Such evidence also can also include reliable results from methodologically sound consumer surveys. *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 790.

The extrinsic evidence in this matter is in the form of (1) a facial analysis by Complaint Counsel's expert witness of the TV spots Respondents ran for Ab Force focusing on the use of

the name itself, the visual depictions, and surrounding circumstances, and (2) a copy test of the most frequently aired spot.[27]

A. Dr. Mazis' Facial Analysis Is Unbiased, Reliable, and Based upon His Expertise

Contrary to Respondent's protestations, Dr. Mazis' testimony meets the Commission's standards for reliability. It provided valuable analysis of the claims conveyed in the challenged TV ads, corroborating the ALJ's facial analysis. The Commission has accepted analogous expert testimony." *See. e.g., Kraft*, 114 F.T.C. at 126, n.13 (expert opinion as to meaning of ad language); *Thompson Medical*, 104 F.T.C. at 799 (opinion as to what consumers typically read in an ad); *see also Schering Corp.*, 113 F.T.C. 1030, 1047, 1058 & 1111 (1994) (ALJ's initial decision, issued before settlement agreement, finding expert opinion, based how consumers process information through the associative learning theory well-supported[28]).

1. The ALJ Properly Ruled That Dr. Mazis Qualified as an Expert

Dr. Mazis has extensive experience as a researcher and university professor in consumer behavior and marketing. (Tr. at 37-41; CX 58 at 2-4 and at Tab A (Mazis *Curriculum Vitae).*) In addition, he has provided expert testimony about ad interpretation in numerous federal court

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[27] Respondents, in their discussion of the extrinsic evidence, suggest that Complaint Counsel made a fatal error by failing to introduce survey evidence that the "test ads" (*e.g*., the first versions that ran for a shorter period than the second versions and that Respondents refer to as the "test ads") made the challenged claims, (RAB at 51), but the test ads' explicit use of words like fitness and exercise are "virtually synonymous with an express claim." *Kraft,* 114 F.T.C. at 40, 120. Therefore, no survey evidence is needed.

[28] The ALJ in *Schering* found that respondents, through references to fibre in their ads, prompted consumers to believe whatever health benefits consumers associated with fiber would be provided by Fibre Trim. *Schering*, 118 F.T.C. at 1057-58. In this regard, the expert's analysis is very similar to that provided by Dr. Mazis.

cases and before administrative law judges. (CX 58 at Tab B.) In rendering his expert opinion in this matter, he is relied on his experience, gleaned from years of research, conducting consumer-perception studies, and familiarity with academic literature. Commission's case law provides that an expert may rely on his experience, including his knowledge of consumer perceptions, as the basis for his testimony. *See Thompson Medical*, 104 F.T.C. at 790; *see also generally* Fed. R. Evidence 702. Considering his extensive background and experience in the field of consumer behavior and marketing, Dr. Mazis is well-qualified to render an opinion in this matter. Furthermore, his opinion is adequately supported by generally recognized marketing principles and by common sense.

2. As a Properly Qualified Expert, Dr. Mazis' Opinion as to the Claims in the Ab Force Ads May Be Given Such Weight as the ALJ Deems Appropriate

The ALJ properly found that Dr. Mazis offered relevant and reliable testimony, based on his knowledge and experience of consumer perceptions, and on claims that consumers would take away from the ads. (ID at 48-49.) Respondents concede that the ALJ was correct in stating that experts may testify based on their experience in a given field. (RAB at 45.) They also concede that Dr. Mazis was qualified by the ALJ as an expert in the area of *consumer perception*. (RAB at 47.) However, they claim that Dr. Mazis' facial analysis of the Ab Force TV spots is "nothing more than unreliable, unverifiable, and unacceptable say-so evidence." (RAB at 49.)

As a basis for their contention, Respondents attempt to hold Dr. Masis's analysis to the standard for the so called "scientific and technical" gatekeeper test that was first propounded in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786 (1993). (RAB at 45-

48.) *Daubert* and its progeny, including *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), hold that a federal court must maintain a gatekeeper role when dealing with expert testimony. *Daubert*, which by its own description is limited to the hard science context (509 U.S. at 590 n.8), sets forth five specific factors the trier of fact must consider to assess whether the expert's analysis is supported by the scientific method. *Id.* at 593-95.

Although the Commission has never expressly adopted *Daubert* in its jurisprudence,[29] Dr. Mazis' testimony surpasses the appropriate gatekeeper test for this type of "soft science" case. According to the *Daubert* framework and the Federal Rules of Evidence, the trier of fact must determine whether the expert is proposing to testify to (1) scientific, technical, or *specialized knowledge* that (2) will assist the trier of fact to understand or determine a fact in issue. Fed. R. Evid. 702; *see also Daubert*, 509 U.S. at 590-92. *Kumho* provides that for fields of soft science, a court may choose among the *Daubert* factors on a case-by-case basis allowing the court discretion in its choice of factors, depending on the issue, the expertise at issue, and the subject of the expert testimony. *Kumho* 526 U.S. at 251; *see* Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Federal Judicial Center, 2d ed., 2000). Thus, the court has considerable leeway in deciding in a particular case how to determine whether particular expert testimony is reliable. *Kumho*, 526 U.S. 137 at 152. Indeed, in applying *Daubert* to advertising cases, federal courts have looked to what *specialized knowledge* the purported expert has with regard to marketing

[29] See, e.g., the Commission's post-*Daubert* 1999 opinion in *Novartis*, whereby it assessed the quality and reliability of experts introduced by both parties following its long-standing jurisprudence. The Commission has stated that it will consider the testimony of expert witnesses as to how an advertisement might reasonably be interpreted, if such opinions are adequately supported. *Thompson Medical,* 104 F.T.C. at 790; *Kraft*, 114 F.T.C. at 122.

and consumer behavior when assessing admissibility. *See, e.g., Half Price Books, Records, Magazines, Inc. v. Barnesandnoble.com, LLC,* 2004 U.S. Dist. LEXIS 23691 at *10 (N.D. Tex. Nov. 22, 2004) (court found expert's 37 years experience in market analysis, as well as his research and writing in the field, constituted "specialized knowledge" for purposes of determining the admissibility of his testimony and report); *Communications LTD v. BB Technologies, Inc.*, 300 F. 2d 325 at 329-30 (3d Cir. 2002) (lower court did not abuse discretion by admitting expert opinion testimony on likelihood of confusion in trademark infringement case based on his personal knowledge or experience); *Tyus v. Urban Search Management*, 102 F.3d. 256 (7th Cir. 1996), *cert. denied* 520 U.S.1251 (1997) (court erred in excluding a social sciences expert's testimony on a focus group's results)*; compare Transclean Corp. v. Bridgewood Services Inc.*, 101 F. Supp. 2d 788, 804 (D. Minn. 2000) (court rejected testimony of an expert auto mechanic on how consumers would perceive advertising claims for an automobile transmission-related device as personal opinion, not based on marketing experience).

