IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 12-10520

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

FINANCIAL FREEDOM PROCESSING, INC., a corporation, formerly known as Financial Freedom of America, Incorporated; COREY BUTCHER, Individually and as an Officer of the Corporation; BRENT BUTCHER, Individually and as an Officer of the Corporation,
Defendants- Appellees.

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

DEBT CONSULTANTS OF AMERICA, INC.; DEBT PROFESSIONALS OF AMERICA, INC.; ROBERT CREEL, ; Individually and as an Officer of each Corporation; COREY BUTCHER, Individually and as an Officer of each Corporation; NIKKI CREEL, Individually and as an Officer of each Corporation,
Defendants- Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division

The Honorable David C. Godbey, United States District Judge

District Court Nos. 3:10-CV-2446 (consolidated) and 3:10-CV-2447

OPENING BRIEF OF
PLAINTIFF-APPELLANT FEDERAL TRADE COMMISSION

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Debt Professionals of America, Inc., Defendant-Appellee

Federal Trade Commission, Plaintiff-Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Federal Trade Commission ("Commission") requests that this Court hear oral argument. This would permit the Commission to address any of this Court's questions concerning the important issues addressed in this appeal, including the district court's failure to apply the correct legal standard in deception cases brought under the FTC Act, that court's clear errors of law and fact, and the need for this Court to reverse – or vacate and remand for further proceedings – that court's judgment.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 15 U.S.C. § 53(b), which gives the Federal Trade Commission ("Commission" or "FTC") the authority to seek injunctive relief in the federal courts. Jurisdiction also is proper under 28 U.S.C. § 1331 (actions involving questions of Federal law) and § 1345 (Commission is an agency of the United States).

The district court entered its final judgment on March 12, 2012. (FFP-3832-33).[1] The Commission's notice of appeal, filed on May 10, 2012 (FFP-3898-99), was timely under 28 U.S.C. § 2107(b)(2) and Fed. R. App. P. 4(a)(1)(B)(ii).

This Court has jurisdiction under 28 U.S.C. § 1291, as this is an appeal of a final judgment. *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012).

ISSUES ON REVIEW

1. Whether the district court erred by failing to apply the correct legal standard for FTC law enforcement actions challenging deceptive sales practices,

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[1] The Commission initially brought two separate enforcement actions, which the district court consolidated for all purposes. Because there were two actions, two Records on Appeal were forwarded by the district court, one for the action against Freedom Financial Processing (10-CV-2446) (under which both actions were consolidated) and the other for the action against Debt Consultants of America (10-CV-2447). Citations to the FFP record are to FFP and then the page number plus a pin-point cite, if any, *e.g.*, FFP-XXXX. The same convention is used for citations to the DCA record.

which require the court to determine a "reasonable" consumer's "net impression" of the defendants' sales claims, and which require strong evidence to support a conclusion that fine-print disclaimers effectively counteracted deceptive sales claims.

2. Whether the district court erred in concluding that defendants' claims of substantial debt reduction were non-deceptive even though defendants did not tell consumers: (a) the high percentage of consumers who exited the program after paying substantial, non-refundable fees but received little or no debt reduction; and (b) that the debt-reduction claims were based on the small minority of defendants' customers who completed the program.

3. Whether the district court erred in concluding that defendants' claims of substantial debt reduction were non-deceptive even though they did not reveal to consumers that they calculated the extent of debt reduction by: (a) excluding defendants' substantial fees; and (b) basing the calculation on the debt the consumer owed when completing the program, including the accrued penalties and interest charges that would inevitably drive up consumer's debt.

4. If this Court does not reverse the judgment, whether the judgment must be vacated and the action remanded for the court below to analyze the facts adduced at trial applying the proper "net impression" analysis.

STATEMENT OF THE CASE

This case involves purported debt negotiation services offered to cash-strapped consumers already owing thousands of dollars in unsecured debts, typically from credit cards. Defendants drew in over 22,000 consumers who paid defendants fees in excess of $57 million through unqualified, express claims – primarily in radio advertisements – that they could save consumers 30 to 60 percent on their existing debt (Savings Claims) and would have consumers debt free in 36 months or less (Timing Claim). Interested consumers were encouraged to call the defendants. When consumers did, defendants' sales representatives repeated and embellished upon the Savings and Timing Claims and also made an express, individualized Savings Claim that the defendants could save that consumer 55 percent based upon his existing debt. Consumers remaining interested would receive an Enrollment Agreement, which consumers were urged to sign and quickly return to the defendants. That agreement – prepared in 8-point fine-print – did not contain the unqualified Savings and Timing Claims, but neither prominently nor clearly disclaimed them. Taken together, defendants' marketing efforts would leave a "reasonable consumer" with net impression that the Savings and Timing Claims were typical results for defendants' customers. In fact, they were anything but – at most 24 percent of defendants' customers achieved the

Savings and Timing Claims. Over 70 percent of the defendants' customers exited the programs without achieving the benefits of neither the Savings or the Timings Claims. Most of those customers – approximately 55 percent – exited before the defendants settled even a single debt, but after the consumers paid to the defendants a multi-thousand dollar non-refundable "administrative fee" equal to 9.9 percent of the consumer's existing debt.

The Commission commenced two separate but related actions in the Northern District of Texas, on December 2, 2010. These actions alleged that the defendants/appellees violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by deceptively marketing and operating three essentially identical debt negotiation businesses. Those actions were styled *FTC v. Financial Freedom Processing, Inc.*, No. 10-CV-2446, and *FTC v. Debt Consultants of America, Inc.*, No. 10-CV-2447. The Commission commenced them under the authority of FTC Act Section 13(b), 15 U.S.C. § 53(b), which authorizes the Commission to bring actions seeking permanent injunctive relief, including monetary redress, for violations of FTC Act Section 5(a).

The complaints stated claims that were identical in substance, alleging deceptive practices in defendants' offering of debt relief services. (FFP-29, ¶ 10; DCA-9-10, ¶ 13). The complaints alleged that defendants, in radio and television advertisements, in telephonic sales pitches, and on webpages, represented without qualification that they could negotiate deals with creditors that could save consumers 30 to 60 percent on their unsecured debts and would get consumers debt free in 18 to 36 months. (FFP-29-31, ¶¶ 11-15; DCA-10-11, ¶¶ 14-17).

Each complaint contained two counts. Count One alleged that defendants' Savings Claims were deceptive because defendants: (a) based the Savings Claims only on the results for the customers who completed the programs; (b) omitted from the Savings Claims the results for the majority of their customers, who exited the programs without any debts settled; (c) based the Savings Claims on the inevitably higher amount that a consumer would owe at the time of settlement (due to accrued interest, penalties and late fees), not the amount of debt that a consumer owed at the time of enrollment into one of the defendants' programs; and (d) did not include the defendants' fees in the calculation of the Savings Claims. (FFP-35-36, ¶¶ 33-34; DCA-16, ¶¶ 37-38). Count Two alleged that the defendants had no substantiation for their Timing Claims. (FFP-36, ¶¶ 35-36; DCA-17, ¶¶ 39-40).

On April 1, 2011, the actions were consolidated for all purposes. (FFP-1036). Following discovery, the district court commenced a seven-day long bench trial on December 11, 2011.

On March 12, 2012, the district court issued its Finding of Facts and Conclusions of Law ("Findings and Conclusions"). (FFP-3825-31). The Findings and Conclusions identified three principal points of dispute, and the court resolved each of them in favor of the defendants. First, the court determined that a reasonable consumer would interpret the defendants' Savings and Timing Claims as based solely on the experience of the consumers who completed the programs, regardless of how many exited prior to completion. (FFP-3829, Finding ¶ 12). Second, the court determined that a reasonable consumer would interpret the Savings Claim to exclude the fees paid to the defendants by customers, regardless of their magnitude. (FFP-3829, Finding ¶ 13). Third, the court determined that a reasonable consumer would interpret the defendants' Savings Claim as based not on the consumer's existing debt, but rather on the amount of a consumer's debt at the time of settlement with creditors, which would include accrued interest, fees and penalties from in the six months or more from when a consumer enrolled and when defendants settled any of a consumer's debts, effectively reducing any savings by consumers. (FFP-3829, Finding ¶ 14). The court did not explain how it arrived at these determinations, nor did it make any effort to reconcile them with the evidence provided regarding consumers' understanding of defendants' claims, including a specific, express savings claim made over the telephone to every prospective customer. It did, however, indicate that it presumed that the fine-print disclosures defendants provided to consumers following defendants' extensive marketing efforts would fully trump the initial unqualified Savings and Timing Claims. (FFP-3827-28, Finding ¶ 8).

On the basis of its determinations regarding a reasonable consumer's takeaway regarding defendants' claims, the court then concluded that the defendants' Savings and Timing Claims "were true for a majority of the customers of the defendants who completed a program." (FFP-3829, Finding ¶ 15; 3831, Conclusion ¶ 3). On this basis, the district court concluded that a reasonable consumer would not be misled by defendants' Savings and Timing Claims. (FFP-3831, Conclusion ¶ 3).

On March 12, 2012, the district court entered a final Judgment in favor of the defendants and against the Commission on both counts. (FFP-3832-33). On May 12, 2012, the Commission filed a timely notice of appeal. (FFP-3898-99).

