Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), in conjunction with the filing of this Stipulated Final Judgment, has filed an Amended Complaint for Permanent Injunction and Other Equitable Relief (the "Amended Complaint") under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), against Defendants United Fitness of America, LLC, George Sylva, eBrands commerce group, LLC, John William Kirby, Jr., Tristar Products, Inc. and Kishore Mirchandani, also known as "Keith" Mirchandani.

The Commission and Defendants United Fitness of America, LLC, George Sylva, eBrands commerce group, Ilc., and John William Kirby, Jr. (together the "UFA Defendants") have stipulated to the entry of this Stipulated Final Judgment and Order for Permanent Injunction, Monetary Redress, and Other Equitable Relief ("Final Order") in settlement of the Commission's Amended Complaint against the UFA Defendants. Defendants United Fitness of America, LLC, and George Sylva, together with Defendants Tristar Products, Inc. and Kishore Mirchandani, have also withdrawn their motions to dismiss and to transfer. The UFA Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Final Order. The UFA Defendants also waive any claim that they may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Final Order. The Court, being advised in the premises, finds as follows:

#### **FINDINGS**

- 1. In its Amended Complaint, the Commission alleged that the UFA Defendants violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. The Commission sought permanent injunctive relief for alleged deceptive acts or practices by the UFA Defendants in connection with the marketing and sale of the Fast Abs electronic muscle stimulation device.
- 2. The Commission has the authority under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to seek the relief it has requested.

- 3. This Court has jurisdiction over the subject matter of this action and over all of the parties. Venue in the District of Nevada is proper.
- **4.** The Amended Complaint states a claim upon which relief may be granted against the UFA Defendants.
- 5. The activities of the UFA Defendants as alleged in the Commission's Amended Complaint were or are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- 6. The Commission and the UFA Defendants stipulate and agree to this Final Order, without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute arising from the Amended Complaint to the date of entry of this Final Order. By stipulating to this Final Order, the UFA Defendants do not admit any of the allegations set forth in the Amended Complaint, other than jurisdictional facts.
- **7.** Each party to this Final Order shall bear its own costs and attorneys' fees incurred in connection with this action.
  - **8.** Entry of this Final Order is in the public interest.

### **DEFINITIONS**

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

- **A.** "Clearly and prominently" means as follows:
  - 1. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure must be presented simultaneously in both the audio and visual portions of the advertisement. *Provided*, *however*, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in

which the advertisement is presented. *Provided further*, that in any advertisement communicated through interactive media that is presented predominantly through visual or audio means, the disclosure may be made through the same means in which the advertisement is predominantly presented. The audio disclosure must be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure must be of a size and shade, with a degree of contrast to the background against which it appears, and must appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

- 2. In a print advertisement, promotional material, or instructional manual, the disclosure must be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
- 3. On a product label, the disclosure must be in a type size and locationanual, iOp- and locat

border that is a color or shade that contrasts with the background against which it appears. *Provided further*, that in a multi-page insert, the disclosure must appear on the cover page or first page.

- 4. The disclosure must be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure can be used in any advertisement or on any label.
- 5. In the case of advertisements disseminated by means of an interactive electronic medium, such as software, the Internet, or online services, "in close proximity" means on the same Web page, online service page, or other electronic page, and proximate to the triggering representation, and does not include disclosures accessed or displayed through hyperlinks, pop-ups, interstitials or other means.
- **B.** "Competent and reliable scientific evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. "Corporate Defendants" means Defendants United Fitness of America, LLC and eBrands commerce group, llc.
- **D.** "EMS device" means an electrically powered device that repeatedly contracts muscles by passing electrical currents through electrodes contacting the affected body area.
- **E.** "Fast Abs" means the Fast Abs electronic muscle stimulation device challenged in the Amended Complaint.

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statements listed in *Appendix A* include material information upon which the Commission relied in negotiating and consenting to this Final Order. If, upon motion by the Commission, a Court should find that any of the UFA Defendants made a material misrepresentation or omitted material information concerning its financial condition, then this Final Order shall be reopened for the purpose of requiring payment from the UFA Defendant(s) who made the misrepresentation to the Commission of additional monetary redress in the amount of Sixty-Four Million, Four Hundred and Forty-Two Thousand dollars (\$64,442,000), which the UFA Defendants agree is the total net amount paid by consumers to purchase Fast Abs products, less the sum of any amounts paid to the FTC by the UFA Defendants after the date of this Final Order. *Provided*, however, that in all other respects this judgment shall remain in full force and effect, unless otherwise ordered by the Court; and *provided further*, that proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings that the FTC may initiate to enforce this Final Order.

#### PROHIBITED REPRESENTATIONS

III.

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

**A.** Any such device causes or promotes loss of inches or fat;

- **B.** Any such device causes or promotes well-defined abdominal muscles, including through the use of terms such as "rock hard abs," "washboard abs," "chiseled abs," "cut abs," "well-developed abs," and/or any other terms with substantially similar meaning;
- C. Use of any such device for any period of time is equivalent to or superior to abdominal exercises such as sit-ups, crunches, or any substantially similar exercises;
- **D.** Any such device is safe for use over the chest and/or pectoral area; or
- **E.** Any such device makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

#### IV.

IT IS FURTHER ORDERED that the UFA Defendants, their successors and assigns, and their officers, agents, servants, and employees, and all persons or entities in active concert or participation with them who receive actual notice of this Final Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product not covered by Part III of this Final Order, are hereby permanently enjoined from misrepresenting, in any manner, expressly or by implication, that:

- **A.** Any such product causes or promotes loss of weight, inches or fat;
- **B.** Any such product causes or promotes well-defined abdominal muscles, including through the use of terms such as "rock hard abs," "washboard abs," "chiseled abs," "cut abs," "well-developed abs," and/or any other terms with substantially similar meaning;

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- C. Use of any such product for any period of time is equivalent to or superior to abdominal exercises such as sit-ups, crunches, or any substantially similar exercises;
- **D.** Any EMS device is safe for use over the chest and/or pectoral area; or
- **E.** Any such product makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

V.