The ALJ was also correct in finding that Dr. Mazis has relevant and helpful. He has over twenty years experience in market research and consumer behavior, experience as a as a professor and university department head; he has served as a consultant on marketing issues to federal and state governments and to private companies; he was an editor of several peer-reviewed marketing journals; he has conducted hundreds of surveys and research studies; and he has published over sixty articles in academic journals. (IDF 148-151.) This clearly meets the specialized knowledge standard for expert testimony in *Betterbox Communications LTD v. BB Technologies*, 300 F.3d 256 (7th Cir. 1996), *cert. denied,* 414 U.S. 469 (1989 and *Half Price Books.*

The ALJ did perform his function as gatekeeper, finding Dr. Mazis' testimony reliable pursuant to Fed. R. Evid. 702, which, as Respondents point out, has been amended in response to *Daubert*. Nonetheless, Respondents, in essence, now ask the Commission to reject his testimony as inadmissible under *Daubert* and Fed. R. Evid. 702 because they object to the content of his testimony. This is not appropriate. "The trial court's role as a *gatekeeper* is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996) (emphasis added). The gatekeeper role is limited to weeding out the obvious hired gun, not to removing the ability of the trier of fact to weigh evidence.[30] As *Daubert* itself noted, cross-examination and introduction of contrary evidence are the traditional and appropriate means to challenge expert opinion. 509 U.S. at 595.[31] Accordingly, the ALJ did not abuse his discretion by admitting Dr. Mazis' report and testimony based on his specialized knowledge and then weighing the testimony on the merits.

Based on the foundation for his opinion set forth in his testimony, (Tr. at 61), the ALJ did assess the weight to be given to Dr. Mazis' testimony. In his report and testimony (including a lengthy and detailed cross-examination), Dr. Mazis applied his professional training and his recognized expertise in consumer perception and accepted marketing principles to specific, objective elements present in the four corners of the Ab Force TV ads as a basis for what he referred to as the "direct effects" of the Ab Force ads. These objective elements consisted of

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[30] Interestingly, Dr. Jacoby was paid $750/hour to challenge Dr. Mazis' analysis without providing his own. Dr. Mazis was paid $200/hour.

[31] As a result, exclusion is the exception rather than the rule. *See* Fed. R. Evid. 702 Advisory Committee Notes on the 2000 Amendments.

numerous images of slim models and muscular men with well-developed abs, images of the Ab Force causing a model's abs to pulsate, and the name of the product. (Tr. At 66.) He explained that visual images are more important than verbal messages in ads because they remain in people's memories. (Tr. at 59.) He also explained that use of the name "Ab Force" conveys the impression that the device will make your abs a force, *e.g.,* they will be noticeable and well-developed.[32] (Tr. at 60.) Considering these "direct effects," he opined that consumers were likely to perceive that the use of the Ab Force would result in loss of inches around the waist and well-developed abdominal muscles. (Tr. at 59-67.) This is exactly what Dr. Mazis is qualified to do as an expert in consumer perception.

Moreover, Respondents provided no expert testimony contravening Dr. Mazis' opinion as to the direct effects of the Ab Force TV ads. Although Respondents clearly had the opportunity to do so, they offered no evidence of either an expert facial analysis or a survey. To the extent that their expert, Dr. Jacoby, expressed an opinion applicable to Dr. Mazis' testimony about the direct effects, it was mostly to argue that the analysis failed to meet the gatekeeper standard of *Daubert* and *Kumho.* The ALJ properly squelched this argument inasmuch as Dr. Jacoby was not qualified to testify as an expert on the law. Without any evidence contravening Dr. Mazis' analysis, and given Dr. Mazis' expertise and credibility, the ALJ was justified in

[32] Respondents allege that their marketing expert, Dr. Jacoby, testified that the words "ab" and "force" may have several meanings that consumers may take away "because there is no basis for such perception." (RAB at 49.) However, Dr. Jacoby was concerned that the questionnaire administered to participants in the copy test used the name "Ab Force" 16 times because the name "raises the distinct possibility that it was the 'demand characteristic' inherent in these mentions that was responsible for some or much of the respondent's answers." (CX 56, ¶ 44.) Given the unresolvable contradiction inherent in Dr. Jacoby's two statements, it is not surprising that the ALJ opted for Dr. Mazis' explanation.

concluding that his analysis supported the conclusion that the Ab Force TV spots claimed that use of the Ab Force caused loss of inches and well-defined abs. (ID at 49.)

As to the indirect effects analysis, Dr. Mazis opined that consumers exposed to the Ab Force advertisements, and who also had been exposed either directly or indirectly to the pervasive advertising claims for AbTronic, AB Energizer, and Fast Abs, would likely attribute to the Ab Force the core claims made in the ads for the other three products. (See discussion generally in Part II, *supra*.) His opinion was based on reliable marketing principles – principally the well recognized psychological/consumer behavior theory of "categorization" in which people group objects together in categories based on their similarity. (Mazis, Tr. 49, 156-57; Cx 57.)[33] The ALJ rejected Dr. Mazis' analysis, concluding that there was no record evidence as to what beliefs consumers would include in an ab belt category. (ID at 51.) The ALJ failed to take into account the direct references in the Ab Force ads to consumers having seen "those [other] ab belt infomercials on TV" and other references to the technological comparability to the other belts. To the extent that the ALJ ruled on the admissibility of Dr. Mazis' theory in this regard, the Commission should consider that he erred and find that Dr. Mazis' opinion as to the indirect effects of the Ab Force ad is reliable and probative.

3. The ALJ Properly Deemed Dr. Mazis to Be a Credible Witness

After qualifying Dr. Mazis as an expert witness on consumer perceptions concluding his testimony was admissible under Fed. R. Evid. 702, the ALJ had the opportunity to listen to and observe Dr. Mazis' testimony on direct and cross examination, allowing him to conclude that Dr.

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[33] Respondents' marketing expert, Dr. Jacoby testified that the theory was well-recognized and accepted in the marketing field. (Tr. at 344-45.)

Mazis was a credible witness. Indeed, the ALJ expressly rejected Respondents' challenge to Dr. Mazis' credibility, finding that Dr. Mazis' testimony on direct and indirect effects of the Ab Force campaign was not based on personal opinion but on his experience and knowledge in the field.[34] Nonetheless, the Respondents ask the Commission to ignore the ALJ's conclusions as to Dr. Mazis' credibility, saying he is "hopelessly tainted" by personal bias and is providing "say-so" testimony. (RAB at 49-50.) Their unfounded bias challenge is based on the fact that Dr. Mazis formed his facial analysis "*after* he had consulted with Complaint Counsel and after he had been provided with the Complaint and other relevant information." (RAB at 50.) (emphasis in original).

Although the Commission's standard of review is *de novo*, the Commission does not disturb the ALJ's conclusions as to credibility absent a clear abuse of discretion. *Horizon Corp.*, 97 F.T.C. 464, 857 n.77 (1981) (citing *Lenox, Inc.*, 73 F.T.C. 578, 604 (1968), *aff'd*, 417 F.2d 126 (2d Cir. 1969)). This is because the ALJ, unlike the Commission has the opportunity to "closely scrutinize witnesses' overall demeanor and to judge their credibility." *Id.* In this case, the ALJ had the opportunity to scrutinize Dr. Mazis' credibility as the Respondents inquired about his purported bias line during a lengthy and detailed cross examination.

It is also well established that it is not inappropriate for an expert to review a plaintiff's rendition of the facts before rendering an opinion. *See, e.g.*, *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162-63 (C.D. Cal. 2002) (expert

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[34] The ALJ did not conclude that Dr. Mazis was proffering biased testimony as to the indirect effects, only that Dr. Mazis' application of established market research was not supported adequately by actual evidence that Ab Force ad viewers saw the other ab belt infomercials retained or comprehended the claims made in those ads. ID 50-51. As discussed at A.2, above, the ALJ erred in reaching his conclusion on Dr. Mazis' testimony on indirect effects.

report should not be excluded in a preliminary dispositive motion merely on the basis that it assumes the substantive allegations of the complaint rather than relying on data not yet discovered); *Tormenia v. First Investors Realty Co., Inc.*, 251 F.3d 128, 135 (3d Cir. 2000) (Fed. R. Evid. 702 "does not require that experts have personal experience with the object of litigation in which they testify, nor does it require that experts eschew reliance on a plaintiff's account of factual events"). In fact, Dr. Mazis testified that receiving a copy of the complaint in such matters and reading it before conducting a facial analysis was common practice in all of the matters he'd been involved in. (Tr. at 116, 141-142.) he stated that it is necessary to read the complaint in order to understand what the key issues are. (Tr. at 142.) The ALJ's finding as to Dr. Mazis' credibility was obviously within his discretion and should not be disturbed.

