**In the Matter of Telebrands Corp., TV Savings, LLC, and Ajit Khubani**
**Docket No. 9313**

## OPINION OF THE COMMISSION

**By LEIBOWITZ, Commissioner, For A Unanimous Commission:**

This is a case about firm abs and phony ads. It illustrates how false and unsubstantiated claims can be communicated indirectly but with utter clarity – to the detriment of consumers and in violation of the laws this Commission enforces.

Respondents Telebrands Corporation ("Telebrands"), TV Savings, L.L.C. ("TV Savings"), and their principal, Ajit Khubani, appeal from Administrative Law Judge ("ALJ") Stephen J. McGuire's Initial Decision and Order holding them liable for violating Sections 5 and 12[1] of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and 52, by using unsubstantiated claims in multiple media to promote the "Ab Force," a belt-like device that uses electronic stimulation to cause involuntary contraction of muscles in the abdominal wall. Complaint counsel cross-appeal the scope of the order's coverage. We affirm liability under Sections 5 and 12 and partially modify the ALJ's Order.

From December 2001 to at least April 2002, respondents marketed the Ab Force belt on television, radio, the Internet, and in print. On September 30, 2003, the Commission issued an administrative complaint charging respondents with making unsubstantiated claims that the Ab Force (1) causes loss of weight, inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise. According to the complaint, respondents' failure to substantiate such claims constitutes an unfair or deceptive act or practice and the making of false advertisements in violation of Sections 5 and 12 of the FTC Act.

The ALJ found that the product name, visual images, and statements in respondents' advertising create the net impression that the Ab Force electronic muscle stimulation ("EMS") device provides health, fitness, weight loss, or exercise benefits; that those claims were false and misleading; and that the claims were material to consumers' purchasing decisions. ID at 41-43,

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[1] Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits "unfair or deceptive acts or practices." Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, services, or cosmetics. A "false advertisement" is any advertisement that is "misleading in a material respect." 15 U.S.C. § 55(a)(1). Under Section 15 of the FTC Act, 15 U.S.C. § 55(d), a "device" includes "an instrument, apparatus, implement, machine, [or] contrivance *** which is *** intended to affect the structure or any function of the body of a man."

60-61.[2] Accordingly, he entered an order prohibiting respondents, *inter alia*, from representing that the Ab Force, or any substantially similar device, causes loss of weight, inches, or fat; promotes well-defined muscles; or is an effective alternative to exercise. Order ¶ II. The order also prohibits respondents from making such misrepresentations, expressly or by implication, about any EMS device. Order ¶ III. Paragraph IV of the ALJ's order further prohibits respondents from making any representation regarding, *inter alia*, the safety, efficacy, or benefits of any EMS device, or any product, service, or program relating to health, weight loss, fitness, and exercise without "competent and reliable scientific evidence" that substantiates the representation. Order ¶ IV.

Respondents' principal contention on appeal is that the ALJ erred in finding that their advertising for the Ab Force conveyed the challenged claims. Complaint counsel cross-appeal the ALJ's refusal to order fencing-in relief[3] that would require respondents to substantiate all claims about weight, inch, or fat loss; muscle definition; or the health benefits, safety, or efficacy of any of respondents' products, services, or programs. Complaint counsel also appeal the ALJ's refusal to require respondent Khubani to obtain a performance bond of $1 million to prevent future violations.

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[2] References to the record are abbreviated as follows:

IDF Initial Decision Finding

ID Initial Decision

Tr. Transcript of Trial Testimony

CX Complaint Counsel's Exhibit

RX Respondents' Exhibit

JX Joint Exhibit

RAB Respondents' Appeal Brief

CAB Complaint Counsel's Answering and Cross-Appeal Brief

RRB Respondents' Brief in Reply to Complaint Counsel's Brief in Opposition to Respondent's Appeal and in Opposition to Complaint Counsel's Cross-Appeal

[3] "Fencing-in" relief refers to provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful. Fencing-in remedies are designed to prevent future unlawful conduct. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992).

Based on our consideration of the entire record in this case and the arguments of counsel, we deny respondents' appeal and grant in part, and deny in part, complaint counsel's cross-appeal. We agree with the ALJ's findings of fact and conclusions of law to the extent they are consistent with those set forth in this opinion and, except as noted herein, adopt them as our own. The Order we issue today supplements the fencing-in relief ordered by the ALJ with a provision prohibiting respondents from making claims about the health benefits, safety, or efficacy of any product, service, or program unless they possess and rely upon substantiation for their claims. With regard to complaint counsel's request that respondent Khubani be required to post a performance bond, complaint counsel have not made an adequate showing that the $1 million bond is appropriate in this case. Thus, although we reject respondents' contention that the Commission lacks authority to impose such relief, we decline to order it in this case.

## I. Factual Background and Proceedings Below

Respondent Telebrands develops, markets, and distributes a wide array of consumer products. IDF 4. It has marketed hundreds of products since 1987, principally through "direct response" advertising. IDF 3, 4, 20, 22; Khubani Tr. 435. Direct response advertising can include program-length infomercials, live TV shopping, or any medium that allows consumers to order products directly from the advertiser. IDF 17-19; Khubani Tr. 431-34.

Telebrands is solely owned by respondent Ajit Khubani, who oversaw the Ab Force promotional campaign and had primary responsibility for developing scripts for radio and TV advertising. IDF 10, 16. As President, CEO, and Chairman of the Board, he sets the general direction of the business and is heavily involved in new product development. IDF 10, 14-16; Khubani, Tr. 247. He tracks trends in the marketplace and in various channels of advertising, using industry publications that collect data and rank direct-response ads on a weekly basis. IDF 126; Khubani Tr. 248-50.

Several times a year, based on Mr. Khubani's assessment of market trends, Telebrands enters the market by offering a product at a lower price than offered by competitors already in the market for the same or similar products. IDF 25; Khubani Tr. 247-48. Once Telebrands decides to market a particular product, it creates "test" advertising. IDF 26-27; Khubani Tr. 440. The term "test" ad is used throughout these proceedings to refer to ads that accompanied the product's initial release and were run on a limited basis by respondents so that they could make a prediction as to a product's likely success before committing to a full-scale national advertising campaign. IDF 27-31. The "test" ads were not simply shown to consumers who participated in focus groups or other types of consumer perception research, but were aired in selected markets for limited periods of time and generated actual sales. IDF 30, 44-45, 49. If consumers respond to the "test" advertising, Telebrands proceeds with a full-scale rollout of the new product promotion. IDF 31; Khubani Tr. 440-42. Respondents purport to conduct a review of the ads "from a claims perspective and a compliance perspective" before mounting a full-fledged national advertising campaign. Khubani Tr. 442; IDF 32-33.

Respondents' business practices have drawn Commission scrutiny in the past. Since 1990, Mr. Khubani has entered three separate agreements with the Commission – in two cases, relating to Telebrands' practices – resolving alleged violations of the Commission's Mail Order Rule. Mr. Khubani and Telebrands also settled a separate action relating to false or unsubstantiated claims for two products, and misrepresentations about the company's money-back guarantee. Mr. Khubani and Telebrands paid more than $900,000 in civil penalties to resolve these actions.[4]

Respondents entered the market for EMS abdominal ("ab") belts in December 2001. IDF 62. Mr. Khubani believed that ab belts – including the AbTronic, Ab Energizer, and Fast Abs – represented "one of the hottest categories to ever hit the industry."[5] IDF 63 (*quoting* Khubani Tr. 255). Ads for the AbTronic, Ab Energizer, and Fast Abs were among the most frequently aired infomercials in 2001 and early 2002. Indeed, according to a direct response television industry publication, the *J.W. Greensheet*,[6] infomercials for the AbTronic, Ab Energizer, and Fast Abs brands were among the 50 most frequently disseminated infomercials in the United States on numerous occasions between September 2001 and March 2002. IDF 125, 127-34. Ads for two of these products also appeared 34 times in the top 40 direct response spot rankings, as published by the *J.W. Greensheet*, in 2001 and 2002. IDF 131, 133.

The AbTronic, Ab Energizer, and Fast Abs belts are substantially similar in appearance to the Ab Force belt, IDF 119, and advertisements for them contain substantially similar images of well-muscled, bare-chested men and lean, shapely women wearing EMS devices around the waist and experiencing abdominal contractions. *Compare* JX 2-5 *with* JX 7-9; IDF 73-76, 78, 83, 119-24. They also depict men and women performing conventional abdominal exercises and close-ups of men and women showing off their trim waists and well-defined abdominals. IDF 119-24. The infomercials contain express and strongly implied claims that the ab belts are an effective alternative to exercise, and will cause users to develop tighter abdominals and lose inches, fat, or weight. IDF 120. According to industry monitoring services, more than 5,000

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[4] *See* n.58, *infra*.

[5] Respondent TV Savings, L.L.C., a Connecticut limited liability company, was created to handle respondents' promotional campaign for the Ab Force. IDF 7, 9-10.

[6] The *J.W. Greensheet* is published for the direct response television industry on a weekly basis. IDF 125. Each issue contains a top 50 ranking of infomercials, a top 40 ranking of television spot ads, and a top 20 ranking of infomercial products. IDF 127. Its rankings are compiled on the basis of confidential media budgets and its own monitoring of national cable and selected broadcast markets. IDF 128. At the time of trial in this case, respondent Telebrands had subscribed to the *J.W. Greensheet* for about 12 years. IDF 126.

infomercials for the AbTronic, Fast Abs, and Ab Energizer aired from April 2001 to February 2002.[7] CX 126.

The Commission, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), filed actions for permanent injunctive and equitable monetary relief against marketers of the AbTronic, Ab Energizer, and Fast Abs in May 2002, alleging that their advertisements made false representations that the devices were an effective alternative to exercise and caused users to lose weight, inches, and fat. IDF 135. In July 2003, the Commission settled with marketers of the Fast Abs device for a stipulated permanent injunction and more than $5 million in equitable monetary relief. *FTC v. United Fitness of America, LLC*, CV-S-02-0648-KJD-LRL (D. Nev. July 24, 2003). In the AbTronic case, the Commission was awarded a permanent injunction and a judgment holding the defendants jointly and severally liable for $83 million. *FTC v. Hudson Berkley Corp.*, No. CV-S-02-0649-PMP-RJJ (D. Nev. June 30, 2003). In April 2005, the Commission settled with marketers of the AB Energizer for a permanent injunction and more than $80 million in equitable monetary relief. *FTC v. Electronic Products Distribution, LLC*, No. 02-CV-888-BEN (AJB) (S.D. Cal. April 26, 2005).[8]

Believing that he could sell an EMS ab belt device for significantly less than they were being offered in infomercials, Mr. Khubani contacted an overseas manufacturer and, with that company, began to develop an EMS ab belt based on the same technology. IDF 37, 39; Khubani Tr. 263-64, 534. In fact, the same manufacturer also produced the AbTronic, one of the competing EMS belts. IDF 38. Mr. Khubani settled on the name "Ab Force" for his product because, as he explained at trial, "it was designed to work primarily on the abdominal area" and it was "catchy, sort of like Air Force." IDF 69 (*quoting* Khubani Tr. 264). In less than four months, respondents sold more than 700,000 Ab Force units and accessories, grossing more than $19 million. IDF 41-42, 44, 46, 49-51.

On September 30, 2003, the Commission issued an administrative complaint pursuant to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), charging respondents with making false and unsubstantiated claims that the Ab Force (1) causes loss of weight, inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise. Respondents stipulated that they had no substantiation for these claims. *See* JX 6 ¶¶ 16-19. They denied, however, that the alleged claims were conveyed by their Ab Force advertising.

After a three-day trial, the ALJ rendered a 72-page initial decision. Based on the interaction between and among various elements in the ads – the product name, visual images, text, and surrounding circumstances – the ALJ concluded that respondents' ads strongly and

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[7] In addition to infomercials, the AB Energizer and Fast Abs belts were advertised in short spot ads. IDF 131, 133.

[8] *See also* IDF 119-24 (describing the AbTronic, Ab Energizer, and Fast Abs advertisements and the claims communicated in those infomercials).

clearly conveyed the alleged claims. ID at 41-43. The ALJ explained that the name of the product – "Ab Force" – suggests that 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; *see* ID at 41. In addition, the ALJ relied on the visual images in respondents' TV advertising – *e.g.*, pulsating abdominal muscles; trim and fit male and female models; a male model performing abdominal crunches. IDF 73-76, 83. These visual images, he explained, "are effective in conveying claims and may also be used to determine implied claims." ID at 41, *citing Kraft, Inc.*, 114 F.T.C. 40, 122-23 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Additionally, he noted, some ads contain statements (*e.g.*, "abs into great shape fast – without exercise;" "latest fitness craze;" "powerful and effective;" "powerful technology") that "strongly and clearly imply" that the Ab Force provides users with health, weight loss, fitness, or exercise benefits. ID at 42; IDF 86-92.

Respondents' failure to identify any other purpose for their EMS device was another factor the ALJ considered in determining the overall net impression of respondents' ads. ID at 43. Most of the ads did not expressly state any purpose for the product;[9] two television ads mentioned a massage function briefly – and then only in a video superscript – but the ALJ ruled that the use of the "single, momentary phrase 'relaxing massage' [in those ads did] not offset or counter the numerous oral and printed statements, in combination with the name and visual images * * *." ID at 42-43; see IDF 97, IDF 100-09. The ALJ also observed that the models in respondents' TV ads did not indicate that wearing the Ab Force device was a relaxing or soothing experience. IDF 108.

