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

REPLY BRIEF OF
PLAINTIFF-APPELLANT FEDERAL TRADE COMMISSION

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

JOHN ANDREW SINGER
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3234
jsinger@ftc.gov

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INTRODUCTION

This case involves defendants' concerted efforts to induce consumers – specifically, financially-strapped consumers looking for a solution to credit card debt problems – to sign up for an expensive "debt negotiation" program that would purportedly yield dramatic reductions in their debt and enable them to become debt-free in a short period of time. Defendants did so through a marketing campaign that touted their ability to help consumers "wipe out 30 to 60 percent" of their debt, and "save thousands" on outstanding debts.[1] The claims first made in defendants' mass media advertisements (mostly radio) and then reinforced in follow-up telemarketing calls were dramatic and unqualified, giving no hint that only a small percentage of the consumers who signed up and paid substantial fees would ultimately receive any of the promised benefits.

Before this Court, defendants continue the same stratagem that they used to lead the court below into error: they ask the Court to ignore entirely the marketing campaign that got consumers in the door; they conflate their marketing claims with the qualifications and warnings they contend were conveyed in the course of telemarketing and fine-print contracts; and urge that reasonable consumers must have understood every nuance of their program. They then argue that there was no

[1] *See* nn. 4-9 and pp. 5-7, *infra*.

deception on the ground that most of the small percentage of their customers who successfully completed the program – approximately 12 percent of defendants' customers overall – obtained good results.

As shown in our opening brief, defendants and the court below misconceive fundamental legal principles regarding deceptive advertising practices under the FTC Act. The basic error below was that the district court *never undertook* the requisite legal and factual analysis of what "net impression" a reasonable consumer would takeaway from defendants' marketing. Consequently, it also never considered whether defendants' purported disclaimers were sufficiently clear and conspicuous to overcome their deceptive statements. Even if the lower court's conclusions about what was conveyed to consumers are viewed solely as factual findings, its error could hardly be clearer: its determination that consumers were properly informed of the details of defendants' program is not only belied by the language of their marketing, but it leads to the wholly illogical conclusion that over 20,000 consumers already in financial distress willingly paid thousands of dollars for a program that gave them no more than a small, 12 percent chance of success. None of defendants' arguments can defeat the showing made below that their actions gulled thousands of consumers already deeply in debt into an expensive program that was highly unlikely to deliver benefits to them. The district court's ruling condoning such actions must be reversed.

ARGUMENT

1. The District Court Erred by Not Analyzing Defendants' Express, Unqualified Media Advertisements and Telemarketing Claims

In a deception action under § 5(a) of the FTC Act, 15 U.S.C. § 45(a), a court first analyzes the marketing that drew in prospective customers and determines the impression that the content of the marketing made on a reasonable consumer. *E.g.*, *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 (7th Cir. 1992). Moreover, in an FTC Act deception case – in contrast to a Lanham Act case[2] – courts evaluate how a reasonable consumer would interpret marketing claims based on a common-sense assessment of the intrinsic content of the marketing materials themselves; a court generally should turn to extrinsic evidence only if "it is unable on its own to determine with confidence what claims are conveyed in a challenged ad." *Id.* at 318-19. *See also* cases discussed in FTC Br. at p. 36 n. 42.

A court must determine if a seller's representations are likely to mislead the seller's target audience and, if they do, find that the representations are deceptive. *See Cliffdale Assocs.*, 104 F.T.C. 110 at *46 (FTC 1984). Here, the district court

[2] Defendants erroneously assert that the FTC Act and Lanham Act have identical extrinsic evidence requirements. Defs. Br. at p. 40 n. 157.

erred as a matter of law by failing first to consider what defendants' express, unqualified Savings and Timing Claims (collectively the "Claims") within their radio and television advertisements facially conveyed to a reasonable member of defendants' target audience – financially-strapped consumers looking for an effective credit card debt solution. Instead, it dismissed the mass media advertisements as doing no more than "encourag[ing] prospective clients" to call the defendants to speak with a telemarketer. Finding ¶ 7 (FFP-3827, *reproduced in* FTC Record Excerpt ("Rec. Exc.") at Tab 5). The district court's approach – ignoring the impact of deceptive mass media advertising and telemarketing, and seemingly basing its analysis of a consumer's understanding entirely on fine-print contracts received shortly prior to being executed, *see* FTC Br. 38-39 – would eviscerate Congress's directive that consumers be protected from all manner of "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