STATEMENT OF RELEVANT FACTS

A. The Parties

Appellant/Plaintiff the Commission is an agency of the federal government, created by the FTC Act, 15 U.S.C. §§ 41 *et seq*. The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *Id*.

Appellees/Defendants are: Financial Freedom of America, Inc. ("FFA"); its CEO and principal owner Corey Butcher ("Corey"); its former COO Brent Butcher ("Brent"); Debt Consultants of America, Inc. ("DCA"); Debt Professionals of America, Inc. ("DPA"); and Robert Creel ("Creel") and Nikki Vrla Creel ("Vrla"), both of whom were officers of DCA and DPA.

Corey formed FFA in December 2005. (FFP-5072:11-17). It changed its operating name to Financial Freedom Processing in May 2010, when it stopped taking new customers; at the time of trial it was servicing its existing customers, (FFP-5072:16-5073:1), as well as those of DCA and DPA, *infra*. Throughout FFA's existence Corey has been its principal shareholder, CEO, and a director. (FFP-4895:25-4896:17). Brent was a shareholder of FFA from January 2006 through December 2009, (FFP-4207:14-15; 4211:12-25; 4953:7-12), a director from January 2006 through February 2010. (FFP-4216:22-25; 4952:19-4953:3), and its VP and COO from November 2008 through February 2010. (FFP-4211:8-20; 4955:7-23).

Corey and Creel formed DCA in 2006. (FFP-4231:15-17). Corey is a 50 percent shareholder, a director and the treasurer (FFP-4906:9-15). Creel is president, CEO, and a 50 percent shareholder of DCA. (FFP-4235:7-19; 4987:9-15). Vrla, Creel's then wife, was a VP of DCA from September 2008 through April 2011, (FFP-4224:8-16; 4225:22-25), and its corporate secretary. (FFP-4225:7-12). DCA stopped taking new customers in May 2009. (FFP-4235:22-24). At the time of trial, FFA serviced DCA's remaining customers. (FFP-4237:8-13; 4267:21-4268:4).

Corey and Creel formed DPA in 2008. (FFP-4234:12-90:6). Corey is a 50 percent shareholder and a director. (FFP-4914:13-4915:4). Creel is president, CEO and a 50 percent shareholder of DCA. (FFP-4235:7-19; 4987:9-15). Vrla was a VP of DPA from September 2008 through April 2011. (FFP-4224; 4225:22-25). DPA stopped taking new customers in July 2010. (FFP-4236:23-4237:2). At the time of trial, FFA serviced DPA's remaining customers. (FFP-4237:8-13; 4267:21-4268:4).

B. Defendants' Shared Business Model

All three corporate defendants targeted consumers with at least $7,500 in unsecured debt, primarily credit card debt. (FFP-4704:23-4705:2). They obtained almost all of their customers through radio advertisements and, to a much a lesser extent, through television advertisements and their websites.[2] DCA and DPA were "clones" of FFA; they "copied [its] documents and advertisements and organizational charts. Everything was pretty much set up the same way" – the three companies were "mirror images" of each other.[3]

C. FFA's Advertised Savings and Timing Claims

FFA's advertisements included broad and unqualified claims of success in negotiating consumers' debts and saving them significant money. Advertisements touted fantastic Savings Claims such as, "If you are drowning in credit card debt and would like to wipe out 30 to 60 percent of it, call Financial Freedom of America."[4] FFA boasted it would: "wipe out up to 60 percent of your credit card bills;"[5] save consumers "thousands of dollars" on their unsecured debt;[6] and make

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[2] Approximately 95 percent of FFA's advertising was radio advertisements. (FFP-5093:16-17). Fewer than one percent of FFA's customers came through its website. (FFP-5094:7-12; PX 95, p. 4).

[3] FFP-4233:22-4234:3 & 4237:22-4239:3 (Robert Creel); 4478:10-17 (Defendants' expert Dr. Thomas Maronick).

[4] PX 14, 4:16-18; PX 15, 4:15-17; PX 16, 4:9-16; PX 25, 4:12-24; PX 26, 4:11-24; PX 28, 4:14-23; PX 29, 4:11-13; PX 30, 4:8-12; PX 31, 4:8-12; PX 32, 4:11-12; PX 33, 4;10-12; PX 34, 4:9-10; PX 38, 4:11-24; PXs 142, 144, 245, 146, 148, 149, 150, 151, PX 154, 4:8-9;155; PX 170, 4:12-22.

[5] PX 16, 4:9-16.

[6] PX 26, 4:11-18; PX 27, 4:15-20; PX 32, 4:14-15; PX 38, 4:11-24; PX 153, 4:8-19.

"your credit card bills reduced as much as 30 to 60 percent. . . . Save thousands or tens of thousands off what you currently owe. [We] are experts at negotiating debt settlements and may wipe out as much as 30 to 60 percent of your credit card bills."[7] Similarly, FFA touted it "averages 43% settlements, which would result in a 50-60% savings of the account balances."[8] and its website set out purported "monthly settlement averages" for its customers' accounts, which ranged from 37-48%".[9]

FFA's advertisements frequently included "testimonials" from satisfied customers. They made claims such as that FFA "settled my biggest account for 33 cents on the dollar. That's a 67 percent debt reduction."[10] Another stated, "I was in debt with one creditor for $15,000, and they managed to get a settlement of $3,000. If you are drowning in credit card debt and would like to wipe out 30 to 60 percent of it, call Financial Freedom of America."[11]

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[7] PX 17, 4:11-18; PX 19, 4:8-16.

[8] PXs 177.1-177.9; *see also* PX 294.2, 12:23-25 (50-60 percent savings)

[9] PX 180, p. 111.

[10] PX 14, 4:9-12; PX 15, 4:18-19; PX 25, 4:12-24; PX 26, 4:11-24; PXs 148-151; PX 170, 4:12-22.

[11] PX 23, 4:8-18.

As its Timing Claim, FFA boldly asserted that consumers "could be debt free in as little as 36 months and save thousands in interest payments"[12] or would be debt free in 18-36 months[13] or 30-36 months.[14]

D. DCA and DPA's Advertised Savings and Timing Claims

Advertisements for both DCA and DPA took substantially the same approach as FFA, touting without qualification that they would "wipe out" or "eliminate" 30 to 60 percent of a consumer's credit card debt.[15] They also claimed consumers could "expect a total reduction of 40-60% of the balance owed on your total debt."[16] Other advertisements boasted DCA and DPA "settled accounts for 33 cents on the dollar, that's a 67 percent debt reduction,"[17] and could "cut your credit card debt in half."[18] "Testimonials" included claims such as that a $15,000 debt

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[12] PX 27, 4:15-20; PX 28, 4:24-25; PX 29, 4:13-15; PX 155; PXs 177.6-177.9; PX 184.

[13] FFP-5477:22-24; 5101:15-24.

[14] FFP-146:22-24; 4394:9-14.

[15] PX 20, 4:8-19; PX 21, 4:12-24; PX 156, 4:8-11; PXs 157-160; PX 162, 4:5-9; PX 163, 4:12-16; PX 164, 4:8-9; PXs165-169; PX 171, PX 172, 4:16-18; PX 173; FFP-5185:15-5186:6.

[16] PX 178.1, p. 4; PX 179.1, p. 6; PXs 178.2-178.7, 182; PXs 179.2-179.4, PX 181, p. 1 DPA 0354.

[17] PX 20, 4:8-19; PX 21, 4:12-24; PX 163, 4:20-21.

[18] PX 107; PXs 108-139 *passim*.

with one creditor settled for $3,000,[19] and that "accounts settled for approximately 40-50 percent of debt."[20]

DPA's website contained charts that purportedly listed its historical settlement rates. These charts listed consumer debt settlements at rates of 39.5 to 42.69 percent[21] and 33 to 42 percent, with some settlements made at a discount of greater than 80 percent.[22]

As to its Timing Claim, DCA and DPA advertised that "[t]he majority of our clients complete the program in 18-36 months."[23]

E. Defendants' Telephonic Sales Pitches to Consumers

FFA, DCA and DPA used identical sales scripts and provided identical training for their sales representatives. (FFP-4242:18-23; 4246:24-4247:4). As a result, the telephonic pitches by their sales representatives were essentially identical and are addressed together.

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[19] PX 20, 4:8-19; PX 21, 4:12-24.

[20] PX 178.1, pp. 2, 8.

[21] PX 180, p. 39, DPA 0383.

[22] PX 180, p. 41, DPA 0385.

[23] PX 181 (9, DPA 0354; 11, DPA 0356); PX 28, 4:24-25; PX 179.1, p. 5 & 6; PX 186.2, p. 28; PX 187.2 (6, DCA 0231); FFP-5477:22-24; 5101:18-24; 4394, 36:9-14; 4247:5-10 (DCA and DPA also offered 42 to 48 month programs).