In addition, the ALJ considered the surrounding circumstances – most notably, evidence that respondents intended to disseminate the challenged claims. ID at 44-46. He reviewed evidence outside the four corners of the advertisements – *i.e.*, expert testimony and copy tests – and concluded that this evidence supported his conclusions regarding the meaning conveyed by the text and images in respondents' advertising. The ALJ, however, did not credit the testimony of complaint counsel's marketing expert, Dr. Michael Mazis, regarding so-called "indirect effects" – *i.e.*, the effects on consumers of previous exposure to ab belts through infomercials, word-of-mouth, or retail packaging for other EMS ab belts. ID at 49-51. While noting that respondents' ads specifically invite consumers to think of infomercials for competing ab belts and expressly claim comparability to those other products, the ALJ found that it was not possible to conclude with confidence that consumers, upon hearing the reference to "those other ab belt infomercials," would necessarily infer that the claims made in those other infomercials would apply to the Ab Force. ID at 50-51.

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[9] IDF 102. While the ads did not expressly state the purpose for the Ab Force, respondents' ads made statements about the purpose of competitors' ab belts – in some cases, direct statements – and indicated that the Ab Force was equally effective, allowing consumers to make the obvious logical connection. *See, e.g.*, CX 1 H, JX 2.

At trial, both complaint counsel and respondents addressed the impact of consumers' preexisting beliefs about the Ab Force belts from sources other than the Ab Force ads themselves. Complaint counsel argued that respondents should be held liable for exploiting consumers' preexisting beliefs; respondents countered that the copy test – even as controlled with a control group – was unreliable because it failed to filter out preexisting beliefs completely. The ALJ rejected the argument that respondents should be liable for exploiting preexisting beliefs on the basis that there was not enough evidence of the "existence, extent, or impact of those preexisting beliefs," but held that the copy test was reasonably reliable and probative. ID at 56-57; *see also* ID at 54-57 (reviewing arguments and case law on liability for preexisting beliefs).

Turning next to the question whether the challenged claims were false or misleading, the ALJ noted that respondents had stipulated that use of the Ab Force does not cause loss of weight, inches, or fat; does not create well-defined abdominals; is not an alternative to exercise; and, furthermore, that they had no substantiation for those claims. ID at 60; IDF 270-73. Given these stipulations, the ALJ held that the alleged claims were false and misleading. ID at 60. Moreover, the ALJ held, the claims related to the purpose and effect of using the product, and the evidence showed that respondents intended to make the implied claims. ID at 61. Accordingly, he reasoned, there was no question that the alleged claims were material to consumers' purchasing decisions. ID at 60-61.

Finally, the ALJ addressed the scope of appropriate relief. The ALJ declined to order respondent Khubani to post a performance bond, given the absence of any case law to support such relief in a litigated FTC adjudicative matter. ID at 63. As to fencing-in relief, the ALJ recognized the seriousness, deliberateness, and transferability of respondents' violations. ID at 64-65. Because respondents' history of prior consent orders did not involve findings of liability, the ALJ did not rely on them; he held, however, that a respondent "need not have a history of prior violations in order for fencing-in relief to be imposed." ID at 65-66. He ordered fencing-in requiring respondents to "possess and rely upon competent and reliable scientific evidence" to substantiate any representation about weight, inch, or fat loss; muscle definition; exercise benefits; or the health benefits, safety, or efficacy of any products, devices, and services promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits. ID at 66, 70.

On appeal, respondents contend that the ALJ erred in concluding that their Ab Force advertising conveyed the challenged claims.[10] Complaint counsel cross-appeal from the ALJ's

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[10] Although respondents' notice of appeal purports to lodge an appeal from the initial decision insofar as it found that their ads were false or misleading, their brief focuses on the question whether the ads in fact conveyed the alleged claims to consumers. They do not argue that there is any substantiation for the alleged claims, or deny that the alleged claims are false, misleading, or material to consumers. Indeed, respondents and complaint counsel stipulated before trial that use of the Ab Force does not cause loss of weight, inches, or fat; does not cause well-defined abdominal muscles; and is not an effective alternative to regular exercise.

refusal to require respondents to post a performance bond before selling or promoting any "device," as defined in Section 15 of the FTC Act, 15 U.S.C. § 55. Complaint counsel also contend that the ALJ should have entered a broader order that would have prohibited respondents, in the absence of substantiation, from making any claim for any product, service, or program, instead of covering those products only when respondents made claims promoting their efficacy or pertaining to health, weight loss, fitness, or exercise benefits.

## II. The Challenged Representations

### A. Legal Standard

An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) ("Deception Statement"); *see, e.g.*, *Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000); *Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 114 F.T.C. at 120. In addition, the Commission long has held that making objective claims without a reasonable basis constitutes a deceptive practice in violation of Section 5. *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) ("*Substantiation Statement*"); *see, e.g., Automotive Breakthrough Sciences, Inc.*, 126 F.T.C. 229, 293 & 293 n.20 (1998); *Jay Norris, Inc.*, 91 F.T.C. 751, 854 (1978), *aff'd as modified*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979).

The primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself. *Deception Statement*, 103 F.T.C. at 176; *see, e.g.*, *Novartis*, 127 F.T.C. at 680; *Stouffer*, 118 F.T.C. at 798; *Kraft*, 114 F.T.C. at 121. Thus, to determine whether an advertisement conveys a particular claim, the Commission looks at the interaction between and among the constituent elements of the ad to determine the "net impression" that is conveyed by the ad as a whole. *Deception Statement*, 103 F.T.C. at 178; *see, e.g.*, *Novartis*, 127 F.T.C. at 679; *Kraft*, 114 F.T.C. at 122. The Commission may rely on the ad itself and need not resort to extrinsic evidence if the text or depictions are clear enough that the Commission can "conclude with confidence" that the claim is conveyed to reasonable consumers. *Novartis*, 127 F.T.C. at 680; *see Stouffer*, 118 F.T.C. at 798; *Deception Statement*, 103 F.T.C. at 176. If an alleged claim is not manifest from the text and images in the ad, the Commission will look to "extrinsic evidence." *See Novartis*, 127 F.T.C. at 680. Such evidence might include common usage of terms, expert opinion as to how an advertisement might reasonably be interpreted, copy tests, generally accepted principles of consumer behavior, surveys, or "any other reliable evidence of consumer interpretation." *Cliffdale Associates*, 103 F.T.C. 110, 166 (1984); *see, e.g., Thompson Medical Co.*, 104 F.T.C. 648, 789-90 (1984) (expert testimony; consumer survey), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086

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ID at 60; IDF 270-72. The parties further stipulated that respondents did not have or rely on substantiation that the Ab Force would have those effects. ID at 60; IDF 273.

(1987); *Novartis*, 127 F.T.C. at 611-12, 617-33, 682-84 (expert testimony; copy tests); *Kraft*, 114 F.T.C. at 121-22 (expert testimony; copy tests); *Figgie Internat'l, Inc.*, 107 F.T.C. 313, 337-39, 377 n.10 (1986) (expert testimony), *aff'd*, 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

The Commission has recognized that an ad may be amenable to more than one reasonable interpretation. *See, e.g., Kraft*, 114 F.T.C. at 120-21 n.8; *Thompson Medical*, 104 F.T.C. at 787 n.7. Where an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible. *See, e.g., Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Moreover, an ad need not mislead a majority of reasonable consumers. An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim. *See, e.g., Kraft*, 114 F.T.C. at 122; *Deception Statement*, 103 F.T.C. at 177 n.20.

If an ad is targeted at a particular audience, the Commission analyzes ads from the perspective of that audience. *Deception Statement*, 103 F.T.C. at 178-79. Different target audiences come to an ad with different perceptions. Consumers cannot understand an ad – or any communication – without applying their own knowledge, associations, or cultural understandings that are external to the ad itself. For that reason, the purpose of ad interpretation is to determine the claims that consumers – particularly the target audience – take away from an ad, whether or not an advertiser intended to communicate those claims. On the other hand, ad interpretation focuses on the impact of the particular ad on reasonable consumers in the target group; an advertiser is not liable for an interpretation of an ad that a consumer may have based on an idiosyncratic perspective.

The final step in the analysis is to determine whether the challenged claims are "material," or likely to affect a consumer's purchasing decision. The Commission presumes that claims are material if, as in this case, they pertain to the "central characteristics of a product * * * such as those relating to its purpose * * * [or] efficacy" or to safety. *Thompson Medical*, 104 F.T.C. at 816-17.

### B. Facial Analysis of Respondents' Ab Force Advertising

We turn first to an examination of the text and images in respondents' ads.[11] We agree with the ALJ that the challenged claims are clearly communicated in ads for the Ab Force belt.[12] As shown below, it is not necessary to look beyond the four corners of respondents' ads to reach this conclusion. This is a straightforward case.

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[11] Respondents' Ab Force promotion included the following ads: (1) a "test" radio ad (CX 1 H); (2) a "roll-out" radio ad (RX 49); (3) a one-minute "test" TV ad (JX 2 (tape); CX 1 B (transcript)); (4) a one-minute "roll-out" TV ad (JX 4 (tape); CX 1 F (transcript)); (5) a two-minute "test" TV ad (JX 3 (tape); CX 1 D (transcript)); (6) a two-minute "roll-out" TV ad (JX 5); (7) a print ad (CX 1 G; RX 48); (8) an Internet ad (RX 52); and (9) two email ads (RX 50-51). Again, all of the ads – including the so-called "test" ads for radio and TV – were disseminated and generated sales. IDF 43-45, 49. Respondents spent more than $4 million on television advertising. IDF 52. The test ads for TV alone were broadcast nearly 96 times in January 2002; more than 4500 orders were called into the telephone number that appeared in those ads. IDF 44-45. The roll-out versions of respondents' television spots were broadcast more than 11,000 times from January 19, 2002 through April 7, 2002. IDF 46-47. The telephone numbers that appeared in the TV ads were associated with more than 300,000 orders for the Ab Force. IDF 48. The radio advertising was more limited, generating a total of only 1,340 orders. IDF 49. The print ad ran for about one week in 13 newspapers and for another week as a newspaper insert. IDF 50. The print and Internet ads together accounted for less than 3 percent of all orders. IDF 50-51.

[12] Respondents challenged the ALJ's findings of fact as to ad interpretation, arguing that the ALJ based the findings on the messages communicated by the Ab Force ad campaign as a whole rather than the messages communicated by each individual ad. We do not agree that the ALJ erred in analyzing the ads but, in any case, the Commission has examined each ad individually and determined that the ads communicate the challenged claims.

### 1. Visual Images and Ad Copy

#### a. Radio Advertisements

Respondents opened their promotion in December 2001 with a 60-second radio spot.[13] The ad invites consumers to recall "those fantastic Electronic Ab Belt infomercials on TV." It then declares: "They're amazing . . . promising to get our abs into great shape fast – without exercise! They're the latest fitness craze to sweep the country!" CX 1 H. The ad continues by claiming that the Ab Force is "just as powerful and effective" as "the expensive ab belts on TV," and would send "just the right amount of electronic stimulation to [a user's] abdominal area." *Id*.

Respondents made several minor changes in the ad after "final review and legal review" and "discussions with counsel" – that is, after the test radio ad had aired. IDF 90 (*quoting* Khubani Tr. 275, 278), IDF 92.[14] These modifications did not change the fundamental ad messages. Again, the rollout radio ad invites comparison to their competitors' "fantastic" and "amazing" ab belts, which they claim are "the latest craze to sweep the country." RX 49. But while the "test" ad claims that the Ab Force is "just as powerful and effective" as "the expensive ab belts on TV" (CX 1 H), the "rollout" ad declares that the Ab Force has the "same powerful

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[13] The text of respondents' first radio ad – the opening ad of the campaign – is as follows:

> *Have you seen those fantastic Electronic Ab Belt (sic) 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! Why so cheap? Because intense competition and mass production have forced prices down. We cut a deal with the factory to buy up to 1 million units at a very special price and we are passing the savings on to you. *The Abforce (sic) 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. Best of all, they're only 10 dollars and have a full money back guarantee. Call now [telephone number omitted]. Don't miss out. Get the amazing electronic Abforce (sic) belt – the latest fitness craze for just $10 [phone numbers omitted].

CX 1 H (emphasis added).

[14] Mr. Khubani admitted that he was aware at the time that there was no substantiation for certain claims about Ab Force, for example that a user could get into shape quickly without exercise and could get a flatter stomach without doing sit-ups. IDF 58-60.

technology as those expensive Ab Belts."[15] IDF 91; RX 49. The revised text does not expressly identify any particular purpose for the Ab Force. It states, however, that it is "[c]apable of directing 10 different intensity levels at [the user's] abdominal area." IDF 100; RX 49.[16]

The ALJ concluded that the challenged Ab Force radio advertisements conveyed the claims alleged in the Commission's complaint. ID at 41-43. We agree. Respondents' "test" ad for radio expressly reinforces the performance claims that their competitors were disseminating for their own ab belts – *e.g.*, that the belts will get a user's abs "into great shape fast – without exercise" – and then goes on to claim that the Ab Force is "just as powerful and effective." CX 1 H. Even consumers who might not have seen ads for competing ab belts or might not remember the ads they had seen would conclude from the text that the Ab Force is as effective as the referenced ab belts in getting their abs "into great shape fast – without exercise." Respondents later eliminated some of the text that described their competitors' efficacy claims, focusing instead on the Ab Force's "powerful technology" and its ability to direct ten different intensity levels at a user's abdominal muscles. RX-49. Respondents' slight modifications to the original text did not alter the elements that communicated deceptive claims as to the product's purpose but only removed claims that would be most likely to attract regulators' attention. While the rollout ad is less direct, the promise that the product has the same "powerful technology" as the other ab belts is not simply a comparative statement: in context, it clearly implies that the

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[15] The script of the rollout radio ad reads as follows:

> *Have you seen those fantastic electronic ab belt infomercials on TV? They're amazing! They're the latest craze to sweep the country and everybody wants one!* The thing is, they're expensive, selling for up to 120 dollars each! That's why we developed the Abforce (sic) that you can buy right now for just 10 dollars. That's right, just 10 dollars! Why so cheap? Well just like cell phones and VCRs, the price of electronic products keeps coming down. We were able to cut a special deal directly with the factory and are passing the savings on to you. *The Abforce (sic) uses the same powerful technology as those expensive Ab Belts (sic).* Capable of directing 10 different intensity levels at your abdominal area (sic). Best of all, the Abforce (sic) is just 10 dollars and has a full money back guarantee. Demand is overwhelming. Don't miss out [on this] tremendous opportunity. Call now [phone numbers omitted].