As the Commission has previously shown, *see* FTC Br. at pp. 32-48, a straightforward, common-sense reading of the advertisements[3] that gave

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[3] While defendants primarily obtained customers through radio advertisements, they also used television advertisements which were essentially identical in content. Only approximately one percent of defendants' customers came through their websites. Defs. Br. at pp. 9-10.

consumers their first exposure to defendants' proffered services demonstrates that they were rife with express, unambiguous and unqualified claims. FTC Br. 10-13. These included Savings Claims such as the defendants could: "wipe out up to 60 percent of your credit card bills;"[4] achieve 67 percent debt reductions;[5] settle a $15,000 debt for only $3,000;[6] "wipe out" or "eliminate" 30 to 60 percent of your credit card debt;[7] "help you cut your debt, in many cases, by 50 percent";[8] and "save you literally thousands or tens of thousands of dollars off your debt . . . down to pennies on the dollar."[9] Defendants' also made Timing Claims that they could get consumers out of debt in 18-36 months.[10]

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[4] PX 19, 4:8-16.

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

[6] *Id.*

[7] *Id.*, PX 29, 4:11-13; PX 34, 4:9-10; PX 172, 4:16-18.

[8] PX 52, 4:12-13.

[9] PX 153, 4:10-19.

[10] Defendants concede that they made Timing Claims in the media advertisements for Financial Freedom of America. Defs. Br. at p. 10. While defendants did not appear to make Timing Claims in the media advertisements for Debt Consultants of America ("DCA") or Debt Professionals of America' ("DPA"), they did make them in other marketing materials. See FTC Br. at p. 13 n. 23 (citing to DCA and DPA Timing Claims).

The subsequent telemarketing reinforced the deceptive impression created by the mass media advertising. In an undercover call to Financial Freedom of America ("FFA") by a Commission investigator posing as a prospective customer, the telemarketer's pitch incontrovertibly established that defendants made further deceptive claims to induce consumers to enroll in their programs. The investigator was told that FFA could save him "a ton of money," that FFA's "special relationships" with major creditors such as Bank of America enabled FFA to obtain pay-offs of only 18 to 25 cents per dollar on its customer's debt, and that if the caller tried to negotiate with Discover directly he would be referred to FFA. PX 294.2 at 23:21-22, 26:6-8, 29:24-30:6.

Defendants' telemarketing scripts also contain bald unqualified Savings Claims. The scripts directed telemarketers to tell prospective customers that defendants "generally average a savings of 50-60% of the debt," "we can really save you some money," and "In our negotiations, we average around 45 cents on the dollar," PX 186.1 at FFP 1145, and that defendants "saved our clients an average of 58% of their balances." PX 186.5 at FFP 1168; FFP 186.6 at FFP 1173. *See also* claims cited in FTC Br. at 14.

The scripts furthered the deception by directing the telemarketers to provide what was seemingly an individualized estimate of the amount that defendants purportedly could save for that prospective customer. In fact, the Savings Claim was not customized. The pertinent script instructs the representative to place the consumer on hold to do "some figuring" based on information obtained from the consumer, to come back on the line and say, "WOW. . . looks we can really save you some money," and then present a Savings Claim that was simply 45 percent of the consumer's *existing* debt-balance. PX 186.1 at FFP 1145; *see also* PX 294.2 at 26:16-27:25 (in making a seemingly personalized Savings Claim to undercover Commission investigator, telemarketer told investigator that FFA did "very well" with investigator's specific creditors, Capital One, Chase and Citibank); FTC Br. at pp. 15-16. This express Savings Claim neither stated nor implied that it excluded defendants' fees or was based on anything other than the caller's debt level at the time of enrollment.