B. The Copy Test of an Ab Force Tv Spot Was Reliable and Established That Consumers "Took Away" the Claims Cited in the Complaint

To constitute reliable and probative evidence, copy tests must be methodologically sound. *Stouffer*, 118 F.T.C. at 799; *Thompson Medical,* 104 F.T.C. at 790. The primary standards that the Commission applies in determining whether a copy test is methodologically sound are whether it "draw[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." *Stouffer,* 118 F.T.C. at 799 (quoting *Thompson Medical,* 104 F.T.C. at 790). In evaluating survey evidence, the Commission does not require that surveys be perfect methodologically, but that they be "reasonably reliable and probative." *Stouffer*, 118 F.T.C. at 799. A study that harbors one or more sources of potential error or bias can still be probative. *Id.*

The copy test designed by Dr. Mazis, implemented by U.S. Research, and introduced by Complaint Counsel in this proceeding provides compelling confirmatory evidence that the Ab

Force TV ads implied that Ab Force causes users to lose inches, weight, and fat; gain well-defined abdominal muscles; and is an effective alternative to exercise.

1. The ALJ Properly Held That the Copy Test Adequately Defined the Proper Universe, Did Not Ask Leading Questions, and Properly Excluded 81 Respondents

The Respondents' argument that the copy test that Dr. Mazis performed on the most heavily disseminated Ab Force TV spot was unreliable is without merit. They contend that the sampling universe was improperly selected, the open-ended and closed-ended questions in the survey questionnaire were leading, 81 respondents to the survey were improperly excluded, and the copy test failed to control for preexisting beliefs. (RAB at 51.) In fact, the ALJ properly ruled that the universe was properly selected, (ID at 52-53), the questions posed were not leading, (ID at 53), and the 81 inattentive respondents were justifiably excluded from participating in the survey. (ID at 57.) With regard to controlling for preexisting beliefs, the ALJ concluded that, although the control designed to filter out preexisting beliefs was flawed, the defect was not critical. (ID at 52.) For the reasons stated below, the ALJ's rulings with regard to the first three issues were correct. Complaint Counsel address the issue of controlling for preexisting beliefs below.

a. The Sampling Universe Was Properly Circumscribed

Dr. Mazis defined the universe of persons to be surveyed in the copy test as anyone who had, in the last 12 months, purchased a product or used a service for weight loss, muscle toning or massage and also in the last 12 months had purchased a product by responding to a direct response TV ad. (Tr. at 73-75.) Dr. Jacoby asserted that the universe is too broad, (Tr. at 352-56), claiming that the proper universe should have been limited only to those persons who

purchased a weight loss, muscle toning, or massage product or service in response to a direct response TV ad. The ALJ ruled that "While the universe could have been more narrowly tailored, as designed, it is nevertheless reasonably reliable and probative," citing *Stouffer* 118 at 799 (Methodological perfection not required.). (ID at 53.)

People who had purchased a product for weight loss, muscle toning, or massage only in a venue other than direct response TV, but who had purchased other items through that venue are potential customers for the listed products, and they are potential customers the direct response TV medium. It is illogical to assume that persons who demonstrated an interest in weight loss, muscle toning, or massage and who had made purchases via direct response TV of products would not be interested in the listed products in the future. To leave them out of the universe, as Dr. Jacoby demanded, would have narrowed the universe. Dr. Jacoby may have made this error because he misconstrued the purpose of the study. The goal of the Mazis study was to determine whether consumers perceived the claims challenged in the complaint, (CX 58 at 10), not to confirm that consumers took away those claims because of preexisting beliefs. Since his goal was not so narrow, Dr. Mazis only had to find purchasers willing to buy products via direct response TV who also were potential users of weight loss, muscle toning, or massage products or services. In other words, his universe was people likely to pay attention to a direct response ad for an ab belt. Thus, while there may have been a better way to define the universe, it was not a fatal flaw, and the resulting universe was, as the ALJ concluded, reasonably reliable and probative.

b. The Closed-ended Questions Were Not Leading

Respondents also allege that the wording of the close-ended questions comprising Question 6 of the main questionnaire, (CX-58, Exh. D), were leading because, according to Dr. Jacoby, they were framed only in the affirmative and invited yea saying. (Tr. At 388-92.) The ALJ concluded that "appropriate, unbiased questions were asked in the copy test." (ID at 53.)

The questions were not leading because survey respondents were instructed before the questions were posed as follows:

> I'm going to read you a list of statements. Some, all, or none of these statements may have been implied by or made in the Ab Force commercial.
>
> For each statement that I read, please tell me:
> YES, it is implied by or made in the Ab Force commercial,
> NO, it is <u>not</u> implied by or made in the Ab Force commercial, or
> You DON'T KNOW or you have NO OPINION.

(CX 58, Exh. D, Question 6.)

In addition the respondents had a card placed before them on which all three possible answers were listed. Hence, all three possible answers to the each question were read and shown to the respondent before the question was asked. (CX 58 at 15, 16; CX 58, Exhibit D; Tr. at 95-96.) Consequently, respondents were free to choose among the three responses the answer that corresponded to their beliefs without any suggestion that there was a correct answer that the surveyors were seeking. Dr. Jacoby testified that he would have posed the questions in a manner that equally emphasizes affirmative, negative, and neutral responses. (Tr. at 390.) However, Dr. Mazis' method of asking the questions gives equal emphasis to all possible responses. The difference between the two methods is *de minimis* and resolves itself to personal preference between two equally effective methods of avoiding asking leading questions.

In addition to properly posing the questions, other measures were included to control for yea saying. Control questions were used to mask the intent of the study and to screen for yea sayers. Moreover, two versions of the questionnaire changed the order in which the questions were read to control for order bias.[35] (Tr. at 92; CX 58 at 14).

The considerable divergence in the responses to the closed-ended questions corroborates Dr. Mazis and the ALJ's conclusions that yea saying was controlled. Compared with 48.1% of the control group who perceived a "well-defined abs" claim and 42.4% who received a "lose inches around the waist" claim, only 28.6% of the control group perceived an "alternative to exercise" claim, 28.1% perceived the "lose weight" claim, and 19.0% took away a "removes fat deposits around the waist" claim. Thus, respondents were discriminating among questions, proving that the questions were unbiased.

c. The ALJ Properly Ruled That Excluding 81 Consumers Who Could Not Identify the Name of the Product in the Ad Immediately after Viewing the Ad Twice in Succession Was Appropriate

Respondents continue to contend that Dr. Mazis improperly excluded 81 inattentive participants from the copy test. Survey respondents, who had qualified under the screening phase of the study, were shown either the test ad or the control ad twice and then were asked to identify the name of the product. Those who were inattentive or unable to identify the brand name of the Ab Force product were not asked any of the subsequent questions and were eliminated from the study. (Tr. at 93-94; CX 58 at14-15.) Dr. Jacoby is misguided in his allegation that excluding survey respondents from the test calculations who could not remember