RX 49 (emphasis added).

[16] Clearly, the process of reviewing and refining advertising claims to remove potentially misleading claims – before an ad is disseminated, not after – is critical, and we encourage advertisers strongly to review their ads. Respondents, however, merely toned down the most obvious false statements in the initial ads. Even though the radio and television rollout ads were revised, the ad copy (and, in the television ads, the visual images) communicated the same messages just as clearly.

product has *some* power and effect on the body. Combined with the claim that the belt is "[c]apable of directing 10 different intensity levels at [the user's] abdominal area," it also clearly implies that the product would exert a "powerful" force and "intensity" at the user's abdominal area. Given respondents' failure to offer any other purpose for the product, listeners would reasonably conclude that such "powerful" technology was designed to develop a fitter abdomen and help them slim down and trim down without exercise.

**b. Television Advertisements**

Respondents' TV spots feature substantially the same kinds of images as those used by competitors in their ab belt infomercials. IDF 73-76, 121. Each of the Ab Force spots displays images of well-muscled, bare-chested men and trim women in tight-fitting exercise apparel wearing Ab Force belts and experiencing abdominal contractions. ID at 41; IDF 73-76. Close-up images highlight the models' trim waists and well-defined abs. JX 2-5. Additionally, the spot ads depict stock images of men without ab belts performing abdominal crunches on an exercise bench (JX 3, 5) and bikini-clad women, also shown without ab belts, showing off their well-toned bodies and trim waistlines in the background. *See* JX 2-5 (Ab Force TV ads); JX 7-10 (infomercials); ID at 41; IDF 83.[17] It was no accident that the models were not only slender and fit but also had well-muscled abdomens – the commercial casting agents were specifically looking for "great abs." IDF 79-80. The producer of the commercials admitted that people viewing the television ads were supposed to aspire to become like the bikini-wearing models in the ads. IDF 85 (*citing* JX 6 at 2 (Liantonio Dep. at 70)).

These visual images of well-toned Ab Force users juxtaposed with images of men executing conventional exercises and trim bikini-clad models clearly convey the message that the Ab Force is not only an alternative to exercise, but also that users of the device will achieve the same trim waists and well-developed abdominal muscles as those displayed by respondents' models. The accompanying text reinforces this message. For example, referring to those "fantastic" and "amazing" ab belt infomercials on TV, respondents claim that the Ab Force is "just as powerful and effective" and characterize the impact of those prior ab belts as "the latest fitness craze." JX 2 (tape); CX 1 B (transcript). For example, one of the early 60-second television advertisements claimed as follows:

> [Spokesperson]: 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 Ab Force is just as powerful and effective as those expensive ab belts sold by others–
>
> ON SCREEN: image of electronic stimulation of abdominal muscles

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[17] Other stock images in the ads included dollar signs and falling numbers. IDF 81-82.

> [Spokesperson]: – designed to send just the right amount of electronic stimulation to your abdominal area.

JX 2 (tape); CX 1 B (transcript). Coupled with visual images of fit, muscled men and fit, trim women wearing the Ab Force belt and experiencing abdominal contractions, the text strongly suggests that consumers can achieve the same results with the Ab Force. Like the radio ad (CX 1 H), the statement that the product was "designed to send just the right amount of electronic stimulation to your abdominal area" implies that the product will send the right amount of stimulation to your abdominal area *to do something*.

In a two-minute television spot, respondents' spokesperson appears in a business suit.[18] She does not state exactly what the Ab Force is supposed to do, but she does claim that it is "just as powerful and effective" as the infomercial ab belts and that it uses "sophisticated electronic technology" that is "designed to send just the right amount of electronic stimulation to your abdominal area." JX-3 (tape); CX 1 D (transcript). She also states that the product is so comfortable that "[consumers] can wear it under clothes." *Id*. Indeed, directing the viewer's attention to her own abdomen, she indicates that the product "is working while [she is] working." *Id*.; IDF 77. The obvious message for consumers is that the Ab Force device is an effective and convenient alternative to exercise.

In some ads the claims are conveyed in more subtle fashion but still are clearly communicated. For example, in one ad, a 60-second television spot, respondents refer to ab belts as the "latest craze," dropping the word "fitness." IDF 89; JX 4 (tape); CX 1 F (transcript). Additionally, instead of asserting that the Ab Force is as "powerful and effective" as competing ab belts in infomercials, the female spokesperson states that the device has "10 completely different intensity levels directed at your abdominal area." IDF 100; JX 4, CX 1 F. JX 5, a 120-second television spot, likewise claims that the Ab Force has "sophisticated computer components" and the "same powerful technology" as other ab belts advertised in infomercials. Furthermore, respondents claim, with "10 completely different intensity levels directed at [a user's] abdominal area," the product is "designed for comfort in mind" and is "so comfortable [that consumers] can wear it under [their] clothes." To illustrate the point, respondents' spokesperson – again gesturing towards her abdomen – reveals that the device is "working while [she is] working." This is truly "a high quality, *powerful*, comfortable" product that is in high demand, she declares. JX 5 (emphasis added). A consumer would reasonably believe that a product designed – supposedly – to work out for them would help them lose weight or inches, just as exercising would.

While the intended purpose of an Ab Force device – as opposed to competitors' ab belts – is not stated explicitly in any of the ads, the product name and references to "sophisticated" and

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[18] This ad, like the other television ads, showed well-muscled men and trim women showing off the ab belt, an image of a woman with trim abs in a bikini, a man preparing to exercise, etc. JX-3 (tape); CX 1 D (transcript).

"powerful" technology strongly suggest that it is effective in honing the abdominal muscles to make them more powerful or forceful. The visual images are used by respondents to convey the impression that their device is an alternative to conventional exercise. The juxtaposition of a male model who is executing abdominal crunches on an exercise bench with men and women in fitness clothing who are wearing Ab Force belts and effortlessly experiencing abdominal contractions drives home the message. Respondents' spokesperson states that her Ab Force belt is "working" while she is "working" in her business suit. Given the spokesperson's business attire, consumers would reasonably believe that the device can be used in any setting to give their abdominal muscles the stimulation they need to make them fit.

**c. Print Advertisement**

Respondents' print ad appeared in thirteen newspapers in February 2002 and in a newspaper insert in March 2002. CX 1 G; RX 48. It follows the same basic format as respondents' radio and TV ads – *e.g.* reminding consumers of "the latest craze to sweep the country" and referring to "those fantastic" and "amazing" ab belt infomercials on TV. RX 48. Respondents claim that the Ab Force has the "same powerful technology as those Ab Belts sold by other companies on infomercials" and consumers "can even wear it under [their] clothes." *Id*. Indeed, the ad continues, it "is capable of directing 10 completely different intensity levels at [a user's] abdominal area * * *." *Id*. Coupled with a close-up photograph of a well-defined male torso wearing an Ab Force belt, respondents' statements strongly imply that consumers can achieve the same well-developed, toned abs as the model merely by wearing an Ab Force belt under their clothes.

**d. Internet and Email Advertisements**

Respondents' Internet ads (RX 51-52) use the same basic format to remind consumers that the Ab Force is comparable to those "fantastic" and "amazing" electronic ab belt infomercials on TV. The photographic image of a well-defined, sculpted male torso wearing an ab belt and its accompanying label – that "AbForce (sic) uses the same powerful technology as those expensive ab belts sold through infomercials" – strongly imply that (1) by using "those fantastic" and "amazing" electronic ab belts that are advertised on TV, consumers can achieve the same well-defined muscles as those displayed in the accompanying photograph; and (2) because it uses the "same powerful technology," purchasers can achieve similar results by wearing an Ab Force. The email ad (RX 50) is less compelling, but it too claims that the "AbForce (sic) uses the same powerful technology as those Ab Belts (sic) sold by other companies on infomercials."

**2. Product Name**

As respondents undoubtedly recognized, IDF 69, a product name can help the advertiser convey a claim about the central attributes of a product. *See, e.g., Jacob Siegel Co. v. FTC*, 327 U.S. 608, 609 (1946) ("Alpacuna" suggests that the product contains vicuna); *Thompson Medical*, 104 F.T.C. at 793 (name "Aspercreme" implies the product contains aspirin). The product name "Ab Force" is an artful choice of words that easily suggests that consumers will achieve more

forceful or well-developed abdominal muscles. ID at 41; IDF 70. We agree with the ALJ that the product name itself, in combination with the text and visual images in each of the ads, played an obvious role in conveying respondents' implied claims to consumers. ID at 41.

Based on our own review of the challenged advertising, we conclude that consumers would reasonably interpret respondents' Ab Force ads to mean that the device (1) causes loss of weight, inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise – even if the consumers had not seen ads for competing ab belts. As shown below, our facial analysis is confirmed by the surrounding circumstances and extrinsic evidence, including expert opinion and a copy test of respondents' most widely disseminated TV ad.

### C. Other Considerations

Our facial analysis of the ads is informed by the market context in which the ads were disseminated and respondents' intent to take advantage of that context by presenting the AbForce as a substitute for other heavily advertised but more expensive "ab belts." As discussed above, respondents presented the Ab Force as an "ab belt," and expressly drew comparisons to other products with which many consumers had been made familiar through prior advertising[19] and which – as respondents knew[20] – were advertised as improving the physical condition of the user's abdominal muscles.[21] It may be possible, of course, for a seller to use a particular product description while at the same time making clear through its advertising that it does not claim a particular functionality for the product. The respondents can point to no such efforts, though, in the context of the Ab Force campaign.

We agree with the ALJ that an advertiser's failure to make a statement about the purpose or core function of its product can play a role in determining which implied claims are conveyed to consumers. ID at 43; *cf. Thompson Medical Co.*, 104 F.T.C. at 793 (noting "absence of any elements giving a contrary impression, such as express disclosures"). Given the absence of any statements in the later TV and radio ads about the purpose of using an Ab Force device (IDF 97) and the express invocation of ads for other ab belts that did communicate the products' purpose, there is nothing to act as a counterweight to respondents' conspicuous visual images or the general notion that an "ab belt" is a device that purports to improve the condition of the abdominal

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[19] *See* IDF 125, 127-34 (advertisement monitoring service rankings showing that infomercials for the competing ab belts were among the 50 most frequently disseminated infomercials and in the top 40 direct response spot rankings in the United States on a number of occasions in 2001 and 2002).

[20] *See, e.g.*, Khubani Tr. 273-74, 445, 461, 471-72.

[21] *See* IDF 117-24 (referencing claims made in infomercials for the Fast Abs, AbTronic, and Ab Energizer ads).

muscles and slim down and firm up users. Although the phrase "relaxing massage" flashes briefly on the screen in two of respondents' TV ads (*see* IDF 100-01; JX 4-5),[22] we agree with the ALJ that it is not nearly sufficient to offset the central message that respondents convey repeatedly with the name of the product and the audio and video elements of the ads. ID at 42-43; *see Kraft*, 114 F.T.C. at 123-24; *Removatron Int'l Corp.*, 111 F.T.C. 206, 294 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Thompson Medical*, 104 F.T.C. at 797-98. It is not clear, for example, why an ad for a massage product would include images of men performing ab crunches on exercise equipment, or why an ad for a massage product would reference competing products' claims to "get [one's] abs into great shape fast – without exercise!" Indeed, the visual images of men and women experiencing rapid and intense abdominal contractions through electronic muscle stimulation seem inconsistent with any commonsense notion of a relaxing experience. As noted by the ALJ, the men and women who were shown wearing an Ab Force device in the TV ads gave no indication that wearing the device was a soothing or relaxing experience. IDF 108; JX 4-5. Finally, at oral argument, counsel for respondents repeatedly declined to represent that the product was intended as a massage device. In fact, he repeatedly stated that he did not know what the Ab Force product was supposed to do. *See, e.g.*, Oral Argument Tr. at 7-11. For example:

> Commissioner Swindle: * * * What was the purpose of the ab belt, I mean, the Abforce belt?
>
> Counsel: I have no idea, Your Honor. I'm basically saying what I'm taking is the language of the commercial. They have the same technology, but they're a lot cheaper.
>
> In fact, all Mr. Khubani was trying to do was to provide a reference point to other products that were being advertised.
>
> Chairman Majoras: What does the technology do?
>
> Counsel: I don't know what the technology does.

*Id.* at 8-9.

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[22] We recognize that a few ab belts – including the respondents' own Ab Pulse – have been advertised as a massage tool. Clearly, however, despite a passing reference to "relaxing massage" – in only two of the Ab Force ads – the product was not intended as a massage tool. *See infra*; *see also* Oral Argument Tr. at 7-11 (colloquy about purpose of Ab Force product in which respondents' counsel claimed he did not know the purpose of the product). The primary focus of the advertising for ab belts as a product category was their supposed efficacy as a health, weight loss, and fitness device. IDF 120-24, 142-46. In fact, respondents' advertising for Ab Pulse, which attempted to position that product as a massage product, tried to distinguish the product from other ab belts on the market. IDF 112; CX 2. Unlike ab belts that were sold for health, weight loss, and fitness, the Ab Pulse product was unsuccessful and quickly pulled from the market. ID at 44; IDF 113; Khubani, Tr. 281.