The defendants' advertisements encouraged potential customers to call a toll-free telephone number and speak with sales representatives, who the defendants called "account executives." The sales representatives used a narrative script supplied to them by the corporate defendants. (FFP-5095:1-11). The script required the sales representatives to tell consumers that, "as a company, we generally average a savings of 50-60% of the debt,"[24] which the defendants' sales representatives did.[25] The scripts also directed sales representatives to tell consumers that while "Each negotiation amount varies, . . . as a company in 2008, our average negotiation was just under 42 cents on the dollar. This means we saved our clients an average of 58% of their balance at the time of negotiations and not including our fees."[26]

Since the sales calls were interactive, sales representatives typically went beyond the confines of the narrative script to close a sale. (FFP-5095:1-11). Sales representatives made claims such as that FFA could save consumers "a ton of money," (PX 294.2 at 23:21-22), and touted that FFA had special relationships with some major creditors such as Bank of America, which permitted FFA to

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[24] PX 186.1, p. 5, FFP 1145; PX 187.1, p. 2, DCA 0227.

[25] FFP-4037:20-4038:2; 4071:1-17.

[26] PX 186.5, p. 28, FFP 1168; PX 249.2, 30:6-9.

routinely settle its debts with these creditors at even lower rates, "for anywhere from 18 to 25 cents on the dollar." (PX 294.2 at 29:24-30:6).

FFA required its sales representatives to provide consumers with an *individualized*, express, unqualified Savings Claim based on the caller's *existing* debt balance. Defendants specifically instructed their sales representatives to calculate this claim based on the consumer paying 45 cents on each dollar of debt at the time of enrollment, *i.e.*, a 55 percent discount on the consumer's *existing* debt. (PX 186.1, p. 5; PX 187.1, p. 2).[27] This individualized Savings Claim failed to take into consideration the approximately 20 percent increase in debt balance that typically would accrue by the time of any settlements with creditors due to interest charges, penalties and fees before FFA settled a consumer's debts, making the express individualized claim untrue. (FFP-4980:23-25).[28]

[27] A Commission investigator posing as a potential customer called FFA and recorded his call with a sales representative. The investigator was told, based on what he represented was his debt balance of $20,650, that FFA could achieve an estimated savings of $11,357.50 on a 30-month payoff schedule, a 55 percent discount. (PX 294.2 at 26:16-27:25).

[28] The sales script did not mention some critical information concerning its Savings Claims. In particular, it did not provide any information about the percentage of consumers who completed a program or – conversely, who dropped out – after enrolling. (FFP-4948:25-4949:5).

The consumer witnesses received inconsistent and incomplete explanations about defendants' fees from defendants' sales representatives. One consumer testified that no fees were mentioned by the sales representative. (PX 287, 23:10-18). Another was told that while she would be charged an administrative fee equal to 10 percent of her existing debt balance, she would pay the fee over time – with $100 of her monthly payment being used toward the fee. (FFP-4037:16-19; 4056:12-21; 4063:12-23). Another sales representative told a consumer she would only have to pay a monthly maintenance fee of $39 to $49 and a 10 percent negotiation fee based on the amount of the negotiated pay-off amounts. (FFP-4072:4-14; 4082:24-4083:8). Another consumer was told that no fees were due until the completion of the program. (FFP-3931:21-22).

F. Consumers' Opportunity to Review the Defendants' Enrollment Agreements

Consumers who remained interested after speaking with a sales representative received a welcome package, including an Enrollment Agreement. Included in the 8-point fine-print of the Enrollment Agreements were: (1) disclaimers that the Savings Claims previously made were only "its best professional estimates or a good faith estimate;" and (2) an accurate portrayal of the defendants' fees. (DXs 18-20, 49-50, and 82-83). The specific terms of the

Enrollment Agreement at issue in this appeal, and the district court's flawed reliance on them, are addressed in the Argument section of this Brief, *infra*.

The district court concluded that a reasonable consumer would take away from the detailed terms of the Enrollment Agreement an accurate understanding of defendants' representations about their programs. The court found that consumers had the opportunity to review the Enrollment Agreement in the privacy of their home without any pressure from the defendants and, therefore, should have fully understood its terms. (FFP-3827-28, Finding ¶ 8). This finding is at odds with the consumer trial testimony, which stated that: (1) consumers did not have much opportunity to review the Enrollment Agreement (and its fine-print disclosures) because they were pressured into signing and returning it as quickly as possible; and (2) the sales representatives did not clearly explain the terms contained in the Enrollment Agreement.

As to being pressured, one consumer received the Enrollment Agreement by email while she was still on the phone with the sales representative. The sales representative made her feel rushed and did not go over the Enrollment Agreement with her. (FFP-4038:11-4039:4). Another consumer received the Enrollment Agreement by facsimile and was told that not returning a signed agreement within two hours would decrease her chances of acceptance into the debt negotiation program. (FFP-4074:4-7; 4089:16-19). A third consumer stated the sales representative encouraged her to sign and return the agreement quickly so she could get her bills paid. (FFP-3934:12-20). Reinforcing this consumer testimony, a former FFA account executive testified that he was directed to encourage consumers to return signed Enrollment Agreements as soon as possible. He was instructed to tell consumers that delaying its return could hurt the consumer's chance of being accepted into FFA's debt negotiation program. (FFP-4706:25-4707:8).

As to failure to explain the terms contained in the Enrollment Agreement, one consumer reported that she asked the sales representative to go over it with her but the representative only did so "very briefly" and "not that well." (FFP-3934:12-20). A consumer with vision problems asked her sales representative to read the entire Enrollment Agreement to her over the phone. While the representative read something, it was not the Enrollment Agreement since he did not mention fees. (PX 287, 27:14-28:13; 29:18-30:7). Another consumer testified that his sales representative did not review the Enrollment Agreement with him. (FFP-5020:12-14).

G. Defendants' Fees

FFA, DCA and DPA charged three distinct fees. The first was an administrative fee equal to 9.9 percent of the customer's debt at the time of enrollment, paid up-front and non-refundable. (FFP-5092:21-23; *e.g.*, DX 18, ¶ 6). The second was a monthly service fee of $29.95 or $39.95, depending upon the customer's debt level. (FFP-4165:8-11; *e.g.*, DX 18, ¶ 6). The third was a "negotiation" fee, equal to 10 percent of any money saved on a debt. (FFP-5092:66-20; *e.g.*, DX 18, ¶ 6). And as noted below, consumers uniformly testified that they were not told that they had to pay the 9.9 percent administrative fee before defendants would even attempt to negotiate debt reductions.

H. Post-Enrollment

Once enrolled in one of the defendants' programs, consumers were required to make a set monthly payment into a "special-purpose" savings account set up at a bank designated by the defendants.[29] Defendants withdrew the entirety of consumers' monthly payments made into this account until the 9.9 percent administrative fee was paid in full, which typically took about four months.[30]

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[29] PX 287, 4:24-25; PX 179.1, pp. 5-6; PX 186.2, p. 28; PX 187.2.

[30] PX 287, 4:24-25; PX 179.1, p. 5 & 6; PX 186.2, p. 28, FFP 1168; PX 187.2.

Defendants would not attempt to negotiate any debt reductions until some months after full payment of the administrative fee, after consumers had made enough additional monthly payments into the special-purpose savings account to accumulate sufficient funds for a lump-sum payment on any debt reductions defendants could negotiate.[31]

Presumably frustrated by the failure of defendants to settle debts despite making repeated monthly payments, most of defendants' customers exited the programs within one year of enrollment.[32] All of the consumers who testified at trial were sued by a creditor or contacted by a collection agency before they exited.[33] When this occurred, the consumers contacted defendants and were told – apparently for the first time – that the consumers' initial monthly deposits into the special-purpose savings accounts had been withdrawn to pay defendants' up-front administrative fee. As a result, the account had little or minimal funds available to resolve the past-due credit accounts for which consumers had been sued or dunned.

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[31] FFP-4200:21-4201:2; 4281:20-22.

[32] FFP-4855:12-16; 4310:12-21; PX 261, pp. 11-12, 16-17.

[33] FFP-3936:1-3937:9 (sued approximately eight months after enrolling); 4040:20-24 (sued ten moths after enrollment); 4074:19-4076:18; 4082:20-23; 4083:9-15 (sued four months after enrollment); 5021:19-5023:4; 5024:10-20; 5025:2-10 (account went into collection about 6 to 8 months after enrollment); PX 287, 37:6-21 (sued 3 months after enrollment).

Id. After cancelling, none of the consumers received a refund of the 9.9 percent administrative fee.[34]

I. The Lack of Benefit for the Majority of Customers

The results – or lack thereof – delivered by defendants to their customers demonstrate how meaningless and inaccurate the vaunted and unqualified Timings and Savings Claims were in reality. The overwhelming majority of the defendants' over 22,000 customers,[35] who collectively paid defendants over $57 million in fees,[36] got nothing for their money – except for an increased debt load due to the accrual of interest, fees, and penalties while they were enrolled in defendants' programs.

Undisputed evidence established that over 70 percent of the defendants' customers exited the programs, achieving neither the benefits of the Savings or the Timings Claims.[37] And of those customers who exited, the defendants had not

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[34] FFP-3943:1-4 ($2,400 not refunded); 4082:20-23 ($11,000 not refunded); PX 287, 115:1-7). One FFA customer received a partial refund, but only she complained to the Better Business Bureau, the New York Times, and her U.S. Senator. (FFP-4041:25-4043:25).

[35] PX 95, p. 19, Table 5. *See also* n.39, *infra*.