Of key importance, defendants' marketing gave consumers no reason to think that the touted results were highly atypical and enjoyed only by a small percentage of those who enrolled and paid defendants' fees. And indeed, defendants are unapologetic about their abysmal success rate with respect to the full universe of consumers who engaged their services. Defendants' Brief states that the three corporate defendants collectively had 23,140 customers, of whom only 3,093 (13 percent) completed a program and, most critically, only approximately 2,789 (12 percent) achieved the advertised Savings and Timing Claims. Defs. Br. at pp. 17-20.[11] Put another way, defendants admit that fully 88 percent of their customers failed to achieve the express, unqualified results promised to consumers.[12]

The lack of qualification in defendants' marketing is particularly significant in light of both the nature of the services offered and the debt-ridden, financially-strapped audience targeted. Defendants affirmatively held themselves out to be

[11] Herein, we are using *defendants'* estimates of their success rates. However, with respect to defendants' performance for their customers regarding the Savings Claims, Commission economist, Dr. Erez Yoeli, found that only 6.5 percent of FFA's customers (PX 261, lines 213-14), 3.8 percent of DCA's customers (*Id.* at lines 333-34), and 5.2 percent of DPA's customers (*Id.* at lines 436-37), settled all of their debt and received the promised Savings Claims.

[12] Defendants assert that about one-third of the participants who did not complete the program nevertheless had one debt settled prior to leaving and many others settled their accounts on their own. Defs. Br. at 21. Even if this is true, still well under half of defendants' customers failed to receive any benefit in return for having paid a substantial up-front fee and certainly did not achieve the Savings and Timing Claims. The record does not show that any consumers who left the program settled accounts on their own, *cf.* FFP-4347:10-13 (one of defendants' experts, Richard Briesch, assumed that they used any money accrued while enrolled to settle debts after leaving the program). Even if some participants took such steps after leaving the program, defendants' claim that they should somehow get credit for this is baseless and it ignores the high fees that such customers had paid to defendants before accruing any monies that could be used to pay off debts.

"experts at negotiating debt settlements"[13] and "professional debt negotiators"[14] who would "wipe out"[15] or "eliminat[e]"[16] debt using their "proven debt reduction system."[17] They made these claims to consumers whom they knew had already experienced difficulties in managing their own financial affairs, thereby creating the perceived need for defendants' expert assistance.

Defendants also represented that enrolling in their programs was a seemingly painless way to become debt-free. The mass media advertisements promised that enrolling with defendants would take "the hassle and headaches of credit card debt off your shoulders," PX 28 at 5:1-3, and that defendants would do "the work for you to reduce your debt."[18] Similarly, the undercover Commission investigator was told that it would be "smooth sailing" once he enrolled, PX 294.2 at 48:13-14, and that "out of respect for us [FFA]" major collection agencies had agreed not to call FFA's customers. *Id.* at 29:2-11. The patently deceptive nature

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[13] PX 19, 4:8-16.

[14] PX 29, 4:11-13.

[15] *Id.*

[16] PX 34, 4:9-10.

[17] PX 153, 4:10-19; PX 162, 4:5-9.

[18] PX 14 at 5:1-2; PX 20 at 5:3-4; PX 23 at 5:1-2. *See also* PX 16 at 4:17-18; PX 17 at 4:19-20; PX 19 at 4:19-20.

of these representations is underscored by Finding ¶ 10, which correctly found that defendants' customers were subject to collection calls, dunning letters and even lawsuits throughout their enrollment in the programs. (FFP-3828, *reproduced* FTC Rec. Exc. at Tab 5).

Accordingly, defendants' protest that consumers must have understood that only a small number of the luckiest (or hardiest) participants in defendants' programs would achieve success ring hollow. Perhaps it is common knowledge among reasonable consumers of a gym's weight loss program that many or most do not stick with it and fail to lose weight (although defendants provide no evidence of this). *See* Defs. Br. at p. 28.[19] By contrast, there is no reason to suppose that average consumers who were considering enrolling with the defendants understood the complexities of the debt-negotiation industry or knew that they were likely to fail to achieve the expressly promised results. And the district court's Findings & Conclusions failed even to consider defendants' low overall success rate, or the question whether a reasonable consumer would be deceived about it by defendants' marketing.