Moreover, there is ample evidence that respondents intended to convey the challenged claims, which provides further support for our facial analysis. ID at 45-46; *see, e.g.*, IDF 65-102. A showing of an intent to make a particular claim is not required to find liability for violating Section 5 of the FTC Act. *See, e.g.*, *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); *Novartis*, 127 F.T.C. at 683; *Kraft*, 114 F.T.C. at 121. However, a showing of intent is powerful evidence that the alleged claim in fact was conveyed to consumers. *See, e.g.*, *Novartis*, 127 F.T.C. at 683; *Thompson Medical*, 104 F.T.C. at 791.

The timing of respondents' decision to enter the market – after reading about the AbTronic and determining that it was a "hot category" – coupled with their decision to invite consumers to recall the (deceptive) advertisements for those products while viewing the Ab Force ads suggests strongly that respondents intended to jump on that bandwagon with the same messages for consumers that had turned ab belts into "one of the hottest categories to hit the market." IDF 63 (*quoting* Khubani Tr. 255). As demonstrated by the text of the ads, respondents' promotion specifically targeted consumers who were already familiar with ab belt infomercials. *See, e.g.*, CX 1 H ("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!"); JX 2 (tape), CX 1 B (transcript) ("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."); RX 49 ("Have you seen those fantastic electronic ab belt infomercials on TV? They're amazing! They're the latest craze to sweep the country and everybody wants one!"). By explicitly referencing the ads for their competitors' "amazing" and "fantastic" ab belts products at the outset of each and every one of their ads (*see* IDF 114), respondents clearly intended to spur consumers' recall of those advertisements' claims[23] and intended consumers to understand that they could accomplish the same fitness goals with the Ab Force that respondents' competitors promised – *i.e.*, tighter abs, loss of inches, weight or fat, and an alternative to conventional exercise. In short, respondents' ads targeted consumers who had seen competitors' ads.

Respondents contend that they merely made express and truthful "compare and save" claims, which they used to create a "bandwagon effect."[24] RAB at 7. They argue that they had to refer to competitors' products to make the price comparison, but suggest that they made no claim about the purpose of the product. They contend that consumers would want to purchase the Ab

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[23] Many consumers did see the competitors' ads based upon the rankings – clearly, the respondents assumed that they had and the frequency with which those ads aired bears out that assumption. *See* IDF 125, 127-34. Moreover, because consumers typically watch TV in multiple time slots, a viewer could easily see an infomercial for one or more of respondents' competitors and also see an ad for the Ab Force on a different channel and in a different time slot. Mazis Tr. 184-85.

[24] A "bandwagon effect" refers to the advertiser's effort to generate interest in a product based on the idea that consumers should buy a product because of its popularity. IDF 96.

Force simply because it is a popular product that other people are buying, even if they are unaware of the product's function. As noted above, respondents' ads clearly communicated the product's purpose within the four corners of the ad. In any case, the suggestion that consumers were buying a product like the Ab Force – without knowing what the product was for – merely because the ad promised that many other people were buying it is not only not credible but also disingenuous. While a product's perceived popularity may motivate a consumer's purchase of items such as clothing or decorations or novelties – witness the "Pet Rock" fad of the 1970s – it is not plausible that consumers would have purchased an Ab Force belt without any idea as to its purpose or function. The comparability claims – *i.e.*, that the Ab Force has the same "powerful" technology and is "just as effective" as their more expensive competitors – reinforced the message that the Ab Force was effective. The references to competitors' (admittedly deceptive) advertisements make little sense unless respondents expected and knew that significant numbers of consumers would recall the claims that respondents' competitors made in their infomercials and interpret respondents' ads with those in mind.[25]

### D. Extrinsic Evidence Supplements and Confirms the Commission's Facial Analysis of the Ab Force Ads

Based on our facial analysis of respondents' Ab Force ads, we conclude that they clearly convey the claims alleged in the Commission's complaint. Although extrinsic evidence is not necessary to reach our decision, consistent with our practice we have examined the extrinsic evidence that the parties have offered about the meaning of the challenged Ab Force ads. *See, e.g.*, *Stouffer*, 118 F.T.C. at 799. This includes (1) Dr. Mazis's expert testimony and report regarding how respondents' TV ads would be perceived by consumers; (2) a copy test that Dr. Mazis designed, based on the most widely disseminated TV ad; and (3) a critique by respondents' expert, Dr. Jacob Jacoby, of the methodology that Dr. Mazis adopted. As discussed below, we conclude that the extrinsic evidence confirms our facial analysis of the Ab Force ads.[26]

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[25] Similarly, in respondents' ad campaign for a later product that was positioned as a massage tool, the respondents also acknowledged that consumers had likely seen the infomercials for the competing ab belts, although respondents attempted to distinguish the Ab Pulse product from those products. Respondents cautioned viewers not to confuse the Ab Pulse "with an electronic ab belt you've seen on infomercials," emphasizing the point by depicting a red "X" superimposed on the image of a model wearing an ab belt and the on-screen legend, "infomercial ab belts." CX 2. To be sure, the ALJ erred in finding that respondents brought the Ab Force to market after disappointing sales of the Ab Pulse belt. *Compare* ID at 44-45 *with* CX 31 & CX 108. Nonetheless, regardless of the time sequence, it is doubtful that respondents would have found it necessary to distinguish their Ab Pulse from "infomercial ab belts" in this manner unless they assumed that consumers would associate the images of models wearing an ab belt in the Ab Pulse ads with the express fitness claims made for the "infomercial ab belts."

[26] Although, as respondents note (RAB at 42 n.6), the extrinsic evidence offered by complaint counsel relates to the trial and rollout versions of respondents' TV ads, many of the

### 1. Expert Testimony

Dr. Mazis testified that respondents' ads communicated certain core performance claims to consumers as a direct result of the text and images in the ads ("direct effects") and, indirectly, as a result of their familiarity with infomercials for other ab belts ("indirect effects").[27]

With regard to the "direct effects" of the ads, Dr. Mazis identified the main visual images in respondents' ads – trim models with well-developed abdominal muscles, and an Ab Force belt shown causing a model's abs to pulsate (Mazis Tr. 59-60, 66) – and concluded that together with the name of the product they were likely to convey the message that by using the Ab Force consumers would achieve well-developed abdominal muscles and loss of inches around the waist. Mazis Tr. 59-61, 66-67, 165. "[E]ven if you had never heard of an ab belt before, * * * you could see the ad and you could make inferences because there's certain implied claims in the ads." Mazis Tr. 66.[28]

Dr. Mazis also testified as to the "indirect effects" of the ads, which he attributed primarily to respondents' efforts to "exploit" or "free-ride" on a blitz of infomercial advertising for three other EMS ab belts – the AbTronic, Ab Energizer, and Fast Abs. CX 58 ¶ 19-20, 48; IDF 163-66; Mazis Tr. 64-66. Infomercials for the AbTronic, Ab Energizer, and Fast Abs contained "numerous representations about how using the products causes consumers to obtain well-defined

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elements considered by Dr. Mazis also appear in the print, radio, Internet, and email ads.

[27] Dr. Mazis testified that the ads conveyed four implied claims. According to Dr. Mazis, the two most prominent claims – that users of the Ab Force will achieve well-developed muscles and lose inches around the waist – were conveyed through the visual imagery in respondents' ads. Mazis Tr. 61. Dr. Mazis also testified that consumers may associate the Ab Force with losing weight and view the product as a substitute for exercise principally because of the association with previous ab belt ads. Mazis Tr. 61-62. Of course, even if one had not seen the prior ads, those claims were neatly incorporated into the Ab Force ads themselves. *See, e.g.*, CX 1 H (Ab Force is "just as powerful and effective as the expensive ab belts on TV" that supposedly would "get our abs into great shape fast – without exercise"); JX-3 (tape), CX 1 D (transcript) (Ab Force is "just as powerful and effective" as the infomercial ab belts, uses "sophisticated electronic technology" that is "designed to send just the right amount of electronic stimulation to your abdominal area," and "is working" on the abdomen even under business wear); RX 48 (promises that Ab Force has the "same powerful technology as those Ab Belts sold by other companies on infomercials" and "is capable of directing 10 completely different intensity levels at [a user's] abdominal area * * *" paired with a close-up of a muscled male torso).

[28] Respondents' expert, Dr. Jacoby, was also qualified to testify as an expert witness in consumer behavior, consumer psychology, and consumer comprehension, but did not offer his own views as to the meaning of the ads.

abdominal muscles and to lose inches around the waist." CX 58 ¶ 17; *see* IDF 122-24. The infomercials also claimed that the products were an alternative to conventional exercise and that consumers could lose weight by using them.[29] CX 58 ¶ 18; IDF 120-24. These claims and representations were conveyed through statements (*e.g.*, "six-pack abs," "washboard abs," "rock-hard abs"); before-and-after photographs; testimonials; and depictions of models with trim waists and highly defined abs. CX 58 ¶ 17. The infomercials aired from 2001 to early 2002 – *i.e.*, the period of time leading up to, and overlapping with, respondents' own Ab Force promotion. IDF 125, 129-33; CX 58 ¶ 15; CX 96 (AbTronic); CX 98 (Ab Energizer); CX 100 (Fast Abs). Given the timing of the promotional campaigns and the similarity in name, appearance, and function of all four EMS products, Dr. Mazis concluded that the infomercial advertising was likely to have had an impact on consumers' perceptions of respondents' Ab Force ads. CX 58 ¶¶ 16, 19-21, 48; Mazis Tr. 48, 59-67. As described by Dr. Mazis,

> There are depictions of well-muscled men and trim women with well-defined abdominal muscles in advertisements for Ab Force and for AbTronic, AB Energizer, and Fast Abs. The models in the Ab Force ads are similar to the models shown in ads for the other EMS ab belts. Also, the brand names are similar – Ab Force, AbTronic, AB Energizer, and Fast Abs use the term "ab" or "abs" to refer to the abdominal muscles.

CX 58 ¶ 19.

Based on the psychological and consumer behavior theory of "categorization,"[30] Dr. Mazis testified that those consumers who had been exposed to infomercials for competing ab belts, word-of mouth, and retail packaging for ab belts would have developed an "ab belt category of beliefs." IDF 163, 166, 169. Such general category beliefs would have included an association between ab belts with well-developed abs, loss of weight and inches, and alternatives to regular exercise. IDF 164. According to Dr. Mazis, respondents' Ab Force ads would trigger such beliefs and cause consumers to read them into the Ab Force ads. IDF 167. The fact that respondents' advertising specifically relied on the fact that many viewers would have seen infomercials for other EMS ab belts (*e.g.*, "I'm sure you've seen those fantastic ab belt infomercials on TV") was cited by Dr. Mazis as further support for concluding that respondents were "free-riding" on claims

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[29] According to Dr. Mazis, "[t]hese are claims that appear in some of the ads for the other EMS ab belts," but they are not as "prominent" as claims that the products cause users to develop well-defined abs and to lose inches around the waist. CX 58 ¶ 21.

[30] The consumer behavior theory of "categorization" is premised on evidence that people place objects in categories based on their similarity. ID at 49-50; IDF 169.

their competitors were making for the other EMS ab belts.[31] *See* JX 7-10; CX 58 ¶ 19; Mazis Tr. 47-48.

With regard to the "direct effects" of the ads, the ALJ rejected respondents' contention that Dr. Mazis's facial analysis was not a proper subject of expert testimony. ID at 48. He explained that while Dr. Mazis's testimony regarding the claims directly conveyed by the four corners of the ads was "not necessary," it was "relevant" and "valuable not as an expression of his personal opinion, but rather as expert opinion regarding his knowledge and experience of consumer perceptions and claims that consumers would take away from the four corners of the advertising at issue." *Id.* Dr. Mazis has taught undergraduate and graduate courses in consumer behavior at American University for more than a decade, and has served as a consultant on advertising issues and consumer behavior for federal and state governments and for private industry. IDF 148-49. Additionally, he has conducted hundreds of surveys and research studies and published numerous articles in academic journals. IDF 151. Based on his knowledge and experience, he was properly qualified by the ALJ as an expert in the area of consumer perception.

Respondents contend that Dr. Mazis did not attempt to explain how his expertise was relevant to his opinions, or how his opinions were logically related to that expertise. RAB at 44. Accordingly, they claim, under the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), his facial analysis must be set aside. RAB at 43-49.[32] We reject respondents' contention

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[31] Respondents' ads referred to "those fantastic ab belt infomercials." As shown in industry monitoring publications, infomercials for the AbTronic, Ab Energizer, and Fast Abs EMS ab belts aired frequently in the period leading up to, and during much of, respondents' Ab Force promotion. IDF 125. Indeed, they were the only ab belt infomercials among the 50 most frequently aired infomercials during the relevant time period. IDF 134. Although the GymFitness device was advertised in infomercials, it was not widely advertised; it did not achieve a Top 50 infomercial ranking at any point during respondents' promotion of the Ab Force. IDF 143. While respondents placed on the record promotional materials for other EMS devices (IDF 137-46), three of these – the IGIA Electrosage, the Mini Wireless Massage System, and the Accusage – are not electronic ab belts. IDF 139-141. Advertisements for another four devices – the Smart Toner, ElectroGym, Slim Tron, and SlendertoneFlex – appeared as short spots, not infomercials (IDF 142, 144-46), so they were evidently not the ads that inspired the references in the respondents' ads. In any case these ads – like those for the AbTronic, Ab Energizer, and Fast Abs – touted the products' health, fitness, and weight loss benefits. IDF 142, 144-46.