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[35] Order bias is also known as "yea saying" to leading questions and the "halo effect." *Stouffer,* 118 F.T.C. at 746.

the name of the Ab Force immediately after viewing the commercial twice was not consistent with sound copy test methodology. (Tr. at 356-65.) Dr. Mazis testified that excluding inattentive survey respondents from further participation in the study is common practice because people who cannot remember the brand name of a product featured in a commercial they have just seen twice would probably be unlikely to buy the product and their answers to the subsequent questions would likely be meaningless. (Tr. at 94, 102.) Even Dr. Jacoby conceded that consumers so inattentive that they could not remember the name of the product immediately after viewing the commercial twice might not be able to remember the telephone number needed to purchase the product. (Tr. at 407.) Since a primary goal of copy testing is to define a universe of likely purchasers of the tested product, it is reasonable to conclude, as the ALJ did, that such inattentive people should not be a part of the survey universe. Unlike other screening criteria that were a part of a separate screening questionnaire, however, it was not possible to screen these people out until they had actually viewed the commercial. (ID at 57.)[36]

There is precedent in FTC law for following such a procedure. In *Kraft*, respondents to a copy test questionnaire who could not remember the advertised brand name or answered "don't know" when asked to restate the points in the ad were not included in the calculations of percentages. The ALJ rebuffed Kraft's attempt to have the survey findings suppressed.[37] 114 F.T.C. at 70, n.2. Federal court decisions in trademark infringement cases under the Lanham Act

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[36] In fact, Respondents' expert, Dr. Jacoby, seems to imply that if inattentive respondents could be identified through a screening questionnaire, their exclusion would not be a problem. (Tr. at 357, 359.)

[37] In his initial decision in *Kraft*, Judge Parker agreed with Complaint Counsel's expert that the number of such respondent's was not large enough to affect the results of the copy test. 114 F.T.C. at 70 n.2.

also have found removing respondents from survey calculations is permissible when valid reasons exist. *Wuv's International, Inc. v. Love's Enterprises, Inc.*, 1980 U.S. Dist. LEXIS 16512, *62 (D. Colo. 1980) (Where 23 out of 403 survey respondents were excluded from survey results because they were unfamiliar with one of the restaurant chain litigants, the court said "[i]t stands to reason that consumer confusion, if any, indicated on the part of the restaurant-going individuals ignorant of 'Love's' restaurants is irrelevant."); *American Home Products v. Proctor & Gamble Co.,* 871 F. Supp. 739, 761 (D.N.J. 1994) ("It is clear that in a false advertising action, survey results must be filtered via adequate control mechanisms to screen out those participants who took away no message from the ad."); *see also Liggett Group, Inc., v. Brown & Williamson Tobacco Corp.,* 1987 U.S. Dist. LEXIS 14785, *30 (M.D.N.C. 1988) (In an action for trademark infringement, the Court stated that, "The test [for level of confusion] is whether the similitude in the labels would probably deceive a purchaser who exercises ordinary prudence, not the careless buyer who makes no examination.").

Dr. Jacoby attempted to illustrate the effects of excluding respondents after screening for the universe using an extreme and unlikely hypothetical, (Tr. at 361), where 98 out of 100 respondents in a copy test could not remember the brand name of the product advertised. Dr. Jacoby's example is ridiculous. In such a situation where only two qualified respondents are left, the data would not even be analyzed because the remaining survey universe was too small. In Dr. Mazis' survey, 389 questionnaires were included in the final data tabulations. Dr. Mazis stated that this was consistent with generally accepted procedures in the field. (CX 58 at 18.)

Dr. Jacoby also argued that excluding these inattentive respondents resulted in exaggerating the difference between the control group and the test group percentages and had the

effect of "stacking the deck" by artificially raising the purported level of deception. (Tr. 366, 392; RX 40, ¶ 56.) The argument is specious. Dr. Mazis did not remove only those in the control group or in the test group, so there is no evidence of stacking. If the 81 respondents were appropriately excluded – and they were – there was no exaggeration and the actual level of deception was not raised, artificially or otherwise. Accordingly, the Commission should uphold the ALJ's conclusion that excluding the 81 respondents was proper. (ID at 57.)

2. The ALJ Properly Held That Controlling for Pre-existing Beliefs Is Not Necessary When There Is No Record Evidence That Preexisting Beliefs Affected the Survey Results

Respondents want their cake and eat it too, asserting there is no evidence of preexisting beliefs to justify Dr. Mazis' testimony, but then arguing he failed to control for such beliefs in his copy test. Respondents ignore *Stouffer* and rely instead on the Commission's earlier holding in *Kraft* to claim the failure to control for preexisting bias rendered the Ab force survey unreliable. (RAB at 53.) In *Stouffe*r, the Commission did not recognize *Kraft* as holding that *all* surveys that failed to control for preexisting beliefs were unreliable. Instead, the Commission held that a study may be flawed, but still reliable and probative and cited a footnote in *Kraft* indicating that even if a survey is flawed because of failure to use alternative or additional controls, it may nevertheless be probative. *Stouffer*, 118 F.T.C. at 807.

The ALJ concluded that the control ad that was used in the copy test to control for background "noise" including pre-existing beliefs[38] contained too many elements that Dr. Mazis

[38] It is important to note for purposes of properly understanding the record, that contrary to Respondent's assertion, Dr. Mazis did *attempt* to control for pre-existing beliefs. He did not use the control that the Respondents argued (and Complaint Counsel disputed) was necessary – a question that would identify copy test respondents who had seen ads for other ab belts. Dr. Mazis used a control ad for this purpose, which the ALJ found to be flawed because it likely

had identified as direct effects to serve as an effective control. (ID at 54.) Importantly, he opined that the consequence of this defect was to "inflate the control ad numbers thereby *reducing* the net takeaway results." (ID at 54.) (emphasis added). The true net takeaway from the closed-ended questions is therefore greater than the difference between the test ad responses and the control ad responses.

The ALJ stated, accurately, that the decision in *Stouffer* "stands for the proposition that a copy test will not be rejected for failure to control for preexisting belief where there is no evidence that such that such a belief [affected] the results." (ID at 56.) Dr. Jacoby testified that "we have no evidence in the record that any [consumers] were exposed to any of these ads [for other ab belts]. (Tr. at 367; *see also* Tr. at 369.) Notwithstanding evidence other than survey evidence that Respondents were exploiting preexisting beliefs, the ALJ agreed with Dr. Jacoby: "The factual record in this case does not support imposing liability on Respondents based upon the preexisting beliefs of consumers *because there is insufficient evidence of the existence, extent, or impact of those preexisting beliefs.*" (ID at 56.) (emphasis added).[39] Therefore,

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contained too many elements that he considered (and Dr. Mazis had identified as) direct effects (three images of slim models and the use of the name Ab Force six times). (ID at 54.) Although Complaint Counsel do not dispute the ALJ's opinion of the control ad, Respondents' allegation' that Dr. Mazis did not attempt to control for preexisting beliefs is inaccurate. (*See generally* Tr. at 83, 108-09, 153,-54, 157.)