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[19] As to the type of information that can be considered "common knowledge" to a reasonable consumer, *see Cliffdale Assocs.*, 103 F.T.C. 110 at *47 (only an unreasonable, unrepresentative and insignificant portion of consumers would think that "Danish pastry" is made in Denmark).

Defendants played off consumers' ignorance by encouraging them to put their trust in defendants – the presumed experts – to achieve what the consumers on their own could not, and to do so in a painless manner. If consumers had known that the overwhelming majority of the defendants' customers failed to complete the program and that, by defendants' own admission, only 12 percent of customers achieved the Claims, Defs. Br. at pp. 17-20, they would not logically enroll with defendants and pay them a substantial up-front fee. Looked at another way, the district court effectively concluded that reasonable consumers would knowingly pay $1,000 or more (defendants' up-front fee) to buy a lottery ticket that had: (1) a 12 percent probability of making them debt-free; and (2) an 88 percent probability of leaving them deeper in debt (due to accrued interest and late fees), as well as out the up-front fee paid to the defendants.[20]

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[20] Defendants suggest that the Commission should be barred from making "common sense" arguments about how a reasonable consumer would interpret the unqualified claims defendants made in their media advertisements, Defs. Br. at pp. 54-56. Yet defendants themselves urge this Court to use this very approach, acknowledging that under the controlling "net impression" standard the fact-finder is to use its common sense to draw inferences as to how a reasonable consumer would interpret claims made in advertisements. Defs. Br. at p. 41 n. 160, *citing Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989), *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985) (other citations in Defs. Br. omitted).

The district court misread the single case it cited, *FTC v. Five Star Auto Club, Inc.*, 97 F. Supp. 2d 502 (S.D.N.Y. 2000). The district court understood *Five Star* to teach that defendants' Savings and Timing Claims were non-deceptive so long as they were true for the majority of the 13 percent of defendants' customers who completed one of their programs. *See* Conclusion ¶ 3 (FFP-3831, *reproduced in* FTC Rec. Exc. at Tab 5). In fact, *Five Star* does not support such reasoning. Rather, consistent with numerous other FTC Act deception cases, it held that where a seller makes an express *unqualified* claim, a reasonable consumer will take the claim to represent a typical result for the seller's customers. And, however a court defines "typical," defendants' success rate of only 12 percent for its Savings and Timing Claims unquestionably means that a "typical" customer did not enjoy the claimed benefits. Thus, the *Five Star* court held that, where the defendants, *without qualification*, claimed in their marketing that "consumers who paid to participate in the Five Star program could 'Drive [their] Dream Car for Free,' while earning substantial sums of money," *Id.* at 527, "at the very least it would have been reasonable for consumers to have assumed that promised rewards were achieved by a *typical* Five Star customer," *Id.* at 528 (emphasis added), not just a few customers. *Id.* at 527. *See also* FTC Br. at pp. 49-51 and cases cited therein. A recent case buttressing this position is *FTC v.*

Medical Data Capital, Inc., 2010 WL 1049977 at *17, *28 (C.D Cal. 2010), which involved a mortgage loan reduction service where defendants claimed that they were experienced in the industry, had a history of success in preventing foreclosure and negotiating mortgage modifications, and had a great likelihood of negotiating substantial reductions in mortgage loan payments. The court held that these claims created a deceptive impression that defendants were experts in the field and provided a positive result for the majority of their customers. Subsequent disclaimers made in the written contract between consumers and defendants did not overcome this deception.

The express nature of the claims repeatedly made by defendants supports only one conclusion: a reasonable consumer had the deceptive impression that the results touted by defendants would be enjoyed by their typical customer, not just 12 percent of customers. Defendants would have this Court hold, as did the district court, that a seller can with impunity and without qualification make claims that a seller knows are achieved only by a small portion of its customers without deceiving a reasonable consumer and running afoul of the requirements of the FTC Act. Findings ¶¶ 12 and 15, Conclusion ¶ 3 (FFP-3829, 3831, *reproduced in* FTC Rec. Exc. at Tab 5); Defs. Br. at pp. 37-41, 48-53. That approach is directly contrary to controlling law and would allow a deceptive seller to trap unwary consumers into wasting money on a program that the seller knows is ineffective for most of its customers – precisely what occurred here.