[32] *Daubert* and *Kumho* do not apply directly to administrative agencies' adjudicative proceedings. *See, e.g., Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001); *cf. FTC v. Cement Institute*, 333 U.S. 683, 705-06 (1948) (FTC adjudicative proceedings are not governed by the "rigid rules of evidence"). The Commission nonetheless is guided by the spirit of *Daubert* and *Kumho* in making a

that *Daubert* and *Kumho* require the Commission to reject Dr. Mazis's testimony. In the context of the so-called "soft sciences," federal district courts are allowed discretion to choose which factors are appropriate and relevant, according to the expertise in question and the subject of the proffered expert testimony. *Kumho*, 526 U.S. at 149-50; *see, e.g., Betterbox Communications Ltd. v. BB Technologies, Inc.*, 300 F.3d 325, 329-30 (3d Cir. 2002) (in trademark infringement case district court did not abuse discretion in receiving expert opinion testimony regarding likelihood of confusion that was based on expert's personal knowledge and experience). To the extent Dr. Mazis's testimony merely identifies elements in the ads that communicate the challenged claims, his testimony adds little to a facial analysis. We agree with the ALJ, however, that Dr. Mazis's testimony regarding how consumers tend to perceive ads – *e.g.*, that consumers remember visual images in an ad for a longer period than the ad's text (Mazis Tr. 59) – is relevant and probative "as expert opinion regarding his knowledge and experience of consumer perceptions and claims * * *." ID at 48; *see, e.g., Kraft*, 114 F.T.C. at 122; *Thompson Medical*, 104 F.T.C. at 790. Considering evidence that shows "how consumers might ordinarily be expected to perceive or understand representations like those contained in the ads we are reviewing" is fully consistent with our past practice. *Thompson Medical*, 104 F.T.C. at 790; *see Kraft*, 114 F.T.C. at 122.

As to the "indirect effects" of the ads, however, the ALJ refused to credit Dr. Mazis's testimony. According to the ALJ, Dr. Mazis's testimony that "many consumers would have been exposed" to infomercials for other ab belts was not credible in the absence of empirical research regarding "exactly how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired * * *." ID at 50-51.[33] We disagree with the ALJ's conclusion that additional empirical evidence was required to demonstrate that the wave of infomercial ab belt advertising influenced consumers' perceptions of respondents' Ab Force ads. *See* ID at 51. By crafting an advertising campaign that expressly capitalized on consumers'

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determination as to the admissibility of expert testimony. *See* 16 C.F.R. § 3.43(b)(1) ("[R]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded."). *See also Niam*, 354 F.3d at 660; *Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (Fed. Cir. 1999).

[33] Dr. Mazis relied in part on the psychological and consumer behavior theory of "categorization" to discuss the effects of consumers' prior exposure to ab belts and ab belt advertising on their perception of messages in respondents' ads. ID at 49-50. Respondents' expert did not question the validity of categorization theory. Rather, he questioned whether Dr. Mazis had been able to confirm that consumers were "exposed to or recall (sic) the exemplars that formed the foundation for the categories that they, in his estimation, have developed." Jacoby Tr. 345. However, as discussed below, given the manner in which respondents *expressly pitched their ads to consumers who were already familiar with infomercial advertising for EMS ab belts*, it is not necessary for the Commission to address the question that troubled the ALJ (ID at 50-51) – *i.e.*, what empirical evidence would be necessary to establish that consumers' prior exposure to infomercial advertising influenced their perception of claims in respondents' advertising.

familiarity with the infomercial EMS ab belts, respondents effectively conceded – and in fact intended – that the content of their competitors' ads would influence how consumers would perceive their Ab Force ads. Surely respondents would not have structured their entire advertising campaign around comparisons to infomercials for other ab belts unless they believed that, when prompted by ads for the Ab Force, a significant number of consumers would recall their competitors' claims. Contrary to respondents' contention (RAB 1), the Commission therefore breaks no new ground in concluding that a significant number of such consumers would respond to respondents' comparability claims by associating competitors' claims with the Ab Force device. While we also find such claims within the four corners of respondents' ads, there is no doubt that those efficacy claims would resonate most strongly with consumers targeted by respondents who had already been exposed to repeated advertisements for other ab belts during the same time period. *See Deception Statement*, 103 F.T.C. at 177-78 (when representations are targeted to a specific audience the Commission will consider the representations from the perspective of the targeted group); *Porter & Dietsch*, 90 F.T.C. 770, 864-65 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979) (same), *cert. denied*, 445 U.S. 950 (1980); *Pfizer, Inc*., 81 F.T.C. 23, 58 (1972) (same).

### 2. Copy Test

Dr. Mazis designed a copy test of the most widely disseminated Ab Force TV ad to help determine whether it conveyed the claims alleged in the Commission's complaint. IDF 193, 195. Using a questionnaire designed by Dr. Mazis, a contractor conducted a mall intercept study in suburban shopping malls in nine different geographic regions. IDF 197, 199. Interviewers screened consumers to bring into the study those who might have some propensity to buy the product – *i.e*., those who had bought products or used a service for massage or to lose weight or tone muscle within the last 12 months. IDF 206, 209. The questionnaire was designed to screen out consumers who had not made purchases by responding to direct response TV ads or infomercials as well as anyone with specialized knowledge of fitness, weight loss, massage, and research methodology. IDF 207-08, 210.

Consumers who qualified to participate in the study were then assigned at random to a "test group" or a "control group." IDF 214; Mazis Tr. 90. The "test group" viewed a version of the most widely aired Ab Force TV ad,[34] while the "control group" viewed a "cleansed" version of one of respondents' two-minute rollout ads. IDF 214; CX 104, 105. In this case, Dr. Mazis, working with a video editor, created the cleansed "control" ad by eliminating respondents' references to infomercials for other ab belts, stock images of a woman in a bikini and a man performing an abdominal crunch, and some – but not all – images of models wearing the Ab Force device. IDF 217; Mazis Tr. 83-84. (It was not possible to remove every element without

[34] The tape that Dr. Mazis used in the copy test was received into evidence as CX 104. It depicts the same ad – the most widely disseminated AB Force TV ad – as the tape that was received as JX 4. The transcript of the ad was received as CX 1 F.

fundamentally redesigning the original ad. Mazis Tr. 83, 108.) Dr. Mazis also added the statement "Ab Force for a relaxing massage" to suggest a massage purpose. CX 58 ¶ 28.

As Dr. Mazis explained, a control ad is the equivalent of a placebo in medical studies – *i.e.*, it accounts for responses that are attributable to factors other than the ad itself.[35] Mazis Tr. 83-84. A control ad is similar to the challenged or "test" ad but, to the extent possible, it is cleansed by eliminating those elements of the ad that allegedly communicate the challenged claims. IDF 216. Generally, the numbers of consumers who perceive the challenged claim in the control ad are subtracted from the numbers who perceive the challenged claim in the test ad. IDF 258-62. If all the challenged elements have been removed from the control ad, the difference between the two figures ("net takeaway") represents the percentage of consumers whose perception of the challenged claims is based on the particular elements of the test ad. *See* CX 58 ¶ 28; *Stouffer*, 118 F.T.C. at 762 (Initial Decision).

Survey participants saw the test ad or control ad twice. IDF 227. Eighty-one participants were eliminated from the study after they could not recall the name of the product. IDF 228-30. The remaining participants were asked a series of questions, beginning with an open-ended (*i.e.*, "unguided") question which asked consumers to state in their own words what they perceived in the ads. IDF 231-32. Consumers were then asked about their perceptions using a progressively narrowing series of open-ended and closed-ended questions.[36] After eliminating consumers whose responses to a "filtering question" indicated they would be inclined to guess,[37] interviewers instructed participants that they would hear a list of statements (*i.e.*, the "closed-ended questions")

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[35] The control group responses represent what is sometimes referred to as "noise" – *i.e.*, preexisting beliefs, confusion, or other factors other than the ad at issue that would account for the participant's affirmative response. Absent other considerations, a survey generally tests more precisely the influence of the stimulus at issue when this "noise" is deducted from the test group responses. *See, e.g.*, *Novartis*, 127 F.T.C. at 619 (Initial Decision); *Stouffer*, 118 F.T.C. at 806.

[36] By asking questions in this order of successively narrowing focus, Dr. Mazis ensured that consumers' answers would not be biased by knowing the content of the questions in advance. *See, e.g.*, *Kraft*, 114 F.T.C. at 70 (Initial Decision); *Stouffer*, 118 F.T.C. at 804.

[37] The filtering question asked: "Does or Doesn't (sic) the Ab Force commercial say, show, or imply that Ab Force improves users' appearance, fitness, or health?" CX 58 ¶ 33. Consumers who answered that the commercial does not say, show, or imply that Ab Force improves users' appearance, fitness, or health were not asked to respond to the five key closed-ended statements. They were funneled to the next question in the survey because their responses to the more specific questions might not be reliable. *See* CX 58 ¶ 33; Mazis Tr. 95.

of which some, all, or none may have been implied by or made in the ad.[38] IDF 236. Participants were then presented with eight statements, five of which related to the allegations of the Commission's complaint, and provided the opportunity to select one of three possible answers: (1) "YES, it is implied by or made in the Ab Force Commercial;" (2) "NO, it is not implied by or made in the Ab Force commercial;" or (3) "You DON'T KNOW or you have NO OPINION." IDF 237-40. An additional three statements – relating to matters that were not at issue (stomach ulcers, nausea, and blood pressure) – were "masking" or "control" questions that Dr. Mazis used to ensure that participants were paying attention and not merely just saying yes to every question (*i.e.*, "yea-saying"). IDF 239.

The copy test results demonstrate that respondents' most widely disseminated TV ad conveyed each of the claims alleged in the Commission's complaint. In this particular copy test, there are three different ways to look at the copy test results: 1) the responses to the open-ended questions (no controls are necessary for these responses); 2) the responses to the closed-ended questions as controlled by the control group responses; and 3) the responses to the closed-ended questions as controlled by the control or "masking" questions.

a. Open-ended Questions

Open-ended questions allow survey participants themselves to articulate the central claim or claims in the ad – those that first come to mind. Marketing experts have found that credible evidence can be obtained from the responses to open-ended questions. *See, e.g.*, *Stouffer*, 118 F.T.C. at 781 (Initial Decision). We agree with the ALJ that it is appropriate to consider the open-ended responses without netting out any controls. ID 58 (*citing Stouffer*, 118 F.T.C. at 808). In this instance, the open-ended question "What did the commercial say, show, or imply about Ab Force?" was followed by asking, "Anything else?" to elicit additional responses. CX 58 ¶ 32.

The copy test showed that a total of 22.3% of participants who viewed the test ad indicated that the ad conveyed that Ab Force causes users to achieve leaner or flatter abs, loss of weight or fat, a better physique, or loss of inches around the waist. IDF 256-57; CX 58 ¶ 42. As the ALJ determined, these results show that a significant number of respondents took away those claims. ID at 59. These results, if anything, likely understate the consumer take-away because consumers

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[38] Only five of the statements that were read to study participants related to claims alleged in the Commission's complaint:

"Using Ab Force causes users to lose inches around the waist."
"Using Ab Force results in well-defined abdominal muscles."
"Using Ab Force removes fat deposits."
"Using Ab Force is an effective alternative to regular exercise."
"Using Ab Force causes users to lose weight."

IDF 238.

are unlikely to volunteer all of the messages they glean from an ad. The response rate for open-ended questions is usually "much lower than for closed-ended questions where the respondent need only check off the response." *Sears Roebuck & Co.*, 95 F.T.C. 406, 451 (1980) (Initial Decision), *aff'd*, 676 F.2d 385 (9th Cir. 1982). *See also Stouffer*, 118 F.T.C. 746 at 805 (citing testimony of an expert for Stouffer that "often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful"); *Thompson Medical*, 104 F.T.C. at 697 (Initial Decision) ("open-ended questions . . . do not draw out a complete or exhaustive list of all the things respondents may have on their minds. Rather, respondents will play back the dominant theme or primary impression and, having done that, will probably stop."); *American Home Products Corp.*, 98 F.T.C. 136, 416 (1981) ("the open-ended questioning technique used by ASI does not elicit an exhaustive playback from consumers of all the representations that may be perceived in the tested advertising"), *enforced as modified*, 695 F.2d 681 (3d Cir. 1983).

b. Closed-ended Questions as Controlled by the Control Group

Marketing experts also rely upon the results to closed-ended questions as indicative of consumer responses to ads. *See Kraft*, 114 F.T.C. at 108 (Initial Decision). Closed-ended questions, however, have the potential to direct participants to certain aspects of an ad. Consequently, participants may respond to such questions based upon yea-saying, inattention, pre-conceptions, or other "noise." Thus, closed-ended questions require the use of some type of control mechanism. *See Stouffer*, 118 F.T.C. at 808. An appropriate control can involve the use of a control ad, *Kraft*, 114 F.T.C. at 110 (Initial Decision); *Thompson Medical*, 104 F.T.C. at 805, or a control question, *see Stouffer*, 118 F.T.C. at 809. The use of both is not required.