[39] Respondents argument that the exclusion of 41 respondents who had seen *very recent* news stories using ab belt ads to illustrate an FTC initiative proves that there was evidence of preexisting beliefs is specious. (CX 58 at 18.) It was appropriate to control for people who had seen the recent negative news reporting because the reports may have influenced consumers responses. Respondents also cite Dr. Mazis' testimony regarding the likely source of the high takeaway numbers from the control ad, (Tr. 103-04), as evidence of the existence of preexisting beliefs. This is not empirical evidence required by the *Stouffer* decision, and, furthermore, the ALJ acknowledged Dr. Mazis' testimony, but concluded that the high takeaway numbers "could also result from the direct effects which remained in the control ad." (ID at 54.)

pursuant to *Stouffer*, to the extent the ALJ was correct in finding there was no evidence of the existence, extent, or impact of preexisting beliefs, he properly concluded that "despite the flaws in Mazis' control ad, the copy test is sufficiently methodologically sound as to be reasonably reliable and probative of the issues before the court." (ID at 57.)[40]

3. Where the Evidence Is Clear That Respondents Intended to Exploit the Pre-existing Beliefs of Consumers, it Should Not Be Necessary to Control for Them

In contrast, to the extent the ALJ *erred* in concluding there was no evidence of Respondents exploiting preexisting beliefs, controlling for them in a copy test would skew the survey results. As noted in Part II above, the ALJ found that the Ab Force advertisements expressly claimed that the device is technologically comparable to other ab belts and that it is significantly cheaper than those other ab belts. (IDF 65.) Moreover, virtually all of the Ab Force ads refer to "those fantastic ab belt infomercials on TV." *(See, e.g.*, CX 1, Exh. A-H.) Ab Force's test ads also claimed that the Ab Force was "just as powerful and effective as those expensive ab belts" on TV (or in some ads, in infomercials. (CX, 1, Exh. A-D and G.) The rollout ads claimed that the Ab Force had the "same powerful technology as those expensive ab belts." (CX 1- E, F, and H.) The likely effect that such references created in consumer's minds was the belief that the Ab Force was just what the ads expressly claimed it was – a product comparable in efficacy to the other ab belts advertised on TV. As noted above, it is not fatal to fail to control for preexisting beliefs if there is no evidence that the preexisting beliefs would bias unduly the results. *Stouffer,* 118 F.T.C. at 810. Rather, the Commission held that it must

[40] Consistent with the Commission's decision in *Stouffer*, the ALJ also held that no controls are necessary for interpreting the responses to open-ended questions. *Stouffer* 118 F.T.C. at 808.

evaluate the totality of the circumstances bearing on the reliability of consumer research, (*id*.) and then noted that respondent may be liable for ads that capitalize on preexisting consumer beliefs. *Id.* at n.31. In that situation, controlling for preexisting beliefs would have an adverse effect on the survey's reliability. Accordingly, given the record evidence in this matter, as discussed *supra* at Part II, it is appropriate, for the Commission to conclude that such exploitation on the part of the Respondents is *additional* justification for relying on the copy test results.

4. The ALJ's Methodology in Determining Net Takeaway Was Appropriate and Consistent with the Methodology Followed in *Stouffer*

It was entirely proper for the ALJ to determine net takeaway from the survey test ad by subtracting the highest set of positive responses to the three control questions from the positive responses to each of the close-ended questions. (*See* ID at 59.) An identical procedure was at issue in *Stouffer*. In that case, the procedure followed by Complaint Counsel's expert was to deduct the percentage of affirmative responses to the control question from the percentage of affirmative responses to the tested claims. *Stouffer*, 118 F.T.C. at 806. A control ad was not used to control for preexisting beliefs. The Commission found that the copy test using those procedures "provides reliable and probative evidence and is methodologically sound." *Id.*

5. The ALJ Properly Concluded That the Net Takeaway from the Test Ad Supports the Conclusion That the Ab Force Ads Made the Challenged Claims

a. Although the Control Ad Was Flawed, the ALJ Correctly Used it to Measure Net Takeaway

Even though the control ad was flawed, in that it did not adequately remove the name ("Ab Force") (and images creating the direct effects, the ALJ properly used it to measure net takeaway. In fact, the impact of the flaw, as he noted, was to artificially inflate the takeaway in the control, thereby lessening the net takeaway. Such a flaw obviously is in the Respondents' favor. Since, even with that flaw, the net takeaway was sufficiently high, as discussed below, to find liability, the copy test was "sufficiently methodologically sound as to be reasonably reliable and probative of the issues." (*Id.* at 57.)

b. The Reported Net Between the Test Ad Responses and the Control Ad Responses Meets or Exceeds the Minimum Net Takeaway That the Commission and the Courts Have Held to Be Sufficient for Liability

The ALJ reported the copy test results as both the takeaway using Dr. Mazis' control ad and, consistent with his conclusion that controlling for preexisting beliefs is not critical in this case, takeaway using the highest response to the three control questions asked as part of the series of close-ended questions. (ID at 59.) Using the control ad produced net takeaway of: 15.9% of respondents perceiving a lose weight claim (43.0% of test ad respondents minus 28.1% of control ad respondents); 16.7% perceiving a lose inches around the waist claim (58.1% - 42.4%); 3.9% perceiving a fat loss claim (22.9% - 19.0%); 17.3% perceiving a well developed abs claim (65.4% - 48.1%); and 10.5% perceiving an alternative to regular exercise claim (39.1% - 28.6%). Consistent with the ALJ's reasoning that direct effect elements in the control ad

resulted in increasing takeaway, these takeaway numbers are *lower* than they should be. (ID at 59.)

Reducing net takeaway by the highest affirmative response rate (5%) to the three controls for the closed-ended questions produced net takeaway of 60.4% (well-developed abs); 53.1% (inches around the waist); 38% (lose weight); 34.1% (alternative to exercise) and 17.9% (removes fat deposits). (ID at 59.)

The ALJ indicated that, in FTC advertising cases and Lanham Act cases, levels as low as ten percent net takeaway may be considered sufficient to find liability. (ID at 57-58.)[41] In *Thompson Medical*, the Commission found close-ended responses of 16 to 18 percent sufficient, and the ALJ cited other Commission decisions that suggest levels of ten percent would be sufficient. (ID at 58.) The ALJ also cited Lanham Act decisions finding response rates in the range of 10 to 15 percent sufficient. (ID at 58.) Thus there is ample precedent for the ALJ's

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[41] FTC law and analogous trade mark infringement actions under the Lanham Act support the proposition that a net difference between 10% and 15% is sufficient to support an allegation of trade mark infringement. *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973), *cert. denied* 414 U.S. 1112 (1973) (Where Firestone's own consumer survey revealed that 15.3% perceived "Safe Tire" to mean every tire was "absolutely safe" or "absolutely free from defects," the court stated that it was "hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public."); *Mutual of Omaha Insurance Co. v. Novak,* 836 F.2d 397, at 400 (8th Cir. 1987), *cert. denied,* 488 U.S. 933 (1988) (10%)*; Humble Oil & Refining Co. v. American Oil* Co., 405 F.2d 803 at 817 (8th Cir. 1969), *cert. denied,* 395 U.S. 905 (1969) (11%); *James Borough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266 at 279, n.23 (7th Cir. 1976) (referring to a prior case showing 11%); *Jockey International, Inc. v. Burkard,* 185 U.S.P.Q. (BNA) 201, at 205 (SDNY 1973) (11.4%); *McDonough Power Equip. Inc. v. Weed Eater, Inc*., 208 U.S.P.Q. (BNA) 676, at 683, 684, and 685 (Trademark Trial & App. Bd. 1981) (11%); *Goya Foods, Inc., v. Condal Distributors, Inc.*, 732 F. Supp. 453, 456-57 (S.D.N.Y 1990) (9%); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*, 365 F. Supp. 707 at 716 (SDNY 1973), *modified and aff'd*, 523 F2d 1331 (2d Cir. 1975) (8.5%); *compare, Sara Lee Corp. v. Kayser-Roth Corp.,* 81 F.3d 455, n.15 (4th Cir. 1996), *cert. denied*, 519 U.S. 976 (1996) ("We may infer from case law that survey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent.") (emphasis added.)

conclusion that "the copy test results support the conclusion that the AB Force ads conveyed claims of that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. (ID at 58.)IV.