[36] PX 95, p. 15, Table 4; PX 261, pp. 5, 11 and 16.

[37] For FFA, 76.5 percent of its customers cancelled or dropped out, while 71.4 percent of DCA's customers cancelled or dropped out. (DX 95 at p.9, Table 1). While Corey Butcher testified that he had no "concrete completion numbers"

settled even a single debt for most – approximately 55 percent – of them.[38] The bottom line is that defendants settled all of the debts for, at most 24 percent of their customers, and even then it is not clear if all of these settlements met the express terms of the Savings and Timing Claims.[39] In fact, there was evidence adduced at trial that for some of the corporate defendants settlement rate was significantly less – as low as 12 percent. *Id*. But, for the purposes of this appeal, the Commission accepts that 24 percent of defendants' customers: (1) settled all of their debts; and (2) achieved the Savings and Timing Claims.

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for his clients, his guess was that only 40 percent of the defendants' customers completed the programs, meaning that 60 percent of the customers dropped out. (FFP-4903:21-22; 4925:13-4926:20).

[38] For FFA, 8,769 (57 percent) of its customers cancelled without FFA settling even a single debt. (FFP-4855:5-8; PX 261, p. 6). For DCA, 3,237 (55 percent) of its customers cancelled without DCA settling even a single debt. (PX 261, pp. 11-12). For DPA, 959 (57 percent) of its customers dropped out without DCA settling even a single debt. (PX 261, pp. 16-17).

[39] Both the Commission and the defendants had experts analyze the defendants' customer database. The conclusions reached by these experts were essentially identical. The Commission's expert concluded that of FFA's 15,158 customers (FFP-4854:1-3; PX 261, p. 6), only 2,443 (16 percent) had all of their debts settled. (*Id*. at 4854:16-20; PX 261, p. 6). Of DCA's 5,836 customers, only 1,153 (20 percent) had all of their debts settled by DCA. (PX 261, p. 11). Of DPA's 1,689 customers, only 199 (12 percent) had all of their debts settled by DCA. (PX 261, p. 15). The defendants' expert economist concluded that 18.3 percent of FFA's customers completed the program with all of their debts settled while 23.7 percent of DCA's customers completed the program with all of their debts settled. (DX 95 at p. 9, Table 1).

STANDARD OF REVIEW

Conclusions of law are reviewed *de novo* and findings of fact are reviewed for clear error. *St. Joseph Abbey v. Castille*, ___ F.3d ___, 2012 WL 5207465 at *3 (5th Cir. Oct. 23, 2012). "Mixed questions should be reviewed under the clearly erroneous standard if factual questions predominate, and *de novo* if the legal questions predominate." *Beech v. Hercules Drilling Company, L.L.C.*, 691 F.3d 566, 569 (5th Cir. 2012). *But see Bertucci Contracting Corp. v. M/V Antwerpen*, 465 F.3d 254, 259 (5th Cir. 2006) ("If a finding is based on a mixed question of law and fact, this court should only reverse 'if the findings are based on a misunderstanding of the law or a clearly erroneous view of the facts.'") (citation omitted). "A [factual] finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony." *French v. Allstate Indem. Co.*, 637 F.3d 571, 577 (5th Cir. 2011), quoting *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009).

SUMMARY OF ARGUMENT

The linchpin of the district court's ruling is found in three paragraphs of its Findings and Conclusions, which set out its determinations as to how a reasonable consumer – already cash-strapped and thousands of dollars in debt – would ostensibly interpret the defendants' unqualified Savings and Timing Claims. Finding ¶ 12 concluded that a reasonable consumer would interpret the defendants' Savings and Timing Claims as based solely on the small subset of defendants' customers who completed the programs. Finding ¶ 13 concluded that a reasonable consumer would interpret the Savings Claim as not taking into account the fees paid to the defendants by customers. Finding ¶ 14 concluded that a reasonable consumer would interpret the defendants' Savings Claim as based solely on the amount of a consumer's debt at the time of settlement, a sum considerably higher than the consumer's indebtedness at the time of enrollment due to the penalties and additional interest that accrued before defendants' ever even attempted to settle a debt.

These three paragraphs are erroneous and reversible under any standard. If (properly) viewed as legal conclusions, they are based on an erroneous view of how sales claims are interpreted in actions under the FTC Act. If viewed as factual findings, they are unsupported by the trial record and are clearly erroneous.

The district court should have assessed defendants' claims under the longstanding "net impression" test for deception claims under the FTC Act. This requires courts to determine how a reasonable consumer would interpret a seller's claims based upon the totality of the seller's representations, focusing primarily on the advertisements and telephonic sales pitches that induce consumers to enter a program or make a purchase. *See* pp. 32-38, *infra*. Instead, the court applied a contractual standard that presumed that the fine-print disclosures in defendants' Enrollment Agreements trumped all of defendants' prior (mis)representations. Beyond failing to use the appropriate net impression analysis and focusing on the claims that induced consumers to sign up with the defendants, the court also ignored numerous cases holding that fine-print disclaimers that attempt to contradict a seller's express, unqualified claims generally serve only to confuse consumers and do not provide the clarification necessary to reverse a reasonable consumer's net impression formed from a seller's initial claims. *See* pp. 36-42, *infra*.

The district court committed additional reversible error by ignoring numerous FTC Act precedents recognizing that, for generalized, unqualified claims, such as the Timing and Savings Claims made by defendants in their advertisements and telephonic sales pitches, the claimed results must be achieved by the majority of the participants in a program, *i.e.*, the claims must represent a typical result. *See* pp. 48-52, *infra*. This was not the case here, since it is undisputed that: (a) at most 24 percent of the defendants' customers achieved the unqualified Savings and Timing Claims touted in defendants' media advertisements and telephonic sales pitches; (b) the overwhelming majority of the defendants' clients – approximately 70 percent – exited defendants' programs; and (c) approximately 55 percent exited after having paid in full a non-refundable, multi-thousand-dollar administrative fee but without having even a single debt reduced by the defendants. Moreover, the district court's conclusion in Finding ¶ 12 that a reasonable consumer would ignore the high cancellation rate defies common sense, since cash-strapped consumers would not "reasonably" sign up for a program with high fees if they correctly interpreted defendants' Savings and Timing Claims to represent that, at best, one in four participants would benefit.

The court's conclusion in Finding ¶ 13 that a reasonable consumer would exclude the cost of the defendants' fees from the Savings Claim also is nonsensical. No reasonable consumer, already deeply in debt, would exclude from his calculation the full cost of becoming debt-free, including the additional cost of defendants' 9.9 percent administrative fee – a fee paid in full prior to any attempt by defendants to obtain a single dollar of debt reduction. Nor would a reasonable consumer willingly sign up for a program that, due to its high customer exit rate, low debt settlement rate, and multi-thousand dollar, up-front, non-refundable administrative fee, often left defendants' customers in worse shape financially than if they had done nothing at all. *See* pp. 52-54, *infra*.

The court's conclusion in Finding ¶ 14, that a reasonable consumer would think the Savings Claim was based on his debt at the time of settlement – an amount up to 20 percent higher than the debt at the time of enrollment due to the accrual of interest, penalties and fees – is also clear error. In their telephonic sales pitches, the express, individualized Savings Claims that defendants' sales representatives were required to make to every prospective customer are based on the consumer's *existing* debt level, not an inflated debt level at the time of settlement. *See* pp. 54-56, *infra*.

If this Court does not reverse the judgment, it should remand this action to the court below for further proceedings, directing the district court to explain the basis for its Findings and Conclusions and to apply the proper "net impression" analysis to the facts adduced at trial. The district court's conclusory Findings and Conclusions violate Fed. R. Civ. P. 52(a)(1) because they fail to set out the basis for how the district court reached the ultimate conclusions set out in Findings ¶¶ 12-14. The district court also failed to set out the legal standard by which it purported to reach these ultimate conclusions. *See* pp. 57-58, *infra*.

ARGUMENT

The court concluded that a "reasonable" consumer would have completely discounted the defendants' misrepresentations about the benefits of using defendants' debt reduction service because the consumers somehow understood critical aspects of defendants' program that were, likely unknown to them and, at best, were buried in the finest of fine-print in the Enrollment Agreement. This conclusion is not only belied by the record in this case, but contravenes fundamental legal principles regarding the assessment of marketing claims under the FTC Act. When the basic undisputed facts regarding defendants' programs are viewed through the correct legal lens, the deceptive nature of that program is patent.

I. THE RULING BELOW TURNS ON THREE UNEXPLAINED AND UNFOUNDED CONCLUSIONS

The district court stated in Finding ¶ 11, that whether the defendants' Savings and Timing Claims "are false and substantiated . . . turns in large part on how the claims are interpreted." (FFP-3828-29, ¶ 11). In turn, the court's interpretation of the claims pivots on three paragraphs in its Findings and Conclusions, Findings ¶¶ 12-14. (FFP-3829, ¶¶ 12-14). While denominated as "Findings of Fact," these critical paragraphs are more accurately characterized as "Conclusions of Law."[40] These paragraphs reach legal conclusions as to what a

[40] Wright, Miller & Kane, 9C *Fed. Prac. & Proc. Civ.* § 2579 (3d ed.) ("An appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may have put on it. Indeed it often is difficult to decide whether a particular matter is a fact finding or a legal conclusion.").