In this case, Dr. Mazis used both a control ad and control or masking questions. Examining first the closed-ended responses as controlled by the control ad group, the ALJ found that 43% of participants in the test ad group and 28.1% of the participants in the control group perceived the message that using the Ab Force belt results in loss of weight. IDF 258; CX 58 ¶ 47. Taking these results and subtracting the control group responses from the test group responses results in a net difference of 14.9%, indicating that 14.9% of consumers perceived the deceptive weight loss claim from the test ad.[39] To the statement that using the Ab Force causes users to lose inches around the waist, 58.1% of the test group and 42.4% of the control group responded affirmatively, resulting in a net difference of 15.7%. IDF 259; CX 58 ¶ 47. The statement that using the Ab Force results in well-defined abdominal muscles received positive responses from 65.4% of the test group and 48.1% of the control group, leaving a 17.3% net difference. IDF 261; CX 58 ¶ 47. For the statement that the Ab Force is an effective alternative to conventional

[39] The ALJ's findings report a net difference of 15.7% for the question relating to weight loss. *See* IDF 258. It is apparent, however, that this figure is a typographical error and the ALJ inadvertently used the figures that Dr. Mazis reported for the closed-ended questions relating to loss of inches around the waist. *Compare* IDF 258 *with* IDF 259. The actual net difference reported by Dr. Mazis for the question relating to weight loss was 14.9%. Mazis Tr. 107; CX 58 ¶ 47.

exercise, there was an affirmative response from 39.1% of the test group and 28.6% from the control group, with a net difference of 10.5%. IDF 262; CX 58 ¶ 47. By contrast, for the statement that the Ab Force removes fat deposits, 22.9% of the test group and 19% of the control group responded in the affirmative, with a net difference of only 3.9% that was not statistically significant, indicating that the test ad did not clearly communicate this claim compared to the control ad. IDF 260.[40]

c. Closed-ended Questions as Controlled by Control Questions

Closed-ended responses in copy tests can also be adequately controlled by control or masking questions. *See Stouffer*, 118 F.T.C. at 808-09. These questions typically ask about a product attribute reasonably associated with the advertised product or product category, but not one closely linked to the explicit claims in the ad. *See id.* at 806 & n.24. Responses to the control question or questions – like a control group – measure the number of participants who answered based upon yea-saying, inattention, the halo effect, or other "noise." *See id.* at 806. To eliminate the effect of such external factors, the responses to the control or masking questions are subtracted from responses to the test questions.[41]

In this case, the control or masking questions that Dr. Mazis used asked about stomach ulcers, nausea, and blood pressure. CX 58 ¶ 34. Claims about those conditions were not communicated in the ad, so participants should have responded in the negative to closed-ended questions asking whether the ad made claims about those conditions. The highest percentage of participants who responded affirmatively to one of the three control questions – whether due to inattention, preconceptions about the product, or some other reason – was 5 percent. To be conservative, this "noise" was eliminated by subtracting 5 percent from the percentage of participants who responded affirmatively to each of the five closed-ended questions that related to the claims challenged in the Commission's complaint. After eliminating this noise level from each of the closed-ended questions, 38% of the survey participants perceived the message that using the Ab Force belt results in loss of weight. To the statement that using the Ab Force causes users to lose inches around the waist, 53.1% of survey participants responded affirmatively. The statement that using Ab Force results in well-defined abs got positive responses from 60.4% of

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[40] All of the results were also reported in terms of statistical significance. IDF 266; CX 58 ¶ 44, 46. The results for the question relating to well-defined abdominal muscles was statistically significant at the .001 level. Mazis Tr. 106. The questions relating to loss of inches around the waist and loss of weight were statistically significant at the .01 level. Mazis Tr. 106-07. The net difference for the question relating to using the Ab Force as an effective alternative to exercise was statistically significant at the .05 level. Mazis Tr. 107. The net difference for the question relating to fat deposits was not statistically significant. *Id. See also* CX 58 ¶ 47.

[41] When a copy test uses control or masking questions to control for noise in responding to closed-ended questions, one only needs to examine the results from the test ad group. *See Stouffer*, 118 F.T.C. at 806. Results for the control ad group can be ignored.

participants. For the statement that the Ab Force is an effective alternative to conventional exercise, there was an affirmative response of 34.1%. Finally, for the statement that the Ab Force removes fat deposits, 17.9% of survey participants responded in the affirmative. IDF 264. These results show that – with the exception of the fat deposit claim – at least one third of survey participants found that the ad communicated the challenged claims, a remarkably high takeaway.

d. Copy Test Analysis

Respondents did not offer a copy test of their own to support their interpretation of the challenged ads. Rather, they contend that methodological flaws in the copy test render the results unreliable. RAB at 50-60. Primarily, respondents allege that the copy test was not probative because they believe that it did not control for preexisting beliefs of the survey participants.[42] RAB at 51. Consequently, they argue, it is not possible to determine with any confidence whether the message that consumers took away from their TV ads is attributable to their claims or to consumers' preexisting beliefs about ab belts. RAB at 54-57. Respondents also allege that Dr. Mazis used an overbroad sampling universe, asked leading open-ended and closed-ended questions, and improperly excluded 81 survey participants. RAB at 51.

We conclude that the copy test was probative and that it confirms our facial analysis of respondents' most widely disseminated TV ad. The standard that the Commission applies in determining whether a copy test is methodologically sound is whether it "draw[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly." *Thompson Medical Co.*, 104 F.T.C. at 790. Dr. Mazis's copy test satisfies this standard.

Respondents contend that the control ad was not completely "cleansed" of all the elements that Dr. Mazis indicated were responsible for conveying the challenged claims. Consequently, they argue, it is not possible to identify with precision how many of the control group participants provided affirmative answers to the closed-ended questions solely as a result of their preexisting beliefs or other potential influence on their answers. *See* RAB at 54-57.[43] We agree that the control ad for the copy test was not – and could not be – cleansed of every element that

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[42] As noted by Dr. Mazis, the level of affirmative responses for the control was relatively high, most likely due to the influence of the product name, visual images, and preexisting beliefs about ab belts on the study participants' perceptions of the test Ab Force ad. IDF 266.

[43] Respondents' reliance on our decision in *Kraft* for the proposition that a copy test invariably must control for preexisting beliefs is misplaced. RAB at 53-54. As we observed subsequently in *Stouffer*, there is no basis for arguing that such a control is invariably required. *Stouffer*, 118 F.T.C. at 810.

communicated the challenged claims.[44] ID at 54; IDF 217-220. Dr. Mazis acknowledged this limitation (IDF 221; Mazis Tr. 108),[45] but this purported "flaw" actually worked in respondents' favor. Regardless of the cause – whether due to preexisting beliefs or ad elements that could not be removed altogether from the control ad – the net difference between the test group and control group responses was, if anything, *reduced* as a result of the relatively high percentage of control group participants who reported affirmative responses to the closed-ended questions. ID at 54. Thus, there is no merit to the contention that respondents were prejudiced by using an incompletely "cleansed" control ad, as any reduction in net takeaway would favor respondents.[46]

Regardless of the reduction in the difference between the test group and control group responses, the ALJ held correctly that as a matter of law the net takeaway – which ranged from 10.5% to 17.3% for all claims except the fat deposit claim[47] – was sufficient to conclude that the challenged claims were communicated. ID at 57-58 (setting forth Commission cases and Lanham Act cases where net takeaway of 10% – or even lower – supported finding that the ads communicated the claims at issue); *see, e.g.*, *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (it would be "hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public"); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (10% net takeaway was enough to support finding that claim was

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[44] This case illustrates the difficulties inherent in designing a control ad where the product name and visual elements appearing throughout the ad communicate the challenged messages to consumers. On the one hand, it may not be feasible in such cases to excise all of the ad elements without creating something that would not be recognizable as an actual ad. On the other hand, writing a completely new control ad to show consumers is not a viable option because it would introduce new, uncontrolled sources of bias into the copy test.

[45] While the copy test may be flawed for its failure to excise from the control ad all of the elements that communicated the challenged claims, copy tests do not have to be flawless to be reasonably reliable and probative. *See, e.g.*, *Novartis*, 127 F.T.C. at 699 n.24; *Stouffer*, 118 F.T.C. at 807; *Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975).

[46] Respondents suggest that the random assignment of copy test participants to the test group or the control group is inadequate to control for preexisting beliefs. RAB at 54-57. That is exactly what the control group is for, however. One cannot possibly account for all of the differences between people – whether based on education level, income, ethnicity, or any other factor – that could possibly affect consumers' perception of an ad. Randomization is the proper technique to control for these possible differences. Mazis Tr. 153. Statistically significant results for comparisons of the test group and control group responses – here, for all but the fat deposit claim – belie the suggestion that the results could be due to chance assignment between the two groups.

[47] For this claim, the 3.9% net difference is not statistically significant. Thus, this result indicates nothing about consumer perception of this particular claim.

communicated in Lanham Act case); *Goya Foods, Inc. v. Condal Distribs., Inc.*, 732 F. Supp. 453, 456-57 (S.D.N.Y. 1990) (net takeaway of 9% justified finding claim was made).

Furthermore, though respondents argue that consumers' preexisting beliefs fatally undermine the copy test results, we believe that their intentional invocation of other ab belt infomercials cuts the other way. In an attempt to argue that the copy test is unreliable, respondents claim that, among other things, "the existence of other, heavily disseminated advertising may have contributed to consumers' exposure to previous claims, thus influencing their results." RAB at 53-54. Yet respondents' strategy in promoting the Ab Force was to invite consumers to recall the claims in advertising that consumers had previously seen for other ab belts – advertising to which respondents referred in every one of their ads.[48] Indeed, it was exactly that "other, heavily disseminated advertising" that respondents took pains to evoke in their own advertising – including claims that respondents knew were unsubstantiated. *See, e.g.,* Khubani Tr. 273-74, 490; ID at 45; IDF 58-60; CX 1 H.[49] Where, as here, an advertiser exploits preexisting beliefs deliberately by inviting consumers to recall the claims in other ads to help convey a message, it makes little sense to remove the influence of those other ads. *See Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (the fact that a false belief "is attributable to factors other than the advertisement itself does not preclude the advertisement from being deceptive"). Accordingly, we believe that the copy test results as controlled by the control group – which serves to filter out the effects of preexisting beliefs – likely understate the extent to which the challenged claims were communicated.

In this instance, because of respondents' consistent, overt references to competitors' advertising claims, it is clear that respondents specially targeted consumers who had preexisting misperceptions based on those ads. We recognize, however, that many cases may not be so simple. In some cases, for example, an advertiser might not be liable for misperceptions that consumers hold – even if the advertiser is aware of them – if an ad does not exploit that misperception. In other cases, however, an advertiser might be liable if the ad leads reasonable consumers to take away a misleading message, even if the ad does not invoke other ads and even if there is no evidence that the advertiser intended to communicate a misleading message. Our

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[48] IDF 114. *See, e.g.*, CX 1-H ("Have you seen those fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs in great shape fast – without exercise!"); JX 2 (tape), CX 1 B (transcript) ("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."); RX 49 ("Have you seen those fantastic electronic ab belt infomercials on TV? They're amazing! They're the latest craze to sweep the country and everybody wants one!").

[49] This is not a case where an advertiser selling an item for one purpose is simply aware of a consumer misperception that the product is effective for another use. Respondents' campaign was built around the existence of and exploited that misperception.

holding, therefore, is limited to these facts: here, it is unnecessary to control for preexisting beliefs that are due in part to the extensive prior advertising that respondents' ads invoke.

We turn next to respondents' contentions that Dr. Mazis improperly excluded 81 survey participants, used an overbroad sampling universe, and asked leading open-ended and closed-ended questions. RAB at 51. We agree with the ALJ (ID at 57) that Dr. Mazis's exclusion of inattentive participants was consistent with the goal of a copy test – *i.e.* to identify a universe of potential purchasers of the product and determine what messages they perceive in an ad. Given that persons who cannot recall the name of a product would not be likely to purchase it (*see* Mazis Tr. 94), it was reasonable for Dr. Mazis to exclude such inattentive participants from the survey universe and, in fact, it is commonly done. Mazis Tr. 102; *see, e.g., Kraft,* 114 F.T.C. at 70 n.2 (excluding participants who could not remember brand name or responded "don't know" to a question asking them to restate the points in the ad).

Respondents' remaining objections to the copy test similarly lack merit. With regard to the sampling universe, the ALJ rejected respondents' contention that the survey population – *i.e.*, those who in the last 12 months had purchased a product or service for weight loss, toning, or massage and also purchased any product by responding to a direct response TV ad – was overbroad. ID at 52-53. Respondents would have limited the survey to those who had purchased a product for weight loss, toning, or massage from a direct response ad. Jacoby Tr. 355-56; *see* RAB at 51. The ALJ held that Dr. Mazis's definition of the survey universe was "reasonably reliable and probative." ID at 53. We agree. The goal of the study was to determine whether potential purchasers of the Ab Force – *i.e.*, those consumers that respondents intended to persuade – perceived the misrepresentations that were alleged in the Commission's complaint. CX 58 ¶ 22. There is no basis for assuming that only consumers who had purchased weight loss, toning, or massage products from direct response TV, rather than by some other means, would be potential Ab Force purchasers. As they had already purchased other products through that venue and demonstrated an interest in this type of product, it is not unreasonable to include them as potential Ab Force purchasers.

With regard to the allegation that the closed-ended questions were leading (RAB at 51), we conclude that the copy test instructions (CX 58 ¶ 34 & Exh. D) were adequate to ensure that participants would give equal weight to all possible responses. *See* ID at 53. In addition, using two different versions of the questionnaire, Dr. Mazis changed the order of the questions. CX 58 ¶ 29; Mazis Tr. 92, 96. The rotation in the order in which the questions were posed supplemented other controls. ID at 53-54; Mazis Tr. 96.

Turning to respondents' allegation (RAB at 51) that the wording of the closed-ended questions invited "yea-saying," we agree with the ALJ that Dr. Mazis used appropriate techniques to ensure that the copy test results would not be compromised by the yea-saying phenomenon or other factors. ID at 53. These techniques included using a filter question to eliminate guessing; rotating the order of questions; and reading the three possible answers to each question before asking any survey question. *Id.* Dr. Mazis also used control or "masking" questions – *i.e.*, questions about attributes that are not closely linked to the alleged claims in the ads – to identify

participants whose affirmative answers to closed-ended questions about the test ad could be attributed to yea-saying, inattention, or other factors. *Id.* at 53-54.

To summarize, we conclude that, although extrinsic evidence was not required to find liability, the copy test and other extrinsic evidence helped confirm our own determination that respondents' ads communicated the challenged claims to significant numbers of reasonable consumers.