V. The Record Supports a Stronger Order, Including a Bond

The Commission should broaden the scope of the ALJ's order to ensure that Respondents do not, in the future, sell products on the basis of claims for which they have no substantiation. Part III of the Notice Order attached to the Complaint prohibits Respondents, "in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ab Force, any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program" from making "any representation, in any manner, expressly or by implication, about weight, inch, or fat loss, muscle definition, or the health benefits, safety, or efficacy of any such product, service, or program, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation." Thus, the Notice Order sought to prohibit Respondents from making any efficacy claim, as well as any health or safety claim, about any product, service, or program unless they possessed and relied on competent and reliable scientific evidence substantiating the claim. Part IV of the Order the ALJ entered is limited to any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." It prohibits Respondents from making any claim about weight, inch, or fat loss; muscle definition; exercise benefits; or the health benefits, safety, or efficacy of any such product, service, or program unless they possessed and relied on competent and reliable scientific evidence

substantiating the claim. The Notice Order, in contrast, would require such evidence for any claim for any product, service, or program.

A. The Commission has authority to impose "all product" coverage

The FTC Act gives the Commission discretion to determine what remedy is necessary to eliminate the deceptive practices that have been found. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-613 (1946). The Commission may prohibit "like or related" acts as well as the specific practice that was at issue in the case as long as the remedy has a "reasonable relation" to the unlawful practices at issue. *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498-99 (1st Cir. 1989); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986), *cert. denied,* 481 U.S. 1038 (1987); *Litton Industries, Inc. v. FTC*, 676 F.2d at 369; *Jacob Siegel Co. v. FTC*, 327 U.S. at 611-12.

The Commission is entitled "to frame its order broadly enough to prevent [the respondent] from engaging in similarly illegal practices in future advertisements," *FTC v. Colgate Palmolive Co.,* 380 U.S. 374, 395 (1965). Indeed, the Commission has entered "all products" orders in many cases. *See, e.g.*, *Colgate-Palmolive*, 380 U.S. at 394-95 (all products); *Jay Norris, Inc.*, 598 F.2d at 1250 (all products); *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 342-43 (7th Cir. 1969), *cert. denied*, 364 U.S. 883 (1960) (all products).

The Seventh Circuit, in its opinion in *Kraft*, sets forth the well settled law with respect to the Commission's ability to issue orders that go beyond the violations at issue in a proceeding under Section 5.

> The FTC has the discretion to issue multi-product orders, so called "fencing-in" orders, that extend beyond the violations of the Act to prevent violators from engaging in similar

> deceptive practices in the future. *Colgate-Palmolive*, 380 U.S. at 395, 85 S. Ct. at 1048; *Sears*, 676 F.2d at 391-92. Such an order must be sufficiently clear so that it is comprehensible to the violator, and must be "reasonably relat[ed]" to a violation of the Act. *Colgate-Palmolive*, 380 U.S. at 394-94, 85 S. Ct. at 1048.

Kraft v. FTC, 970 F.2d at 326.

In deciding whether an order is reasonably related to a respondent's violation the Commission considers three factors. The first is the deliberateness and seriousness of the violation. The second is the degree of transferability of the violations to other products, and the third is the respondent's history of violations. *Kraft*, 970 F.2d at 326; *Thompson Medical*, 104 F.T.C. at 833. In the case at bar, all three factors are present and argue for an "all products, all claims" order.[42]

As is discussed in the next sections, the facts of this case warrant comprehensive order coverage, both in terms of products and claims. Given the serious and deliberate nature of Respondents' violations, the readiness with which they can be transferred to other products, and Respondents' history of violations, strong fencing-in provisions are required.

B. Respondents' Violations Were Serious And Deliberate

The ALJ concluded that the Ab Force ads claim that it causes loss of weight, inches, and pound; causes well-defined abs; and is an effective alternative to exercise. (CL 8.) He also found that these claims relate to appearance, fitness, or health, and are material to consumers.

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[42] The presence of all three factors is not required to justify broad fencing-in provisions if the Commission finds that the factors involved in the violations outweigh the absent factors. For example, the Seventh Circuit affirmed the Commission's decision to broaden the product coverage of an order provision entered by an ALJ to all cheese products from individually wrapped cheese slices, although the respondent had no history of prior violations. *Kraft*, 114 F.T.C. at 327. *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (extreme fencing-in provision sustained because of the egregiousness of the violation and propensity to commit violations).

(IDF 275.)[43] Respondents' offense is inherently serious, because claims about health are important to consumers. In addition, claims related to loss of weight as especially serious. As Commissioner Harbour noted in *KFC Corporation* (C-4118), 2004 FTC LEXIS 151, *14-15 (2004) (Statement of Commissioner Harbour), "obesity has been described as both an 'epidemic' and a 'crisis.'"[44] A recent FTC Staff Report on weight-loss advertising noted that being overweight or obese is "the second leading cause of preventable death, after smoking, resulting in an estimated 300,000 deaths per year. The costs, direct and indirect, associated with [being] overweight and obese are estimated to exceed $100 billion a year."[45]

The seriousness of the violation is enhanced because the challenged ads were broadly disseminated nationwide. As the ALJ noted, deceptive claims were widely disseminated in numerous ads, in multiple media and across the nation. (F. 47, 49, 51-61.) Respondents paid over $4 million to disseminate the challenged ads. The duration, number of executions, and multi-million dollar cost of the campaign all constitute significant evidence of the seriousness of the violations. *See Thompson Medical*, 104 F.T.C. at 834-36; *see Kraft*, 114 F.T.C. at 326. In

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[43] The Commission has stated that advertising claims are presumed to be material if they are express or if they pertain "to the central characteristics of the product," such as its purpose, safety, or efficacy. *Deception Statement*, 103 F.T.C. at 182. Moreover, the Commission may presume materiality for (1) express claims; (2) implied claims where Respondents intended to make the claims; and (3) claims involving health, and safety. *Thompson Medical,* 104 F.T.C.. at 816-17.

[44] *See* The Time/ABC News Summit on Obesity (Preliminary Agenda for June 2-4, 2004), available at http:/www.time.com/time/2004/obesity; America's Obesity Crisis, TIME (June 7, 2004).

[45] Weight-Loss Advertising: An Analysis of Current Trends, A Report of the Staff of the Federal Trade Commission (Sept. 2002), at vii ("Executive Summary"), available at http://www.ftc.gov/bcp/reports/weightloss.pdf.

addition, as the ALJ noted, the campaign was very effective. Respondents sold about 747,000 units of the Ab Force and took in about $19 million. (F. 41, 42).

Moreover, the violations were deliberate as well as serious. *See Kraft*, 114 F.T.C. at 134; *Thompson Medical*, 104 F.T.C. at 834-35. The ALJ noted Khubani's desire to enter what he had called "one of the hottest categories ever to hit the industry." (ID at 45.)