"reasonable" consumer would take away from defendants' various representations. And, as discussed below, assessment of the "net impression" that a reasonable consumer would take away from the defendants' claims is the very core of the legal analysis that the court should have undertaken in this action, but did not.

In Finding ¶ 12, the court concluded that a reasonable consumer would interpret the defendants' Savings and Timing Claims to be based solely on the experience of defendants' customers who completed the programs. (FFP-3829, ¶ 12), In fact, those customers constituted at most 24 percent of the total number who signed onto the programs. (*See* n.39 and accompanying text, *supra)*. Thus, the district court's conclusion assumes that a reasonable consumer would be indifferent to the fact (had defendants even disclosed it) that approximately 70 percent of defendants' customers dropped out of the programs, most after paying the non-refundable 9.9 percent administrative fee, but before receiving any benefit from defendants.

In Finding ¶ 13, the court concluded that a reasonable consumer would interpret the Savings Claim as not taking into account the fees paid to the defendants by customers. (FFP-3829, ¶ 13). This conclusion assumes that a cash-strapped consumer would not take into account the substantial administrative, negotiation, and monthly maintenance fees he would be required to pay in ascertaining whether the program would be beneficial.

Finally, in Finding ¶ 14, the court concluded that a reasonable consumer would interpret the defendants' Savings Claims as based solely on the amount of a consumer's debt at the time of settlement, despite the fact that this figure would typically be 20 percent higher than the consumer's indebtedness at the outset of the program, because of the accrual of interest, fees, and penalties. (FFP-3829, ¶ 14). This conclusion assumes that a reasonable consumer would not find it important to know whether his debt would be reduced to, say, 60 percent of his present indebtedness (an amount the consumer knew and which the basis for the individualized savings claims made during the telephonic sales pitches) or instead to 60 percent of some higher, undisclosed post-enrollment debt load.

These three determinations are the pillars of the district court's ruling, for it then went on to find that the defendants' Savings and Timing Claims – as interpreted in Findings 12 through 14 – "were true for a majority of of the customers of the defendants who completed a program." (FFP-3829-30, Finding ¶ 15). Accordingly, the court concluded there was no deception of a reasonable consumer. (FFP-3831, Conclusion ¶ 3). By contrast, it is beyond dispute that defendants' claims *were* deceptive, if they are interpreted contrary to these three determinations.

As shown in the following section, these three critical paragraphs reflect serious errors of law, for they show that the court below failed to adhere to basic tenets of deception law under the FTC Act: that a court must look first to the marketing claims that draw consumers in and then ascertain the "net impression" conveyed to consumers by those claims. The court erred in not following accepted law that reliance by a seller on the supposedly corrective nature of later disclaimers must be supported by a strong showing that such disclaimers were both clear and prominent enough to dispel any contrary impressions. It further erred by not concluding that unqualified claims promising specified results are deceptive unless they are true for the typical customer, not for just a small minority of customers. Accordingly, this Court should reverse the district court's judgment and hold that defendants' Savings and Timing Claims were deceptive.

If this Court concludes that ¶¶ 12-14 are findings of fact, reversal is still appropriate because these findings are clearly erroneous. There is no significant dispute in the record about the content of defendants' sales pitches, which made extravagant and unqualified representations of large and quick debt reduction, and gave no hint that these benefits would accrue only to those able to endure prolonged subjection to dunning letters and often lawsuits, or that the claimed reductions ignored the effect of accrued fees, penalties, accrued interest. The fine-print disclosures in defendants' Enrollment Agreement were neither prominent nor clear enough to dispel a reasonable consumer's takeaway from defendants' prior representations, and the court below clearly erred in finding to the contrary. *See* cases discussed at pp. 38-45, *infra*.

II. THE COURT BELOW FAILED TO UNDERTAKE A PROPER ANALYSIS OF THE NET IMPRESSION OF DEFENDANTS' REPRESENTATIONS TO CONSUMERS AND ERRED IN RELYING ON FINE-PRINT DISCLAIMERS IN THE ENROLLMENT AGREEMENTS

There is a well-established legal standard for determining whether claims are deceptive under Section 5(a) of the FTC Act. Courts must consider: (1) whether the defendant made claims to consumers; (2) whether the claims are likely to mislead consumers acting reasonably under the circumstances; and (3) whether those claims were material to prospective consumers. *See, e.g.*, *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). In addressing whether a defendant made a claim likely to mislead consumers acting reasonably under the circumstances – the pivotal second element of a Section 5(a) deception analysis – a court must determine the "net impression" of all of the claims made by a seller on a consumer acting reasonably under the circumstances. *Id*. The court in *FTC v. Tashman*, 318

F.3d 1273 (11th Cir. 2003), teaches how a court should determine the net impression of a reasonable consumer. "Representations violate Section 5 if the FTC proves that, based on a common sense net impression of the representations as a whole, the representations are likely to mislead reasonable customers to their detriment. . . . [B]oth the advertisements and the disclosure documents must be construed together to evaluate the net impression of the representations to consumers. Consumers need not be actually deceived, the representations need only have the tendency or capacity to deceive." *Id*. at 1283 (citations omitted). A court is to consider all written and oral representations made by a seller to a consumer in determining the net impression. *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1437 (9th Cir. 1986). "'Alleged misrepresentations should be evaluated as a whole without emphasizing isolated words or phrases apart from their context.' When evaluating . . . statements as a whole, the use of the words 'may' and 'might' do not blunt the overall net impression created by" affirmative, unqualified statements. *FTC v. Affiliate Strategies, Inc.*, 849 F. Supp. 2d 1085, 1105 (D. Kan. 2011) (citations omitted).

The primary purpose of Section 5(a) is to lessen the harsh effects of caveat emptor. That rule "can no longer be relied upon as a means of rewarding fraud and deception and has been replaced by a rule which gives to the consumer the right to rely upon representations of facts as the truth." *FTC v. Freecom Comm.*, 401 F.3d 1192, 1202 (10th Cir. 2005) (citing *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *see also Tashman*, 318 F.3d at 1277 ("caveat emptor is simply not the law" in actions under the FTC Act); *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116, 82 L. Ed. 141, 58 S. Ct. 113, 25 F.T.C. 1715 (1937) (consumer protection laws "are made to protect the trusting as well as the suspicious"). "Instead, the 'cardinal factor' in determining whether an act or practice is deceptive under § 5 is the likely effect the promoter's handiwork will have on the mind of the ordinary consumer." *Freecom Comm.*, 401 F.3d at 1202. To be reasonable, there does not have to be a single interpretation or reaction; a seller is liable for a misleading interpretation even if there is more than one possible interpretation or reaction. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 178, 1984 FTC LEXIS 71 (FTC Mar. 23, 1984). When assessing the net impression of claims targeted to a specific audience, the Court must determine the effect on a reasonable member of that group. *Id*. at 179. Here, that audience is consumers in dire financial circumstances due to overwhelming debt.

The district court appears to have entirely ignored the communications that should have been its primary focus, the aggressive marketing claims that lured consumers into defendants' programs in the first place. "'The law is violated if the first contact . . . is secured by deception . . . even though the true facts are made known to the buyer before he enters into the contract of purchase.'" *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008), quoting *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961). Here, the defendants made express, unqualiifed Savings Claims in their media ads, websites and telephonic sales pitches that they could save consumers substantial sums of money (30-60 percent) on existing debt, (s*ee* pp. 10-15, *supra*), as well as a Timing Claim, that they would achieve these savings and get their customers debt free in 36 months or less. *Id.* Indeed, the court's ruling contains no findings that defendants included any disclaimers or qualifiers in their efforts to induce consumers to enroll in their supposed debt reduction programs.[41]

A host of cases enforcing the deception prong of Section 5(a) of the FTC Act consistently hold that, where a seller makes unqualified claims to induce consumer to make a purchase, a reasonable consumer's net impression turns on the content of these claims, at least in the absence of very strong evidence to the contrary – evidence that is not present here. For example, in *Stefanchik*, 559 F.3d

[41] Defendants may contend that they made statements in advertisements such as "individual results may vary" or that the savings stated were only "estimates." However, even if true, they are not of significance to this appeal since the district court did not rely on them in its Findings and Conclusions.

at 927, the court ascertained a reasonable consumer's net impression based upon the content of the defendants' voluminous direct mail marketing materials, telemarketing materials and website, which asserted that purchasers of defendants' real estate programs could make large amounts of money in their spare time and would be coached by defendants. In *FTC v. American Tax Relief LLC*, 751 F. Supp. 2d 972, 980 (N.D. Ill. 2010), while the defendants never expressly promised that they could negotiate reduced tax liability to the IRS, the court concluded that the net impression conveyed to consumers was that defendants could do so, basing this conclusion on advertisements and sales scripts that stated that defendants could reduce their clients' tax liability to "pennies on the dollar." In *Medical Billers Network*, the court concluded that a reasonable consumer's net impression predominantly came from the defendant's initial representations made in advertisements and telemarketing calls, not from subsequent disclaimers made in the contract with the consumer. 543 F. Supp. 2d at 304.[42] Indeed, one of

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[42] *See also, e.g., FTC v. Vacation Property Services*, 2012 WL 1854251 at *2-*3 (M.D. Fla. May 21, 2012) (defendants' telemarketers made various claims about defendants' services to consumers which were then often contradicted by the defendants' sales verifiers. The court held that a reasonable consumer's net impression was formed by the initial claims touted by the telemarketer); *Kraft, Inc. v. FTC*, 970 F.2d 311, 313 (7th Cir. 1992) (net impression conveyed by an advertisement that visually showed and stated that 5 oz. of milk went into every Kraft single cheese slice was that consuming one slice had the same nutritional content as drinking 5 oz. of milk); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("net impression" about an unwanted hair removal machine

defendants' experts, Dr. Thomas Maronick, acknowledged that the net impression of a reasonable consumer must be based upon the totality of a defendant's representations. (FFP-4479:3-4).