## III. First Amendment Claims

Respondents' contention that the First Amendment limits the Commission's ability to conduct a facial analysis of ads to "a narrow category of cases" in essence rearticulates their previous objections to the ALJ's interpretation of their ads. RAB at 64. Simply put, respondents' First Amendment argument is equally without merit: they cannot manufacture a constitutional issue out of a straightforward deceptive advertising case. The First Amendment does not protect deceptive commercial speech. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

Respondents concede, as they must, the Commission's authority "to engage in facial analysis and to find, in an appropriate case, the existence of implied claims without reliance on extrinsic evidence * * *." RAB at 63. Respondents contend, however, that there is no basis for the ALJ's facial analysis and "no reliable extrinsic evidence that consumers actually took such claims away from the advertisements." RAB at 61. According to respondents, "substantial constitutional problems" concerning regulation of commercial speech would be raised if the alleged implied claims "have to be teased and constructed out of background elements." RAB at 64.

This plainly is not a case in which implied claims "have to be teased and constructed out of background elements." *Id.* The challenged claims are clearly communicated. Moreover, the Commission's facial analysis of the implied claims is buttressed by extrinsic evidence, including expert testimony and a copy test.

Moreover, contrary to respondents' claim (RAB at 67), nothing in *In re R.M.J.*, 455 U.S. 191, 202 (1982), or its progeny suggests that facial analysis runs an "inherent risk" (RAB at 68) of restricting protected commercial speech. Indeed, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985), the Supreme Court squarely rejected that proposition, ruling that no consumer survey was required to prove that the public would be misled by a law firm's ad that claimed "if there is no recovery, no legal fees are owed by our clients." Although at issue was the public perception of the distinction between such technical terms as "fees" and "costs," the Court relied on commonsense assumptions as to how consumers would interpret the language to find that the possibility of deception was so "self-evident" that it would not require state disciplinary authorities to "conduct a survey of the public before it [may] determine that the [advertisement] had a tendency to mislead." *Id.* at 653 (*quoting Colgate-Palmolive Co.*, 380 U.S. at 391-92). In

*R.M.J.*, the Supreme Court considered a different issue – whether a state regulatory scheme that broadly prohibited attorney advertising without regard to whether the solicitations were false or misleading was constitutional. Because such blanket prohibitions risk snaring truthful expression along with fraudulent and deceptive speech, the Court concluded that to justify a prophylactic rule the government must demonstrate that the prohibited conduct is either inherently likely to deceive, or provide record evidence that a particular method of advertising in fact has been deceptive. *R.M.J.*, 455 U.S. at 202. Such prophylactic rules are not at issue here. Rather, this case involves an adjudicative finding that the particular ads challenged in this case are false and misleading.

Thus, respondents' cited decisions provide absolutely no support for the proposition that the First Amendment requires that the government provide extrinsic "evidence that a particular form or method of advertising has in fact been deceptive." RAB at 67. *See American Home Products Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982) (argument that the First Amendment requires an order to be based on empirical evidence that the public was misled is "distortion" of *R.M.J.*). When implied claims are self-evident, as they are in this case, there is no constitutional mandate for the government to survey consumers before it can find that an ad is misleading. *Zauderer*, 471 U.S. at 652-53; *see Kraft*, 970 F.2d at 320; *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985).[50] *See also Zauderer*, 471 U.S. at 652-53 (when the alleged deception rises to a "commonplace," a court may itself find the deception to be "self-evident").[51]

In the present case, the Commission has considered carefully all the extrinsic evidence and, notwithstanding respondents' allegations of methodological flaws, we conclude that it corroborates the Commission's own interpretation of the ads. Thus, respondents' concern about an "inherent risk of restricting protected speech" (RAB at 68) is inapposite. The challenged claims are obvious from the face of the ads. *See Kraft*, 970 F.2d at 320-21.

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[50] Even if facial analysis might, in rare cases, raise the sorts of concerns that respondents have raised about an "inherent risk of restricting protected speech" (RAB at 68), that problem would not arise with respect to an order that, as here, simply prohibits false and deceptive claims and requires advertisers to have substantiation for any claims they might make in the future.

[51] Respondents also contend that a facial analysis is necessarily a "subjective measure that looks into the minds of the Commissioners." RAB at 62. According to respondents, such an analysis effectively denies a respondent "meaningful appellate review" of the Commission's decision except in "the most extreme cases" because a reviewing court may not inquire into the minds of agency decision makers. RAB at 65. Given that a reviewing court can conduct an independent review of the ads, there is no foundation for the argument that a facial analysis of the ads would deny respondents effective review of an adverse Commission decision. Moreover, this contention would logically apply to any exercise of the Commission's authority to determine implied claims; yet respondents admit that, except in unusual cases, the Commission has authority to determine implied claims.

In its amicus brief, the National Association of Chain Drug Stores ("NACDS") raises concerns about chilling commercial speech, specifically comparative advertising. NACDS asks the Commission to clarify when the sponsor of a "compare and save" advertisement may be deemed "derivatively liable" for misleading implied claims in an advertisement that is part of the "target universe" for the sponsor's "compare and save" advertisement. Amicus at 13. To be sure, truthful comparative advertising, including "compare and save" advertising, is generally valuable for consumers and competition. *See Federal Trade Commission Statement of Policy Regarding Comparative Advertising*, 16 C.F.R. § 14.15(b) (1979). Head-to-head product comparisons can demonstrate a product's superiority over a competitor or highlight a price differential. As noted above, however, this case does not stand for the proposition that compare and save advertisers are derivatively liable for all advertising claims made by a competitor by virtue of a comparison. Putting aside the fact that respondents' ads communicated the challenged claims within the four corners of the ads, the comparisons in this case are readily distinguishable from the prototypical "compare and save" advertising where an advertiser places a terse, "Compare to ___" message on a product package or "shelf talker" that names a competing brand's product. Respondents' ads expressly referred consumers to advertisements for the comparison products – not just to the products themselves – and then proceeded to repeat and incorporate claims from those ads. Moreover, as respondents knew,[52] ab belts as a product class were consistently positioned as products that would improve a user's health or fitness or cause weight loss, but the competing ab belts – and the Ab Force, as respondents again knew[53] – had no actual value for those purposes. This case does not present the question, and the Commission does not address, what implied claims are communicated when an advertiser merely claims that it is comparable to a competitor's product without conveying additional information.

As for the possible "chilling effect" on the dissemination of truthful "compare and save" advertising, we reject the proposition that implied claims are inherently unpredictable. *Kraft*, 970 F.2d at 320-21 (rejecting First Amendment challenge "when the alleged deception although implied, is conspicuous"). Indeed, this case provides a good example of implied claims that are so conspicuous and self-evident from the face of an ad that extrinsic evidence is simply not required to determine what messages the ad likely conveys to a reasonable consumer. We recognize, of course, that the role of consumer perception creates an inevitable continuum of meaning in ad interpretation.[54] It does not follow, however, that finding liability based in part on respondents' parroting of competitors' ad claims will have a "chilling effect" on the dissemination of legitimate "compare and save" advertising. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 n.4 (1996) (Thomas, J., concurring) (commercial speech, the "offspring of economic self-interest," is a "hardy breed of expression") (*quoting Central Hudson Gas & Elec.*

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[52] *See, e.g.*, Khubani Tr. 273-74, 445, 461, 471-72.

[53] *See* ID at 45; IDF 58-60; Khubani, Tr. 490; JX 6 ¶¶ 16-19.

[54] Indeed, even where extrinsic evidence has been introduced, differences of opinion can emerge as to which claims are conveyed to consumers.

*Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 n.6 (1980) (internal quotation marks omitted)).

A respondent who believes that an advertisement does not communicate an implied claim may, of course, choose to conduct a copy test or submit other evidence demonstrating that consumers do not take away such a claim. These respondents did not. The Commission will consider carefully all the extrinsic evidence, including consumer surveys, that the parties may introduce as to the meaning of challenged ads. *See Stouffer*, 118 F.T.C. at 799; *Kraft*, 114 F.T.C. at 121-22; *Thompson Medical*, 104 F.T.C. at 789-90.

## IV. Remedy

In considering the breadth of appropriate fencing-in, the ALJ acknowledged respondents' substantial resources, their experience and sophistication in marketing a broad array of products, and the deliberate nature of their violations. ID at 64-65. He nonetheless limited fencing-in relief to any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." ID at 66. Complaint counsel contend that more comprehensive fencing-in relief is necessary, including a performance bond and a requirement that respondents have substantiation prior to advertising the "Ab Force, any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program" for any representation "about weight, inch, or fat loss, muscle definition, or the health benefits, safety, or efficacy" of the product. CAB at 67. We conclude that more comprehensive fencing-in relief is warranted but are not persuaded that the record supports a performance bond requirement.

Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that it must bear a reasonable relationship to the unlawful practices. *See, e.g.*, *Colgate-Palmolive Co.*, 380 U.S. at 394-95; *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co.*, 327 U.S. at 612-13. In determining the appropriate scope of relief, the Commission considers three factors: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violation may be transferred to other products; and (3) whether the respondent has a history of prior violations. *See Stouffer*, 118 F.T.C. at 811; *Thompson Medical*, 104 F.T.C. at 833. All three elements need not be present to warrant fencing-in. *See Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Porter & Dietsch*, 605 F.2d at 306.

As the ALJ found, the first two elements weigh in favor of broad fencing-in. ID at 64-65. We agree. First, as discussed above, the alleged violations were serious and deliberate.[55] This is

[55] The ALJ seems to have treated a portion of Mr. Khubani's trial testimony as an admission that express claims in the so-called "test" ads were still communicated implicitly in respondents' "rollout" ads. IDF 87-89. In our view, the cited testimony is inconclusive on this point. *Compare* Khubani Tr. 492 ("[A]ll these scripts were the same message.") *with* Khubani Tr. 496 ("There were some minor changes made in the wording. In my opinion, the message was

not a case where the product advertised was essentially fit for the intended purpose but the advertising oversold the product's qualities in some way. Rather, respondents promised that Ab Force users would get health, fitness, and weight loss benefits, but without substantiation that the device provided any such benefits to those who purchased it. Indeed, Mr. Khubani admitted that he knew before the ad campaign started that he lacked substantiation for the claims that users "could get into shape fast without exercise" and could get "a flatter tummy without painful sit-ups." ID at 45; IDF 58-60; Khubani, Tr. 490. Yet the day after he removed those direct claims from a proposed television script, a radio ad he had authored hit the air waves; the ad proclaimed that the Ab Force "is just as powerful and effective" as other ab belts that "promis[ed] to get [one's] abs into great shape fast – without exercise." Khubani, Tr. 484-86; CX 1 H.

Respondents contend that the evolution of the advertising campaign demonstrates that they took their compliance obligations seriously. Although the respondents slightly modified their claims in the ads that were disseminated most widely, we have no doubt that the respondents deliberately intended to communicate the implied claims even in the later ads, as the ALJ determined. ID at 64-65.[56] It is not plausible that the respondents expected to sell the Ab Force as a mere phenomenon. The record demonstrates that respondents carefully and deliberately timed their launch of the Ab Force promotion to coincide with an ongoing infomercial promotion of EMS ab belts by respondents' competitors – a situation that respondents quickly put to their advantage with their repeated comparisons between the Ab Force and "those 'fantastic electronic Ab belt infomercials on TV'" or "ab belts sold by other companies." IDF 114. Respondents were well aware of the express claims in those infomercials – claims that respondents concede were not only unsubstantiated, but false. *See* ID at 60; IDF 270-73; JX 6 ¶¶ 16-19. As the ALJ concluded, while Mr. Khubani did not want to make those claims expressly, "the evidence shows that Khubani intended to imply those same claims. Merely removing false express claims will not protect an advertisement where the same claims are implied." ID at 45 (*citing Thompson Medical*, 104 FTC at 792). Furthermore, the nationwide dissemination in multiple media, cost of

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– was still the same, compare and save."). Accordingly, we do not rely on it.

[56] For example, after legal review, the phrase "relaxing massage" was added as a briefly flashing superscript in two roll-out television ads. IDF 100-01. Neither that phrase nor the word "massage" were used in any other ads or in any of Mr. Khubani's radio and television scripts, however. IDF 106. The user manual – which consumers received only after the purchase – stated that the product was "intended to provide a relaxing massage. Ab Force is not intended for medical use, for the treatment of any medical condition, or for any permanent physical changes." RX 45-46; IDF 104-05. This disclaimer must have been mystifying to consumers who purchased the product – for example, consumers who purchased the Ab Force after responding to the ad that opened respondents' promotional campaign. That ad compared the Ab Force to other ab belts that "promis[ed] to get our abs into great shape fast – without exercise" and said ab belts were "the latest fitness craze to sweep the country," but said nothing about massage. IDF 86, 93, 104-08; CX 1 H.

the campaign, and risk that purchasers of the Ab Force would view the product as a substitute for regular exercise all demonstrate that the violations were serious.

Second, as for the ease with which the claims may be transferred to other products, respondents market a broad range of products and services. ID at 65; IDF 4. Respondents' marketing strategy is potentially applicable to almost any kind of product or service, including the many products it already markets. They already employ the same strategy with other products – in fact, it is one of the company's standard techniques. Khubani Tr. 247-49.[57] Given that the violations were serious and deliberate and easily transferable to other products, we conclude that comprehensive fencing-in relief is necessary to ensure that respondents will not be able to use the same or similar strategies to mislead consumers in the future.

These two factors – the serious and deliberate nature of respondents' violations and the ease with which they can be transferred to any one of the myriad of services and products offered by respondents – are sufficient, without more, to justify comprehensive coverage in our final order. Nevertheless, respondents' history of entering into multiple consent orders with the FTC[58]

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[57] Indeed, as described by respondent Khubani, a strategy that Telebrands has used on a number of occasions (one or two times a year on average) is to identify existing popular products and then enter the market as a competitor at a lower price. Khubani Tr. 439. To be clear, there is nothing wrong with this approach, but the fact that respondents' deceptive practice here is easily transferable to the other products that it markets in this manner is relevant to the remedy.