> Given the commercial success of the 'infomercial ab belts' and despite knowing that he did not have substantiation to expressly make the type of health, weight loss, fitness, and exercise claims contained in those ads, Khubani nevertheless created commercials for the Ab Force which relied on the name, visual images, and statements to implicitly make those very same false and misleading claims. (F. 60, 65-102, 114-136.) The absence of an expressly identified purpose of using the Ab Force required consumers to rely on these implied claims. Thus, Khubani's intent seems clear. While Khubani may have removed the express health, weight loss, fitness, and exercise claims, perhaps in an attempt to avoid liability, he clearly intended to make those same claims by implication.

(ID at 45-46.)

As discussed in greater detail above, Khubani wrote all of the ads and intended all of them to convey the same message. Several of his early ads contained explicit references to "fitness," "shape," "exercise," "powerful," and "effective." IDF 86, 91. Then, as he reviewed a script drafted by the infomercial producer, he struck the express claim "do you wish you could get into great shape fast without exercise?" because he did not have substantiation for the claim. IDF 58-60. Thus, he deliberately tried to convey the same message without the making the clearly illegal express claim.

Khubani's use of visual images also show that his violations were deliberate. The TV ads feature thin models with well-defined abs in skimpy clothing who are wearing the Ab Force and experiencing abdominal contractions. (F. 74-76.) Khubani testified that it was necessary to use slim models with exposed abdomens in order to show their muscles involuntarily contracting

when they used the Ab Force. (F. 78.) The TV ads, however, also include "stock footage" of close-up images of a bikini-clad woman, who is not wearing the Ab Force or any exercise belt, showing off her thin waist and well-defined abs. (F. 83.) The longer TV ads contain stock footage of a bare-chested, thin, well-muscled man who is not wearing any exercise belt performing a crunch. (F. 83.) Khubani himself observed the TV ads carefully enough to suggest to the producer that some stock visual images be inserted (dollar signs, falling numbers, wheels of technology). (F. 81-82.) He obviously could have asked that the stock footage of the bikini-clad woman and the crunch-performing man be removed from the ads.

In short, Khubani purposely created ads that conveyed that the Ab Force was a weight loss and fitness product.

C. The Violations Are Readily Transferable To Other Products

Respondents' violations are readily transferable to any product and any claim. There is nothing about these violations that is peculiar to ab belts or health claims. Absent the order sought by Complaint Counsel, there would be no impediment to Respondents' making misrepresentations in the same manner in which they did in this case. *See Kraft*, 114 F.T.C. at 139; *Thompson Medical*, 104 F.T.C. at 836.

The ALJ found that the fact that Respondents "have the financial means to spend millions of dollars on effective, nationwide advertising" (ID at 65) and "have promoted and sold hundreds of products (IDF 22, ID at 65), is sufficient for the Court to determine, under the *Kraft* rationale, that Respondent's advertising techniques and practices are readily transferrable to other products." (ID at 65.) He stressed, however, that health, weight loss, fitness, and exercise benefits cannot "readily be determined by consumers from an advertisement, and therefore

consumers must rely on the representations of the advertiser." *Id.* In fact, however, very few if any benefits can be "readily be determined by consumers from an advertisement." The technique at issue - failing to identify expressly the purpose of an item and simply implying its benefits through images and other means - is applicable to virtually any product.

D. Past History

The Commission has taken four previous actions against Respondent Khubani and his corporations. In 1990 and in 1996, the Commission obtained consent judgments enjoining Khubani and corporations he controlled from violating the Mail or Telephone Order Merchandise Rule ("Mail Order Rule") and requiring them to pay penalties of $35,000 (1990) and $95,000 (1996) for alleged violations.[46] In 1996, the Commission entered an administrative order prohibiting Khubani and Telebrands from violating Section 5 of the FTC Act in connection with the marketing of antennas and hearing aids.[47] Then, in 1999, the Commission modified the existing 1996 Mail Order Rule consent judgment with Khubani and Telebrands and obtained penalties of $800,000 for alleged violations of the Mail Order Rule.[48] The ALJ held that, because the consent orders did not involve any finding of liability, they cannot be used to justify a broad "fencing in" order. ID at 65.[49]

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[46] *United States v. Azad Int'l, Inc.*, No. 90 CIV 2412-(PLN) (S.D.N.Y. Apr. 12, 1990); *United States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 18, 1996).

[47] *In re Telebrands Corp.*, 122 F.T.C. 512 (1996).

[48] Modified Consent Decree, *United States v. Telebrands Corp.*, Civ. No. 96-827-R (W.D. Va. Sept. 1, 1999).

[49] The initial decision also states that the consent orders cannot be considered because copies of the orders were never moved into evidence. I.D. 65. The administrative consent and the 3 federal court consents were cited in CC's brief. *Id.* Consent orders and judgments are official agency and court records. The administrative consent is contained in an official agency reporter

In *Jay Norris Corp. v. FTC,* 91 F.T.C. 751, 856 & n.33 (1978), *aff'd as modified*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979), the Commission based its all-products order, in part, on the existence of prior consent orders. Prior orders had been issued by the

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and the federal court consents can be obtained from the court clerks, although the Respondents, as defendants in these actions, are familiar with them. Courts often cite to consents in the same manner in which they cite to reported cases. *See County of Oakland v. City of Detroit*, 784 F. Supp. 1275, 1281 (E.D. Mich. 1992), in which the court cited to a consent judgment pursuant to which "the city's actions were apparently taken".

Moreover, consents are often cited by courts in their decisions although they have not been admitted in evidence. In *Bowman v. Hale,* 302 F. Supp. 1306, 1307 (S.D. Ala. 1969), *vacated on other grounds,* 464 F.2d 1032 (5th Cir. 1972), the court dismissed an action by a prisoner for cruel and unusual punishment, but noted that "the court wants the record to reflect that many complaints similar to those in grounds 3 through 7 were the subject of an agreement worked out between Atmore Prison authorities and complaining inmates, in the nature of a consent judgment, . . . of which a copy is appended." In *Lancaster v. Lord,* 1991 U.S. Dist. LEXIS 8328 (S.D.N.Y. 1991), the court denied a motion by the city of New York to dismiss the complaint. The court noted that in such actions, the complaint "must plead specific facts that would establish a violation." Id. at *2. The complaint referred to a class action that "put city officials on notice of an alleged constitutional inadequacy of medical treatment" but did not cite it. The court noted that "it is clear from the plaintiff's memorandum of law that the class action in question was Reynolds v. Siefaff," a consent judgment which was a challenge to the conditions in the prison wards at three city hospitals. Id. at *7-8.

Moreover, as the ALJ notes, Respondents acknowledged on the record in their Reply Brief that the consents exist and simply alleged that none involved any finding of liability. Id. The ALJ should have taken official notice of the consents pursuant to rule 3.43(d) of the Commission's Rules of Practice. *See Skylark Originals, Inc.,* 80 F.T.C. 337, 350 (1972) (taking official notice of FTC guidelines). Although it could be argued that Complaint Counsel should have formally requested the court to take official notice and Respondents should have been given an opportunity to disprove such noticed facts upon a timely motion rule as 3.43(d) provides, Respondents in fact had such an opportunity in their Reply Brief and only addressed the lack of findings of wrongdoing. Any failure to follow the formalities is harmless error. In *Skylark,* respondents requested the Commission to take official notice of FTC guidelines **after** oral argument before the Commission, not during the trial.

Finally, it should be noted that courts have recognized that an administrative agency's ability to take official notice is even broader than courts' ability to take judicial notice. *See* Kenneth C. Davis and Richard J. Pierce, Jr., *II Administrative Law Treatise* (3d ed. 1994) § § 10.5 and 10.6 (discussing cases and observing that administrative agencies operating under the Administrative Procedures Act enjoy broader discretion to take notice of contested material facts than do courts operating under the Federal Rules of Evidence).