In seeking to avoid the facial deception of their express claims, defendants argue that "expert" extrinsic evidence is required to determine the true nature of the claims. Defs. Br 39-41. Defendants wholly misstate the controlling law, asserting that: extrinsic evidence is the "best" evidence to determine the meaning of the express Claims made by the defendants; the Commission had to come forward with extrinsic evidence explaining the meaning of the Claims; and the district court was obliged not only to consider but to give greater – if not conclusive – weight to extrinsic evidence concerning a reasonable consumer's interpretation of the Claims. Defs. Br. at pp. 39-41. As explained in the Commission's Opening Brief at pp. 35-38, resort to extrinsic evidence is only appropriate where necessary to interpret advertisements whose meaning cannot be "determine[d] with confidence" by a plain reading, *Kraft,* 970 F.2d at 318; *see also Cliffdale Assocs.*, 103 F.T.C. 110 at *46 ("In cases of express claims, the representation itself establishes the meaning.") – which is not the case here.

Critically, there is no evidence that the district court, in *Kraft*'s words, lacked the "confidence" to determine the intrinsic meaning of the Claims. If it had, the court below presumably would have cited to some of the extrinsic evidence adduced at trial in its decision, but it did not. Furthermore, nothing stated by the defendants' experts changes the intrinsic meaning of the express Claims made by defendants and, therefore, this "expert" evidence fails to support defendants' arguments on appeal.[21]

2. The District Court Failed to Consider Whether Defendants Made Disclaimers Sufficient to Overcome the Deception of Defendants' Marketing

As we have shown previously, the district court erred by failing to undertake a meaningful "net impression" analysis, and instead imposed what amounts to a standard of caveat-emptor – it placed an overwhelming reliance on the details of defendants' fine-print contract. *See* FTC Br. 32-48. In their attempt to defend the lower court's flawed analysis, defendants advance two arguments. Defs. Br. 37-41. The first is that in Findings ¶¶12-14 (FFP-3829, *reproduced in*

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[21] For example, Carol Scott opined only that a consumer would interpret the Claims to represent results for customers who completed the programs, excluded results for customers who left the programs, and that the Savings Claims excluded defendants' fees. DX 93 at p. 2; FFP-4369:15-25. Richard Briesch opined that the defendants created a positive value for its customers who completed a program and even some value for consumers who left the programs (based upon the assumptions that consumers accrued funds in their "special purpose accounts" prior to leaving the program and then used these funds to pay off debt). DX 95 at pp. 3-4; FFP-4347:10-13. Thomas Maronick acknowledged that there could be ambiguity concerning defendants' fees resulting from the initial advertisements but opined that the contents of the telemarketing calls and enrollment agreement clarified any such ambiguities. DX 97 at pp. 4-5.

FTC Rec. Exc. at Tab 5), the court used the term "reasonable consumer" to describe how it believed consumers interpreted defendants' Savings and Timing Claims. The second is that the district court could not have applied the caveat-emptor standard since the Findings & Conclusions do not mention this standard.

Such arguments – based on the presence or absence of labels – ignore the substance of the district court's analysis. Defendants correctly note that the district court's Findings & Conclusions did not expressly incorporate "caveat-emptor" as its controlling legal standard. (In fact, the Findings & Conclusions are devoid of an express reference to any legal standard.) But they fail to grapple with the fact that the court effectively applied that standard, by presuming that each consumer would absorb and understand the details of defendants' fine-print contract and would ignore defendants' prior deceptive inducements. That the lower court went on to assert that a "reasonable consumer" would interpret defendants' claims in this manner does not (as defendants would have it) show that it was actually applying controlling law about a reasonable consumer's net impressions. On the contrary, it simply reinforces the legal error inherent in that court's conception of what a consumer must do to act "reasonably."