The district court failed to engage in any express analysis of the net impression a reasonable consumer would have gleaned from the representations made by defendants in this case, based on the content and circumstances of all of those communications taken together. Had it done so, it would have had to conclude that the Savings and Timing Claims were deceptive. As defendants' marketing expert Dr. Carol Scott aptly put it, the "kicker" that drew in consumers and formed their perceptions of the Claims was the defendants' initial media advertisements. (FFP-4378:24-4379:21). Dr. Scott did not even consider any other inputs in her efforts to determine how consumers interpreted defendants' Savings Claims. Rather, her efforts were based exclusively on having consumers listen to exemplars of defendants' radio advertisements because, in her opinion, the

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was created by statements in defendant's advertisements touting efficacy of machine, comparing it to electrolysis, claiming that machine was "clinically tested and shown superior"); *Floersheim v. FTC*, 411 F.2d 874, 876-878 (D.C. Cir. 1969) (reasonable consumer's net impression formed by "the appearance and prominent repetition of the words 'Washington D.C.' on debt-collecting forms from a private collections company," which "created the deceptive impression that the forms were a demand from the government even though the forms contained a small print disclaimer informing recipients that such was not the case").

primacy of these claims was what formed consumers' perception of what defendants' were claiming. *Id.* These advertisements, reinforced by the telephone sales pitches, would convey to reasonable consumers that they would be out of debt in 36 months or less for a much smaller sum than they owed at the time of enrollment.

Instead, the district court summarily concluded that the terms set out in the obscure fine-print of the Enrollment Agreement were determinative of whether the defendants' Savings and Timing Claims were deceptive. This is wrong as a matter of law. Finding ¶ 8 demonstrates the district court's misplaced exclusive reliance on the terms of the Enrollment Agreement. The Finding states:

> If the prospective clients were still interested after the initial phone call, the Companies [corporate defendants] sent them an enrollment package, including a written agreement [the Enrollment Agreement] to review and sign. The actual moment a consumer decided to enroll as a client was when the consumer mailed the agreement back to the company. Thus the contents of the agreement were conveyed to the potential client to review in the privacy of his or her home before that person decided to become a customer. The contents of the enrollment package should be considered as part of the information disclosed to the consumer during the sales process.

(FFP-3827-3828, Finding ¶ 8).

The district court's reliance on this logic demonstrates that it did not apply the net impression standard. The court made no effort to ascertain what was conveyed to a reasonable consumer by the repeated Savings and Timing Claims – made through media advertisements and telephonic sales pitches – that consumers received prior to receiving the Enrollment Agreements. Nor did it make any effort to consider whether and how the statements in the defendants' Enrollment Agreement served to alter a reasonable consumer's net impression, to yield an overall impression wholly contradictory to the advertising claims on their face. Instead, the court appears to have conflated the FTC Act's net impression standard and private contract law principles. In a private contract action – in contrast to a deception action brought under Section 5(a) of the FTC Act – a court is generally prohibited from looking beyond the terms of the contract between the seller and buyer unless the contract is ambiguous, so a consumer's failure to read and understand the terms of a written contract may be fatal to relief from contract-based claims.[43] The district court flatly erred in supposing that this standard applied here, failing to recognize the distinction between contract standards and those applied by courts in deception cases under the FTC Act.

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[43] In private contract law, an individual consumer generally is bound by the terms of a written contract whatever the substance of any oral representations that preceded the execution of the contract. *E.g., David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450-51 (Tex. 2008); *DRC Parts & Acc. v. V.M. Motori S.P.A.*, 112 S.W.3d 854, 857-59 (Tex. App. 2003) ("reliance upon an oral representation that is directly contradicted by the express, unambiguous term of a written agreement between the parties is not justified as a matter of law").

For example, the court in *FTC v. Minuteman Press, Inc.*, 53 F. Supp. 2d 248, 262 (E.D.N.Y. 1998), addressed the critical distinction between enforcement of deception law under the FTC Act and private contractual rights, and the reason for needing the distinction. In *Minuteman Press*, the defendant franchisor made a variety of unsubstantiated oral earnings claims to prospective franchisees. The franchise agreement contained a provision in which franchisees affirmed that they did not receive any oral earnings claims or, if they did, they did not rely on them in making the decision to purchase a franchise. In numerous prior private contract litigation actions, Minuteman Press had successfully argued that this provision in the written franchise agreement fully repudiated any oral representations received by a franchisee in the sales process leading up to the execution of the franchise agreement. Minuteman Press asserted that the same result should follow in the Commission's deception action. The *Minuteman Press* court rejected this argument. The court held that the purpose of the FTC Act is to enforce public policy and a federal statute prohibiting making deceptive claims to consumers to induce a sale, not to determine individual rights arising from a private contract. As a result, in a law enforcement action under Section 5(a) of the FTC Act, a court must look at the entirety of the representations to a consumer – both oral and written – to determine the "net impression" made on a reasonable consumer by the seller's claims. While written contractual disclaimers are factors that may be considered in determining a reasonable consumer's net impression, such disclaimers are not dispositive. To the contrary, as the following discussion shows, disclaimers buried in the fine-print of a contract, following on lavish express, unqualified claims, should be accorded little, if any, weight in determining a reasonable consumer's net impression.

Bold initial promises by defendants that they subsequently attempt to recant with fine-print disclaimers are not unusual in Commission enforcement actions alleging deception. Numerous decisions address the issue of what subsequent disclaimers must state and how prominent they must be to negate prior deception. Consistent with net impression analysis, these cases uniformly hold that, if the initial sales claims made to consumers are deceptive, subsequent disclaimers can only neutralize the initial deceptive claims if the disclaimers are as prominent as those misrepresentations.[44] One decision in this line of cases is particularly

[44] *E.g., FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1274-75 (M.D. Fla. 2012) (in a mortgage modification scam, disclaimers on the sixth page of a retainer agreement did not change the net impression created by prior oral and written representations by the defendants, including savings claims made in postcards sent to prospective customers and oral claims of savings promised by telemarketers to consumers); *Medical Billers Network*, 543 F. Supp. 2d at 305-06 (misrepresentations made in advertisements and telemarketing calls are not "cure[d]" by making accurate representations in contract with the consumer); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir.

instructive here, in light of its similar factual setting regarding a purported debt reduction program. In *FTC v. Connelly*, 2006 WL 6267337 (C.D. Cal. Dec. 20, 2006), the district court held that, "disclaimers [such as in a contract] do not automatically exonerate deceptive behavior and disclaimers are particularly inadequate when they appear in a different context than the claims they purport to repudiate." *Id*. at *10.[45]

Even in situations where (unlike here) a defendant simultaneously delivers both deceptive representations and disclaimers of those representations, courts consistently hold that such disclaimers do not overcome the deceptive representations unless they are as prominent as the deceptive ones. These decisions also teach that disclaimers made in fine-print are especially unlikely to alter the impact of deceptive claims. *See, e.g., FTC v. Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006) (fine-print disclaimer did not preclude liability under Section 5 of FTC Act, because "solicitation may be likely to mislead by virtue of the net impression it creates"); *Removatron.*, 884 F.2d at 1497 ("Disclaimers or

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2001) (after defendants made unqualified claims in radio advertisements that they could improve consumer's credit reports, disclaimers in contract between defendants and consumer do not repudiate the unqualified claims made to prospective purchasers).

[45] That court denied the Commission's summary judgment motion, holding that the effect of the disclaimers on consumers was a question of fact. The case settled before trial so this factual question was never judicially resolved.

qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.”).[46] The Commission itself, acting in its adjudicative capacity, has recognized that, “in many circumstances, consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.” *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 1984 FTC LEXIS 71 at *184. Accordingly, the Commission has rejected arguments that “mouse print” disclaimers could dispel the overall net impressions created by express and prominent claims made in advertisements. *In re Daniel Chapter One*, 2009 WL 5160000 at *14 (FTC Dec.

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[46] *See also FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C. Cir. 1985) (advertisement’s description of cigarette tar content was deceptive even though fine-print in the corner of the advertisement truthfully explained how tar content was measured); *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1077 (N.D. Cal. 2009) (“statement that appears in minuscule type at the bottom of the advertisements . . . cannot innoculate [defendants] from the representations that appear in the body of the text by including these cautionary statements at the foot of the advertisements”); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 924 n.15, 930 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir 2008) (“Defendants’ inconspicuous small-font statement that . . . ‘this product is not intended to diagnose, treat, cure or prevent disease’ is wholly inadequate to change the net impression of the pain relief claims made in the infomercial.”); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. 1992) (“Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.”).