[58] In the past 15 years, Mr. Khubani has entered into three separate consent agreements with the Commission resolving alleged law violations – some addressing multiple counts – and agreed to a modification of one consent agreement; Mr. Khubani and Telebrands paid more than $900,000 in civil penalties. In 1990, respondent Khubani and a mail order company he operated, Direct Marketing of Virginia, settled allegations they were violating the Commission's Mail Order Rule by paying a $30,000 civil penalty. *United States v. Azad Int'l, Inc*., No. 90-CV-2412-PLN (S.D.N.Y. April 12, 1990). Subsequently, in September 1996, Mr. Khubani and Telebrands paid a $95,000 civil penalty to settle charges that they failed to ship their products in a timely manner in violation of the Mail Order Rule. *United States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 18, 1996). Also in 1996, Mr. Khubani and Telebrands settled charges that they had made unsubstantiated performance and efficacy claims for two products, the WhisperXL hearing aid and Sweda Power Antenna, and misrepresented the terms of a money-back guarantee. They stipulated to entry of an administrative cease and desist order that prohibited them from making unsubstantiated or false performance claims with respect to the Sweda Power Antenna and any hearing aid. *In re Telebrands Corp.*, 122 F.T.C. 512 (1996). Finally, in 1999, respondents Telebrands and Mr. Khubani stipulated to a modification of the 1996 Mail Order Rule civil penalty order providing that those respondents pay $800,000 in civil penalties and requiring, as an additional remedy, that they fund an independent monitor with expertise in mail or telephone order fulfillment. *United*

– the third element that we consider – provides additional support for more stringent fencing-in. Thus, we disagree with the ALJ's conclusion that Mr. Khubani's previous consent agreements "cannot be utilized to form the basis for imposing a broad fencing in order in this case."[59] ID at 65. We recognize that litigants may settle matters for a variety of reasons; indeed, whether in federal court or at the Commission, most litigation is settled. Settlement is often an efficient way of resolving legal disputes. Holding a prior consent agreement against a party in a subsequent action may affect that party's decision to settle. Having said that, if every consent agreement were inadmissible, the Commission could never fashion relief appropriate to address a pattern of

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*States v. Telebrands Corp.*, Civ. No. 96-0827-R (W.D. Va. Sept. 1, 1999).

[59] The ALJ held that broad fencing-in relief was warranted based on the deliberateness and seriousness of the violations and the ease with which respondents' unlawful conduct could be transferred to other products. ID at 66. With regard to complaint counsel's contention that respondents' history of prior consent orders should also be considered, the ALJ ruled that the consent orders were not in evidence and did not involve any findings of liability. ID at 65. Accordingly, he declined to consider them in determining the appropriate scope of fencing-in relief.

We agree with the ALJ that the deliberateness, seriousness, and transferability of respondents' violations are sufficient, without more, to warrant broad fencing-in relief. However, we do not agree with the ALJ that complaint counsel's failure to offer the prior consent orders into evidence precludes the Commission from considering them in fashioning its order. The Commission may take official notice of them to the extent they are on the public record. *See, e.g., Chicago Bridge & Iron Co.*, 2005 FTC LEXIS 70 at *39 n.82 (2005) (taking official notice of SEC K-1 filing); *South Carolina State Board of Dentistry*, FTC Docket No. 9311, slip op. at 11-12 (July 30, 2004) (matters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and reports and records of administrative agencies); *Avnet Inc.*, 82 F.T.C. 391, 464 n.31 (1973) (taking official notice of U.S. Census report), *aff'd*, 511 F.2d 70 (7th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975). Furthermore, while complaint counsel could have filed a formal motion before the ALJ to take judicial notice of the consent orders earlier in the proceedings, respondents have no claim of prejudice; indeed, the existence of the consent orders is undisputed. As for complaint counsel's alleged "failure to follow the formalities" (RRB at 63), the Commission's adjudicative rules specifically anticipate the possibility that in rendering a decision on the merits the Commission *sua sponte* will take official notice of a material fact. *See* 16 C.F.R. 3.43(d) ("When any decision of an [ALJ] or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."). Thus, the Commission's ability to take official notice of a fact does not turn on whether any of the parties has filed a formal motion before the ALJ, as respondents seem to suggest. *Cf. Dobrota v. INS*, 195 F.3d 970, 973 (7th Cir. 1999) (taking *sua sponte* judicial notice of updated country conditions in light of parties' failure to introduce such information).

conduct by someone who repeatedly violates the law but invariably settles. Moreover, we are well aware that a majority of the Commissioners must have "reason to believe" that the law has been violated before issuing a proposed complaint, 15 U.S.C. § 45, including any proposed complaint accompanied by a proposed consent agreement.

Thus, we hold that it is appropriate to consider a pattern of consent agreements. The fact that a party has entered into one prior consent agreement with the Commission may say little about the appropriate scope of relief in a future case. *See Thompson Medical*, 104 F.T.C. at 833 n.78 ("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."). The Commission, however, may properly take into account a respondent's pattern and practice of alleged law violations that result in a succession of narrowly tailored injunctive orders in determining whether more comprehensive relief is called for. *See Sterling Drug Inc.*, 102 F.T.C. 395, 793 n.54 (1983) (five outstanding advertising orders, one litigated and four by consent), *aff'd*, 741 F.2d 1146 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Jay Norris Corp.*, 91 F.T.C. at 856 n.33 (three consent orders in 15 years); *see also FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1270-72 (S.D. Fla. 1999) (seven prior court and administrative orders entered by consent). Respondents' previous consent order with the Commission relating to allegedly unsubstantiated advertising claims for a hearing aid and an antenna – leaving aside the troubling misrepresentation relating to the company's money-back guarantee – demonstrates that respondents were well aware of the Commission's advertising substantiation requirements, including requirements for "devices" such as the Ab Force. Moreover, the alleged violations that resulted in a succession of consent orders relating to Mail Order Rule violations – culminating in an order that required the company to hire a third party monitor to oversee compliance – suggests a troubling inability to comply with the consumer protection laws enforced by the Commission.

Accordingly, we modify the fencing-in provisions in the ALJ's order to take into account the demonstrated need to protect the public from future unfair or deceptive acts or practices by respondents. Our Order requires respondents to substantiate all claims about weight, inch, or fat loss; muscle definition; or the health benefits, safety, or efficacy of any product, service, or program. This broader product coverage is warranted in light of the seriousness of this violation; the ease of transferability of these deceptive practices to products of all types; and the pattern of alleged illegal activity that resulted in the previous consent orders.

All product coverage is reasonably related to the Commission's goal of protecting the public. As the Supreme Court stated in *Colgate-Palmolive*, "We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements." 380 U.S. at 395; *id.* at 394-95 (upholding order prohibiting deceptive mock-ups in advertisements for "any product" and noting that "courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist"). *See also Jay Norris Corp.*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (affirming Commission order fencing-in claims for all products). We recognize that this order will impose some additional burden on respondents to substantiate claims for products that the ALJ's order would not cover, but Commission law requires such substantiation for any

advertiser in any case. *See, e.g., Substantiation Statement*, 104 F.T.C. at 839. In limiting these provisions to a prohibition on deceptive and unsubstantiated claims, the Commission's order leaves respondents free to advertise in any way they choose, except deceptively. Moreover, respondents market a wide range of products; efficacy claims for most of these products would not be covered by the ALJ's order as they do not relate to health, weight loss, fitness, or exercise benefits.[60] In fact, one of the respondents' previous consent orders[61] relates to unsubstantiated performance and efficacy claims for an antenna – the type of deception that would violate Section 5 of the FTC Act but not the ALJ's order. As the Commission held in *Litton Industries, Inc.*, 97 F.T.C. 1 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982):

> The rationale for entry of a multi-product order based upon violations in the advertising of only one or a few products is that many kinds of deceptive advertising are readily transferrable to a variety of products, and it would serve the public poorly to halt the use of a deceptive tactic in the advertising of one product if the respondent remained free to repeat the deceptive practice in another guise, with no threat of sanction save for another order to cease and desist.

*Id.* at 78-79 (citations omitted).

We turn then to complaint counsel's request that the Commission order respondent Khubani to obtain a performance bond of $1 million before engaging in or assisting others in engaging in any manufacturing, sale, or promotion of any "device," as that term is defined in Section 15(d) of the FTC Act, 15 U.S.C. § 55(d).[62] As the ALJ observed, although the Commission has accepted numerous consent agreements that require respondents to obtain performance bonds, it has not required a performance bond in a litigated administrative case. ID

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[60] Products respondents have marketed in the past include Ambervision Sunglasses, the Magic Hanger, Dental White Tooth Whitening System, the Safety Can Opener, the Audobon Singing Bird Clock, the Better Pasta Pot, and the Roll-a-Hose Flat Hose. IDF 22. Another recent Telebrands product was the Cyclone Diet, a blended powder that would supposedly cause users to "lose ten pounds in two days," a seemingly impossible claim. Khubani Tr. 251-52. *Cf.* Federal Trade Commission, *Red Flag: Bogus Weight Loss Claims*, *available at* <www.ftc.gov/bcp/conline/edcams/redflag/beyond.html> (setting forth claims for weight loss products that are false on their face because they are not scientifically feasible).

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

[62] While Mr. Khubani challenges the application of a bond requirement to himself as an individual rather than to the corporation, it is not only appropriate but sometimes preferable to make the principal of a corporation subject to fencing-in so that the individual cannot circumvent the order by establishing a new company with a different name.

at 63. However, this is not a proper basis for declining to impose such relief.[63] Courts have recognized that the Commission has broad discretion in its choice of remedies and is authorized to impose fencing-in provisions to prevent a recurrence of the same or similar violations and "to close all roads to the prohibited goal" so the respondent cannot simply circumvent the order. *Ruberoid*, 343 U.S. at 473. The Commission has employed a wide variety of fencing-in remedies to achieve effective relief. *See, e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 606 (1966) (divestiture order); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (corrective advertising), *cert. denied*, 435 U.S. 950 (1978); *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (compulsory licensing of intellectual property), *appeal after remand*, *Pfizer Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); *Chicago Bridge & Iron Co. N.V.*, 2004 FTC LEXIS 250 (Dec. 21, 2004) (appointment of monitor trustee); *Brake Guard Products, Inc.*, 1998 FTC LEXIS 184 (Jan. 23, 1998) (brand name excision). Such fencing-in relief may include a performance bond requirement that, together with the prospect of monetary penalties for violating an order, is likely to spur a respondent to take appropriate measures to ensure compliance and, failing that, provide some measure of relief for consumers who were harmed by the illegal conduct.

In determining whether a performance bond is warranted as fencing-in, we apply the same standard enunciated in *Ruberoid*. We consider the likelihood of a respondent's future violations, the deliberateness and egregiousness of any past violations, and the transferability of the unlawful practices to other products or situations. As discussed above, after consideration of those factors, we believe that broad injunctive relief is warranted here.

The Commission, of course, also considers other factors to decide whether a performance bond is reasonably necessary to supplement other forms of fencing-in. In this instance, we decline to order Mr. Khubani to obtain a performance bond because complaint counsel has presented insufficient evidence as to the amount of the performance bond that would likely be necessary to prevent future law violations. The Commission must determine whether a performance bond is reasonably necessary to secure Mr. Khubani's compliance with the order yet there is no evidence in the record as to his financial resources. Such information would assist the Commission in determining whether a bond requirement is appropriate – and, if so, at what amount – to ensure

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[63] Respondents' reliance on *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) for the proposition that such relief is beyond the Commission's remedial authority is misplaced. RRB at 65-67. In *Heater*, the Ninth Circuit specifically recognized the Commission's authority to order affirmative relief, but treated restitution as a private, retroactive remedy – tantamount to an award of damages – that was beyond the Commission's authority in an administrative proceeding. Even assuming, *arguendo*, that the *Heater* court correctly treated an administrative award of restitution as a private remedy, a performance bond operates *prospectively* by ensuring that a fund will be available for consumers should respondent Khubani violate the order in the future, and increasing his incentives to comply. *See FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992), *modified by*, 1992 U.S. Dist. LEXIS 6152 (N.D. Ill. May 6, 1992), *aff'd sub nom. FTC v. Vlahos*, 1995 U.S. App. LEXIS 6092 (7th Cir. Mar. 6, 1995).

his compliance and in assessing the financial burden that a bond might impose on him. The amount may have to be more than the $1 million requested or less than that amount, but the Commission does not have enough information to weigh the reasonableness of the request. Although Mr. Khubani's compliance with the order will not be secured by the performance bond, we believe that the order's requirement that respondents substantiate objective claims for all of their products – while not a substitute for the bond – will help protect consumers in the future.

## V. Conclusion

Contrary to respondents' claim, this case does not involve a novel theory of liability. It involves false and unsubstantiated claims that are communicated with such utter clarity that, even without any consideration of extrinsic evidence, we are able to conclude with confidence that the claims were made. Undoubtedly, as a result of respondents' calculated efforts to capitalize on their competitors' ongoing infomercial promotions, respondents' claims for the Ab Force resonated more strongly with those who had viewed those infomercials or were familiar with the competing ab belts. But respondents' ads are not subtle: even putting aside the claims used in the so-called "test" phase of their Ab Force promotion – which generated sales, like the rollout ads – the images and text in the other ads clearly conveyed each of the claims alleged in the Commission's complaint. The copy test amply confirms this conclusion. We emphasize, moreover, that this is not a case in which the product was merely "oversold." Respondents' advertising left no doubt that the Ab Force was an amazing tool that would work wonders on the body, but they had no evidence that the product did any such thing. The product is useless for the health, weight loss, and fitness purposes for which it was advertised, as respondents were well aware. The idea that consumers were purchasing the Ab Force simply to share in the excitement of buying a popular product is not credible.

For all the foregoing reasons, we affirm the ALJ's finding as to liability and conclude that a broad cease and desist order applicable to all products is appropriate here. As discussed above, however, we decline to require respondent Khubani to obtain a performance bond.

Date News Release Issued: September 23, 2005
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