Commission, the U.S. Postal Service, and the state of New York. In *Sterling Drug, Inc.*, 102 F.T.C. 395, 793 n.54 (1983), *aff'd,* 741 F.2d 1146 (9th Cir. 1984), *cert. denied*, 105 U.S. 1843 (1985), the Commission noted that consent orders are relevant "for determining the appropriate scope of relief." [50] In *J. Walter Thompson USA, Inc*., 120 F.T.C. 829 (1995), a consent order, three Commissioners issued a statement as part of the record that order coverage should have been broader given the fact that there were three prior consents against the respondent.

Many courts have followed the Commission's lead in using consent orders as evidence of a past history of violations. In *United States v. Union Circulation Co.,* 1983-1 Trade Cas. (CCH) P65,372 (N.D. Ga. 1983), a civil penalties case, the court considered a prior consent order and a consent judgment resolving allegations of violations of that order as showing a "history of prior such conduct." (15 U.S.C. § 45(l)(C) sets out "history of prior such conduct" as a factor to be considered in assessing civil penalties.) In *FTC v. SlimAmerica, Inc*., 77 F. Supp. 2d 1263 (S.D. Fla. 1999), the court noted that six states had obtained judgments (five defaults, one consent) against one of the defendants for misrepresentations to consumers and that the U.S. Postal Service had also obtained a consent order against him. Noting his past record, the court entered a requirement of a performance bond for the defendant.

The Second Circuit, however, in *ITT Continental Baking Co.*, 532 F2d. 207, 223 n.23 (2d Cir. 1976), noted that consent orders do "not constitute an admission by proposed respondents that the law has been violated" and stated that 'the Commission may not rely on such orders as

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[50] In *Thompson Medical Co.*, 104 F.T.C. at 833 n.78, the Commission stated, "Because consent orders do not constitute a legal admission of wrongdoing, we will not use a *single* consent order as a basis for concluding that Thompson has a history of past violations." (emphasis added.) The Commission left open the possibility that a "pattern" of consent orders would be relevant.

evidence of additional illegal conduct when formulating cease and desist orders in other proceedings."[51] Nevertheless, the court did enter an order covering all food products, as the Commission had requested, so the statement may be viewed as dictum. (One respondent had six prior orders, five of which were consent orders.) Also, as noted above, a few years later the Second Circuit affirmed the Commission's all products order in *Jay Norris*, which was based in part on the fact that there were prior orders against the respondent. Moreover, in *SEC v. Drexel Burnham Lambert, Inc,* 837 F. Supp. 587 (S.D.N.Y. 1993), *aff'd*, 16 F.3d 520 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 724 (1995), the Second Circuit upheld a district court opinion that barred Victor Posner from serving as an officer or director of a public company in part because of two prior injunctions in SEC actions to which Posner had agreed without admitting or denying the allegations of the complaint.[52]

In short, both the Commission and the courts have taken prior consents into account in determining the appropriate scope of an order. In this matter, Respondents' past history with the Commission indicates that they may be likely to fail to conform to the requirements of the law. Broad order coverage will give them an incentive to be sure they do so. The "fencing-in" relief in Part III of the Notice Order, which extends the prohibitions of the order beyond EMS devices to any efficacy claim for any product, service, or program, is appropriate given the seriousness of

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[51] This reasoning was followed in *North American Phillips*, 111 F.T.C. 139, 193 n.10 (1988), in which the ALJ refused to consider multiple consent orders, stating that the "agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated."

[52] In *United States v. Gilbert,* 668 F.2d 94 (2d Cir. 1981), *cert. den.,* 456 U.S. 946, the Second Circuit upheld a district court decision allowing an SEC consent decree to be admitted in evidence to prove that the defendant knew of the SEC reporting requirements.

the violations, the ease with which the unlawful conduct can be transferred to other products, and the fact that Respondent Khubani, who controls the other two Respondents, has a long history of violations of the FTC Act, including making misrepresentations in connection with a hearing aid device. *See Thompson Medical*, 104 F.T.C. at 833.

VI. The Commission Has Authority to Require a Bond and Should Do So

Part V of the Notice Order would have required Respondent Khubani to secure a $1,000,000 performance bond before engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device, as that term is defined in Section 15(d) of the FTC Act, 15 U.S.C. § 52. This provision was included because of the serious nature of the violations and because Khubani has repeatedly given the Commission reason to believe he violated the FTC Act, and previously marketed a device (a hearing enhancement aid) with allegedly deceptive claims.[53] The ALJ did not include a bond in his order, noting that there is no precedent for the imposition of a bond in a litigated Part III matter. While an appropriate cease-and-desist order will help prevent Respondent Khubani from making unsubstantiated claims about medical devices, "where a company appears to have exploited a national health crisis, an even stronger response from the Commission is warranted." *See KFC Corporation* (C-4118), 2004 FTC LEXIS 151, *19 (2004) (Statement of Commissioner Harbour).

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[53] *See* 15 U.S.C. § 55(d)(2), (d)(3) (defining "device" to include any implement "intended for use . . . in the cure [or] mitigation of disease . . . or intended to affect the structure or any function . . . of the body of man").

A. The Commission Can Impose a Bond if Necessary to Prevent Future Violations

The Commission has the authority to impose a bond as fencing-in relief if presented with facts showing that such relief is necessary to prevent future violations. The Commission has broad discretion to fashion remedies to "close all roads to the prohibited goal, so that [the Commission's] order may not be by-passed with impunity." *FTC v. Rubberoid Co.*, 343 U.S. 470, 473 (1957). Indeed, the Commission has accepted consent orders with a bond in part III matters. *See, e.g., William E. Shell, MD*, 123 F.T.C. 1477 (1997); *Original Marketing, Inc.*, 120 F.T.C. 278 (1995); *Taleigh Corp.*, 119 F.T.C. 835 (1995).

B. Requiring a Bond Prior to Marketing a "Device" Is Reasonably Related to the Conduct and Necessary to Prevent Future Violations

Requiring Respondent Khubani to post a bond prior to marketing a device as defined by the FTC Act is reasonably related to the conduct and appropriate to prevent future violations. *See, e.g., United States v. Vlahos,* 884 F. Supp. 261, 266 (N.D. Ill. 1995), *aff'd*, 95 F.3d 1154 (7th Cir. 1996); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1276-77 (S.D. Fla. 1999). Khubani's history of giving the Commission reason to believe he has violated the FTC Act and that he has marketed medical devices with false claims suggests that a powerful deterrent is necessary to ensure that similarly deceptive campaigns do not occur in the future. The proposed bond also ensures that funds will be available if Khubani fails to comply with the FTC Act in marketing devices.

VII. CONCLUSION

Respondents disseminated advertisements for the Ab Force that presented it as a health and fitness aid and misrepresented its ability to cause well-defined abdominal muscles and loss

of weight, inches, or fat and substitute for regular exercise. Respondents intentionally disseminated these misrepresentations, which involved health claims that were and are of importance to consumers. Accordingly, based on the record in this proceeding, the requested order is the appropriate relief for their violations of Section 5.

Dated: December 14, 2004

Respectfully submitted,

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COMPLAINT COUNSEL

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that I have caused to be served by hand this 14th day of December, 2004, a paper original and twelve copies as well as an electronic version of the foregoing Complaint Counsel's Answering Brief And Cross-Appeal Brief to be filed with the Secretary of the Commission:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and one copy to served by hand upon:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Washington, D.C. 20580

and one copy to be served by United States mail and email upon:

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