In the absence of an express statement of the legal standard applied, only the language and emphasis of the Findings & Conclusions can be used to divine the standard used by the district court. And the language and emphasis here demonstrate that the court effectively used the caveat-emptor standard. In Finding ¶ 8 (FFP-3827-28, *reproduced in* FTC Rec. Exc. at Tab 5), the district court placed great emphasis – in what are otherwise very limited findings of what was communicated by defendants to consumers – on the written enrollment agreement and the supposed opportunity that consumers had to review its terms prior to signing and returning the agreement to the defendants. FTC Br. at pp. 38-41. Combined with the court's conclusion that the "actual moment a consumer decided to enroll as a client" was "when the consumer mailed the [enrollment] agreement back to the company," Finding ¶ 8, this establishes that the district court believed that a reasonable consumer had the obligation to read and understand every term contained in the enrollment agreement prior to signing and then returning it to the defendants – and a consumer's failure to do so was at his own peril. This contract-driven analysis is the very essence of the harsh caveat-emptor standard, *see* FTC Br. at p. 39 n. 43, which the "net impression" standard used in FTC Act deception enforcement actions is specifically designed to temper. *FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003) ("caveat emptor simply is not the law" in FTC deception actions); *FTC v. Minuteman Press, Inc.*, 53 F. Supp. 2d 248, 262 (E.D.N.Y. 1998); *see also* FTC Br. at pp. 39-41.

Defendants could overcome their deceptive Savings and Timing Claims only by demonstrating that they provided consumers with sufficiently prominent and unambiguous disclaimers or qualifications that changed the deceptive impression their marketing created. *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *see also* FTC Br. at pp. 36-37 and cases cited therein. Such disclaimers would have to overcome the affirmative lavish claims, seemingly personalized estimated savings, and assurances of program success presented by the mass media advertisements and defendants' telemarketers. In contrast, the purported disclaimers defendants made did nothing to alter the deceptive claims and, at best, created "an overall impression of nonsense, not clarity." *FTC v. Direct Mktg Concepts*, 624 F.3d 1, 12 n. 9 (1st Cir. 2010).

Defendants essentially contend that the information conveyed to consumers by their telemarketers and in the enrollment agreement made clear to a reasonable consumer that defendants' Savings and Timing Claims were not intended – despite their express and repeated nature – to describe a typical result for all of their customers, but rather only for the small group of customers who completed the program. Defs. Br. at pp. 37-41, 50-51. Two assumptions are implicit in this position. The first is that a reasonable consumer understood that most of the defendants' customers failed to complete the program. The second is that, even with this knowledge, the lack of debt reduction delivered by the defendants to the overwhelming majority (88 percent) of their customers was immaterial to a reasonable consumer. The fallacy in these assumptions is that defendants provided no disclaimers that would alert a reasonable consumer that only a small percentage of the defendants' customers completed the programs. Moreover, it is illogical to suppose that a reasonable consumer, if he knew this fact, would not consider it to be material in his decision whether to enroll. Indeed, the Findings & Conclusions pointedly are devoid of even a single finding that the defendants provided disclaimers or qualifications regarding the express Savings and Timing Claims – prominent, unambiguous or otherwise.

Given defendants' deception, the district court erred by failing to conduct a "net impression" analysis of all of the information provided to prospective customers or making any specific underlying factual findings that would establish that the defendants made sufficiently prominent and unambiguous disclaimers to change a reasonable consumer's deceptive impression. The Findings & Conclusions are silent as to the factual "circumstances" or "evidence" that led to the district court's dispositive legal conclusion that the Commission failed to establish that defendants made any "misleading representations." Conclusion ¶ 3 (FFP-3831, *reproduced in* FTC Rec. Exc. at Tab 5).

3. The District Court's Findings are Reversible Even if Deemed Purely Factual

The discussion above, and in our Opening Brief, shows that the court below committed legal error, failing even to make an assessment of the net-impression made on consumers by defendants' marketing, or to weigh whether the ostensible disclosures were sufficiently clear and prominent to ameliorate prior deception. Even if, however, this Court were to accept defendants' invitation to gloss over those errors and presume that the lower court's pivotal "findings" on consumer takeaway (Findings, ¶¶ 12-14) were the product of a proper analysis of all pertinent evidence, those findings are flatly contrary to the evidence and common sense, and must be overturned under any standard of review.