24, 2009), *aff'd* 405 Fed. Appx. 505 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 2917 (2011).

In sum, these cases almost invariably teach that fine-print contractual disclaimers are ineffective in dispelling consumer impressions formed by express, unqualified claims. The reasoning behind this line of decisions is simple: after receiving glowing but deceptive sales pitches, consumers often do not make detailed examinations of fine-print disclaimers, whether in contracts or elsewhere. As one DCA consumer witness put it, he felt he had no reason to think that the terms of the Enrollment Agreement differed from what the sales representative had told him. (FFP-5054:12-14).

If attempts at last-minute disclaimers – such as those in the Enrollment Agreements – do anything, they generally serve only to create confusion, not clarification, when the content of the disclaimers competes with and is contrary to the claims contained in prior sales pitches. "A statement that studies prove a product cures a certain disease, followed by a disclaimer that the statement is opinion and the product actually does not cure the disease, leaves an overall impression of nonsense, not clarity." *FTC v. Direct Marketing Concepts,* 624 F.3d 1, 12 n.9 (1st Cir. 2010). Similarly, unless disclaimers are sufficiently prominent and unambiguous as to change the impression created by the deceptive claims, the disclaimers only serve to "cause confusion by creating contradictory double meanings." *Removatron*, 884 F. 2d at 1497.

Viewed in light of these precedents, the disclaimers in defendants' Enrollment Agreements were wholly inadequate to counteract the express, unqualified claims made during the marketing of defendants' services. In the first place, these fine-print disclaimers, on their face, were not nearly as prominent as those made previously, both orally and in writing. As discussed below, the following two provisions are the most salient; we reproduce them first in 14-point type in compliance with Fed. R. App. P. 32(a)(5) and then in the 8-point type used by defendants.

> **9. Estimated Savings:** *Although [FFA] agrees to perform professional services on Client's behalf to the best of its ability, [FFA] cannot make, and has not made, any expressed or implied guarantees regarding the results or specific negotiated percentages that it can obtain. [FFA]'s expressions about the outcome of any matter are its best professional estimates only, and are limited by present policies, cash advances, balance transfer and Client's financial resources at the time negotiations are obtained with Client's Creditors (estimated savings does not include all applicable fees).*

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> **5. Payment Plan:** The estimated number of months to complete the program is ___. *Client understands that [FFA] has made it clear and has otherwise fully explained to Client that the "estimated Number of*

> *Months to Pay Off" . . . is a <u>good faith estimate based upon the information Client had given to [FFA], Client's full participation in the [FFA] program and their outside savings account maintenance.</u>*
>
> **5. Payment Plan:** The estimated number of months to complete the program is ___. *Client understands that [FFA] has made it clear and has otherwise fully explained to Client that the "estimated Number of Months to Pay Off" . . . is a <u>good faith estimate based upon the information Client had given to [FFA], Client's full participation in the [FFA] program and their outside savings account maintenance.</u>*

DX 20 (emphasis in original).[47]

Even apart from the minuscule print, the disclosure language is vague and confusing and cannot be said to overcome the deceptive sales pitch. If anything, with the backdrop of the Savings Claims, the oblique, fine-print representations in the Enrollment Agreements that "the outcome of any matter are its best professional estimates only" and that the Timing Claim is a "good faith estimate based upon the information Client had given" would reinforce a reasonable consumer's net impression that he could comfortably rely that defendants' Savings and Timing Claims were backed by the defendants' "good faith" and "professional" experience. In any event, these clauses are not sufficient to provide a reasonable consumer with notice that at most 24 percent of defendants' customers achieved the Savings and Timings Claims and that consumers were over

[47] Though the specific verbiage of the defendants' Enrollment Agreements varied slightly over time and among corporate defendants, their substance remained consistent. *See* DXs 18-20 (FFA), 49-50 (DCA), and 82-83 (DPA).

three times more likely to pay a substantial fee to the defendants and get nothing back in return.

The district court also ignored the testimony of defendants' marketing expert, Dr. Scott, that it is impossible to make any conclusions about what a consumer would takeaway from reviewing the Enrollment Agreement, (FFP-4378:24-4379:21). It also ignored the uniform consumer testimony that they were pressured into quickly signing and returning the Enrollment Agreement and had little opportunity to review it. *See* pp. 16-18, *supra*.

As a result, the district court erred as a matter of law in concluding (or made a clearly erroneous error if deemed a factual issue) that the fine-print disclosures in the Enrollment Agreement changed a reasonable consumer's net impression that the defendants' Savings and Timing Claim were anything but typical results for the majority of defendants' thousands of customers. Had the district court properly applied the net impression standard, it could not have concluded that the defendants' "Savings Claims and Timing Claim were not likely to mislead consumers acting reasonably under the circumstances."

III. THE COURT BELOW ERRED IN CONCLUDING THAT DEFENDANTS' STATEMENTS CONVEYED TO REASONABLE CONSUMERS THAT THEIR CLAIMS WERE BASED ON THE SMALL SUBSET OF CONSUMERS WHO COMPLETED THE PROGRAM

It is undisputed that for defendants' customers: (1) at most 24 percent achieved the Savings and Timing Claims; (2) approximately 70 percent exited their programs; and (3) approximately 55 percent exited after having paid in full a non-refundable, multi-thousand dollar administrative fee, but without having even a single debt reduced by the defendants. Based on this incontrovertible data, the district court committed reversible legal error by: (1) ignoring well-established law that unqualified claims are deceptive under Section 5(a) of the FTC Act, unless they are achieved by the majority of the participants in a program, *i.e.*, the claims must represent a typical result; and (2) concluding that a reasonable consumer would interpret the Savings and Timing Claims to exclude the results of the overwhelming majority – approximately 70 percent – of defendants' customers who did not achieve these claims and, typically, received no benefit from the defendants.

Conclusion ¶ 3 and Finding ¶ 12 encapsulate the district court's fundamental misunderstanding of the concept of deception in the context of the enforcement of § 5(a) of the FTC Act:

> The Savings Claims and Timing Claims were true with respect to a majority of the clients of the Companies who completed the program. *See FTC v. Five Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000). The Savings Claims and Timing Claim were not likely to mislead consumers acting reasonable under the circumstances. The Savings Claims and Timing Claim do not violate section 5 of the FTC Act. The FTC failed to establish by a preponderance of the evidence that any Defendant violated section 5(a) of the FTC Act by making a misleading representation.

(FFP-3831, Conclusion ¶ 3). In Finding ¶ 12, the district court concluded: "A reasonable consumer would interpret both the Savings Claims and Timing Claims not to include dropouts." (FFP-3829, Finding ¶ 12).

A long line of cases, including the single case cited by district court, *Five-Star Auto Club*, definitively establish that the question that should have guided the district court's analysis is what was the typical result for the majority of the defendants' customers, not the result achieved by at most 24 percent of them. *Stefanchik*, 559 F.3d at 929 (defendants' claims held to be deceptive "where very few people made money using the Stefanchik [real estate] Program as promised in the advertising materials and telemarketing pitches"); *Ger–Ro–Mar, Inc. v. FTC,* 518 F.2d 33, 38-39 (2d Cir. 1975) (earnings claims deceptive unless a majority of participants in the community or geographic area in which such representations are made achieve the claims); *National Dynamics Corp. v. FTC,* 492 F.2d 1333, 1335 (2d Cir. 1974) (claims deceptive where they used "unusual earnings claims realized only by a few”); *FTC v. Washington Data Resources*, 856 F. Supp. 2d at 1274-75 (a reasonable consumer would understand ads to mean that, in return for a $2,000 payment, consumers typically would secure a mortgage loan modification with affordable payments, not that only a minority of consumers would receive such modifications); *American Tax Relief*, 751 F. Supp. 2d at 980 (advertising and telemarketing script stating that tax obligations would be reduced to “pennies on the dollar” created the impression that this was a typical result when, in fact, defendants rarely achieved this result); *Five-Star Auto Club*, 97 F. Supp. 2d at 528 (reasonable consumers would assume that promised rewards were achieved by a typical Five Star participant); *FTC v. Febre*, 1996 WL 556957 (N.D. Ill.) *aff’d*, 128 F.3d 530 (7th Cir. 1997) (unconditional earnings claims would be understood to represent typical or average earnings and are therefore deceptive).

Beyond this unambiguous legal standard, common sense also dictates that defendants’ customers must have been misled by defendants’ generalized Savings and Timing Claims – otherwise consumer behavior here is inexplicable. Implicit in Conclusion ¶ 3 and Finding ¶ 12 is that a reasonable consumer, already at least $7,500 in debt, would pay defendants a 9.9 percent non-refundable, up-front administrative fee even though that consumer understood that: (1) only a small minority of defendants’ customers saw the program through to completion and achieved the Savings or Timing Claims; (2) the majority of customers received no benefit from the defendants (*i.e.*, they did not have even a single debt settled); (3) the majority of customers also ended up losing the 9.9 percent administrative fee; and (4) the majority of consumers would end up in greater debt, due to accrued interest, fees, and penalties, than if they had not enrolled with the defendants. It defies logic to suppose that financially strapped consumers would sign up for defendants' programs and pay a substantial, non-refundable fee to obtain only a dim prospect of benefit and a likelihood of being made worse off than if they ignored defendants' siren song claims and not enrolled with defendants.