**IT IS FURTHER ORDERED** that the UFA Defendants, their successors and assigns, and their officers, agents, servants, and employees, and all persons or entities in active concert or

misrepresenting, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

### REQUIRED DISCLOSURES

### VII.

**IT IS FURTHER ORDERED** that the UFA Defendants, their successors and assigns, and their officers, agents, servants, and employees, and all persons or entities in active concert or participation with them who receive actual notice of this Final Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale,

require for such devices. Provided, however,

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# PROHIBITED PRACTICES: REFUNDS AND WARRANTIES VIII.

IT IS FURTHER ORDERED that the UFA Defendants, their successors and assigns, and their officers, agents, servants, and employees, and all persons or entities in active concert or participation with them who receive actual notice of this Final Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, are hereby permanently enjoined from:

- A. Failing to provide at least one reasonable means consumers may effectively use to obtain, in a timely manner, a refund, cancellation, exchange, or repurchase pursuant to the terms of the seller's refund, cancellation, exchange, or repurchase policies; *provided* that if a toll-free telephone number or other telephone number is provided to consumers for customer services, including but not limited to, making a complaint or obtaining a refund, cancellation, exchange, or repurchase pursuant to the terms of the seller's refund, cancellation, exchange, or repurchase policies, Defendants must ensure sufficient capacity on such telephone line so that consumers may effectively use it to obtain customer services; or
- **B.** Misrepresenting, in any manner, expressly or by implication, the existence or material terms of any warranty.

#### FOOD AND DRUG ADMINISTRATION

#### IX.

**IT IS FURTHER ORDERED** that nothing in this Final Order shall prohibit the UFA Defendants from making any representation for:

**A.** Any drug that is specifically permitted in labeling for that drug under any

tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration;

B.

- 2. Each Corporate Defendant shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising under this Final Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Final Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change. *Provided that*, with respect to any proposed change in the corporation about which either of the Corporate Defendants learns less than thirty (30) days prior to the date such action is to take place, such Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.
- **B.** One hundred eighty (180) days after the date of entry of this Final Order, the UFA Defendants shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Final Order. This report shall include, but not be limited to:
  - 1. Any changes required to be reported pursuant to Subpart A, of this Part;
  - 2. A copy of each acknowledgment of receipt of this Final Order obtained by the UFA Defendants pursuant to Part XIII, below;
  - **3.** For the purposes of this Final Order, the UFA Defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

## Associate Director for Enforcement Federal Trade Commission

contracts for personal services from the Individual Defendants and (b) has responsibilities with respect to the subject matter of this Final Order. The Individual Defendants shall secure from each such person a signed and dated statement acknowledging receipt of the Final Order within thirty (30) days after the date of service of the Final Order or the commencement of the employment relationship.

# ACKNOWLEDGMENT OF RECEIPT OF FINAL ORDER BY DEFENDANTS XIV.

**IT IS FURTHER ORDERED** that each of the UFA Defendants, within five (5) business days of receipt of this Final Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Final Order.

# TAXPAYER IDENTIFICATION NUMBERS XV.

IT IS FURTHER ORDERED that each of the UFA Defendants must, in accordance with 31 U.S.C. § 7701, furnish to the FTC his or its respective taxpayer identifying number (social security number or employer identification number), which shall be used for purposes of collecting and reporting on any delinquent amount arising out of any of the UFA Defendant's relationship with the government.

### RETENTION OF JURISDICTION 1 2 XVI. 3 IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Final Order. 4 5 **SO STIPULATED:** 6 **Attorneys for Plaintiff Federal Trade Commission:** 7 8 9 LAUREEN KAPIN DANIEL G. BOGDEN 10 WALTER GROSS **UNITED STATES ATTORNEY** JOSHUA S. MILLARD BLAINE T. WELSH Assistant United States Attorney 11 Attorneys for Plaintiff 333 Las Vegas Blvd. South, Suite 5000 Federal Trade Commission Las Vegas, NV 89101 600 Pennsylvania Ave., N.W., Room NJ-2122 12 (702) 388-6336 Office Washington, D.C. 20580 (202) 326-3237 Office (702) 388-5087 Fax 13 (202) 326-2558 Fax 14 Dated: \_\_\_\_\_\_, 2003 purposes on\_\_\_, 2o7\_, 2o7\_, 0r12.96001 Ave., 15 16 17 18 19 20 21 22 23 24 25 26

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2	Attorneys for Defendants:	
3	DENNIS L. KENNEDY LIONEL SAWYER & COLLINS 300 South Fourth St., Suite 1700 Las Vegas, NV 89101	JEFFREY D. KNOWLES
4		
5		& CIVILETTI, LLP. 1201 New York Ave., N.W., Ste.100
6		Washington, D.C. 20005 (202) 962-4800
7	Dated:, 2003	Dated:, 2003
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12		KENT J. DAWSON
13		UNITED STATES DISTRICT
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### Appendix A

### Sworn Financial Statements Provided by Defendants to the FTC

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United Fitness of America, dated April 29, 2003 eBrands commerce group, llc, dated April 30, 2003 George Sylva, dated May 15, 2002 John William. Kirby, Jr., dated March 24, 2003