The district court was correct in finding that success in defendants' programs was achieved only with "difficulty." (FFP-3828, Finding ¶ 10). Indeed, that observation is quite an understatement. Since defendants "typically did not settle any of the clients' debts until the client had been in the program for about six months," clients had to endure months of "creditors' collection efforts, including phone calls, dunning letters, and lawsuits," which caused large numbers of clients to drop out. *Id*. The district court's decision is devoid of any findings that defendants attempted to inform prospective clients of how difficult it would be to stick with the programs. Nor could it have made such findings since the consumers uniformly testified that they were surprised and disappointed when a creditor sued or dunned them after enrolling with the defendants (*see* n.33 and accompanying text, *supra*); they had understood that enrolling in defendants' programs would insulate them from such problems while the defendants purportedly were negotiating reduced debt payments on their behalf.

A full understanding of the communications defendants made to their target audience of financially distressed consumers utterly rules out any reasonable basis for concluding – as the district court did – that these communications, taken as a whole, conveyed to consumers that the defendants' Savings and Timing Claims were achieved by fewer than one-quarter of defendants' customers. The initial sales pitches instead clearly conveyed a hopeful message, and the disclaimer language in the Enrollment Agreement had neither sufficient prominence nor clarity to dispel the initial deceptions that the Savings and Timing Claims were typical results for the majority of defendants' customers. The district court clearly erred in its assessment of defendants' representations.

IV. THE COURT BELOW ERRED IN CONCLUDING THAT DEFENDANTS' STATEMENTS CONVEYED TO REASONABLE CONSUMERS THAT THEIR SAVINGS CLAIMS EXCLUDED THE IMPACT OF FEES, PENALTIES, AND ACCRUED INTEREST

The district court made two additional fatal errors that defy common sense in the context of already cash-strapped consumers. First, in Finding ¶ 13, the court erroneously concluded that a reasonable consumer would not consider the defendants' multi-thousand dollar fees to be included as part of the total cost on which the Savings Claim was based. Second, in Finding ¶ 14, the court erroneously concluded that a reasonable consumer would not consider the Savings Claim to be based on the amount of the consumer's debt at the time of enrollment, but rather on the amount of debt at the time of settlement even though, when defendants negotiated settlements for their customers, the debt balance typically had increased by 20 percent due to accrued fees, penalties and interest.

Finding ¶ 13 provides:

> In determining the percentage of debt saved, one must determine the percentage of debt paid. If the percentage paid computation includes the fees paid to the [corporate defendants] as well as the amount paid to creditors to settle debts, that has the effect of increasing the percentage paid and reducing the percentage saved. A reasonable consumer would interpret the Savings Claims to exclude fees paid to the [corporate defendants].

(FFP-3829, Finding ¶ 13).

The district court failed to explain how it reached this conclusion, and indeed, it is inexplicable. It defies logic that a reasonable consumer, already in significant debt, would exclude from his calculation of how much it would cost to become debt-free the additional cost of the defendants' 9.9 percent administrative fee – a fee paid in full prior to any efforts by defendants to obtain a single dollar of debt reduction.

The record provides no evidence to support the district court's conclusion. While a variety of representations were made in the sales process to consumers that set out some of the fees charged by the defendants, defendants did not disclose that the Savings Claims were based only on the amount paid to creditors, *not* on the *total cost* to the consumer, including both payments to creditors *and* fees charged by the defendants. Rather, this fact was only revealed to prospective customers in ¶ 9 of the Enrollment Agreement which, in 8-point type, obscurely disclosed that "estimated savings does not include all applicable fees." (*E.g.* DX 20, ¶ 9).

Finding ¶ 14 noted that the parties disputed:

> whether the Savings Claims are based on [the] amount of debt at the time of enrollment or [the] amount of debt at the time of settlement (which would include interest and penalties that accrued between enrollment and settlement). A reasonable consumer would interpret the Savings Claims to be based on the amount of debt at the time of settlement.

(FFP-3829, Finding ¶ 14). As with its finding regarding the relationship between the Savings Claim and defendants' fees, the district court does not explain how it reached this conclusion.

The significance of these competing benchmarks for measuring defendants' Savings Claims is that consumer debt levels were significantly higher at the time of settlement than at the time of enrollment (for the fewer than 55 percent of consumers for whom defendants settled at least one debt). This was because, by the time defendants negotiated any reduced debt payoffs, the amount of the consumer owed to his creditors would have increased by as much as 20 percent due to accrued late fees, penalties, and interest. (FFP-4980:23-25).

In the end, a reasonable consumer would want to know the total cost to settle his debts and would have no logical reason, based upon the representations made by the defendants, to add an extra 20 percent to his debt load and a corresponding additional 20 percent to the amount it would cost to pay off his creditors. This conclusion is underscored by the fact that the defendants' sales scripts directed their sales representatives to calculate and state the Savings Claim for each consumer based upon the consumer's debt at the time of enrollment, not on an increased debt level at the time of any settlements. Defendants did "not explicitly" tell consumers that their existing debt would grow by as much as 20 percent before it settled any of their consumer's debts. (FFP-4980:1-4).

A simple example illustrates this point. Suppose a consumer has $10,000 in unsecured debt at the time of enrollment and was told he would save 40 percent on his debt by enrolling. Nothing the defendants said suggested that the Savings Claims was based on a projected $12,000 debt load at the time of settlement rather than the $10,000 he owed when he enrolled – in other words, a required payoff of $7,200 rather than $6,000. The most compelling evidence on this point is the Commission's undercover tape, where the defendants' sales representative, per the defendants' sales script, (*see* p. 15, *supra*), calculated the projected Savings Claim on the undercover agent's claimed existing amount of debt.

To be non-deceptive, defendants' Savings Claims would need to have been based upon the actual cost of settlement, using the higher debt balance at the time of any settlements. *See American Tax Relief*, 751 F. Supp. 2d at 980. Therefore, the district court erred in concluding that defendants' representations would convey to a reasonable consumer that at the time of settlement he would have a level of indebtedness substantially in excess of what he owed at the time of enrollment. By failing to disclose to consumers that their debt levels would increase substantially before any settlements, defendants' Savings Claims were deceptive because consumers are entitled to know the true amount that it will cost them to settle their debts.

V. IF NOT REVERSED, THE JUDGMENT MUST BE VACATED AND THIS ACTION REMANDED TO THE COURT BELOW TO ANALYZE THE FACTS ADDUCED AT TRIAL APPLYING THE PROPER "NET IMPRESSION" ANALYSIS

Even if this Court determines that it cannot reverse and direct judgment for the Commission, it must at least vacate the judgment and remand this action for further proceedings. Fed. R. Civ. P. 52(a)(1) requires that, in all bench trials, the district court "must find the facts specifically." *Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373, 376 (5th Cir. 2012). To comply with Rule 52, a district court must set out not just its ultimate factual findings, but also the subordinate factual foundations for these ultimate findings. *Osthus v. Whitesell Corp.*, 639 F.3d 841, 845 (8th Cir. 2011); *Sabsina Corp. v. Creative Compounds LLC*, 609 F.3d 175, 182 (3d Cir. 2010); *Henry v. Champlain Enterprises, Inc.*, 445 F.3d 610, 622 (2d Cir. 2006). *See also* Wright, Miller & Kane, 9C *Fed. Prac. & Proc. Civ.* § 2577 n.3 and accompanying text (3d ed.). By any fair reading, the district court's spare seven and one-half page decision does not measure up to this standard. It is devoid of even a single citation to the trial record, and fails to set out any of the subordinate factual findings that are necessary to support the ultimate findings contained in Findings ¶¶ 12-14. Additionally, while these Findings purport to conclude how a reasonable consumer would interpret the Savings and Timing Claims, the district court failed to set out any cognizable legal standard it used in reaching these dispositive conclusions. This failure to identify or use any cognizable legal standard is itself reason enough for remand. *Whitehouse Hotel Ltd. Partnership v. Comm'r*, 615 F.3d 321, 336 (5th Cir. 2010), citing *Curtis v. Comm'r*, 623 F.2d 1047, 1050 (5th Cir. 1980).

Curtis is particularly instructive on these points. In *Curtis*, the court of appeals remanded a decision that it characterized as having "conclusory" findings that did not reflect how the district court chose "between conflicting accounts of events or between alternate legal interpretations of those events." Absent remand, this Court would have been "left to guess" as to how the district court reached its decision, so it remanded the case, directing the district court to issue new findings "with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." 623 F.2d at 1051.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court or vacate the judgment and remand this matter to the district court to conduct an analysis of the facts adduced at trial apply the proper "net impression" analysis considering all of the representations that were made by the defendants and their representatives.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2012, I served the preceding Opening Brief of Plaintiff-Appellant Federal Trade Commission by Federal Express, postage prepaid, and by electronic mail on:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains 13,454 words.

/s/ John Andrew Singer
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