Defendants contend that their telemarketers fully outlined all of the elements of defendants' programs to prospective customers, including a proper explanation that only a small fraction of customers received the claimed benefits. Defs. Br. at 12-14. There are several reasons why this is not the case. *First*, the fundamental of the purpose of the telemarketing call was not to alert consumers to defendants' lackluster 12 percent success rate, but rather to induce consumers to enroll in defendants' programs. Indeed, defendants and their telemarketers had every incentive not to provide clear and conspicuous notice of this material information to consumers – as a result, statements by the telemarketers must be viewed in the context of them saying whatever they believed was necessary to make a sale. *Second*, and following on the first point, the sales calls were not as rigidly scripted and formulaic as defendants suggest or the district court, in Finding ¶ 7 (FFP-3827, *reproduced in* FTC Rec. Exc. at Tab 5), implies. Rather, the telemarketing scripts were largely narrative in format and, since the sales calls were interactive, telemarketers often went beyond the contents of the script. FFP-5095:1-11. An example of beyond-the-script embellishment to try to make a sale was the undercover Commission investigator being told that FFA had special relationships with major creditors that permitted them routinely to settle customers' debts at exceptionally low rates, presumably unavailable elsewhere, PX 294.2 at 29:24-30:6, and that FFA had agreements with major collection agencies that they would not contact FFA's enrollees, *Id*. at 29:2-11. *Third*, none of the purported affirmative statements made by telemarketers negated the impression that the Savings and Timing Claims were a typical result for defendants' customers. *See* Defs. Br. at pp. 12-14.[22] Indeed, the telemarketers reinforced the deception created by the mass media advertisements by providing the seemingly personalized estimated savings that the defendants purportedly could provide if the consumer enrolled in their programs. *Fourth*, the Savings Claims made in the telemarketing calls were based specifically on the consumer's *existing* debt, not what would be the increased debt (due to interest accrued and late fees) at the time of any settlements.

Defendants also assert that the enrollment agreement independently explained all of the elements of defendants' programs. They admit that the agreement was in a single size font and it is self-evident from even the most cursory review that the small size font used[23] makes the agreements classic

[22] Assuming, *arguendo* that in each telemarketing call the telemarketers made all of the disclosures claimed in Defs. Br. at pp. 12-13, none of these disclosures would alert a reasonable consumer of defendants' low 12 percent success rate. At most, these disclosures could make a reasonable consumer know: he had to default on his credit cards; could be harassed or sued by creditors; the defendants charged fees for their services; the monthly payments to defendants were used first to pay defendants up-front administrative fee and then accrued until defendants settled debts; and defendants only began debt negotiation after they collected their administrative fee.

[23] Defendants deny that the small font used in the enrollment agreements was 8 point, but do not identify the correct measure. In any event, the agreements placed into evidence (DXs 18, 19, 20, 49, 50, 82 and 83) are reproduced in their actual size in the FTC Rec. Exc. at Tabs 6-12.

examples of contracts set in condensed fine-print with all of the material terms obscure and difficult to read – even the purported disclaimer language which defendants argue was "conspicuous" because it was italicized. Defs. Br. at p. 42. *See* DXs 18, 19, 20, 49, 50, 82 and 83, *reproduced in* FTC Rec. Exc. at Tabs 6-12. Additionally, consumers did not receive the enrollment agreements until just before entering into a contract with the defendants. *See* FTC Br. at pp. 17-18. While the terms of a written contract, including disclaimers, may be considered as part of a court's "net impression" analysis, cases addressing fine-print disclaimers in contracts in the context of FTC Act § 5(a) enforcement actions repeatedly teach that fine-print contractual disclaimers, especially when provided just before entering into the contract, are not sufficiently prominent to overcome any prior deceptive impressions made on consumers. *See, e.g., FTC v. Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006); *FTC v. Capital Choice Consumer Cred., Inc.*, 2003 WL 25429612 at *5 (S.D. Fla. 2003); cases cited in FTC Br. at pp. 39-41.

Further diminishing any possible curative impact that the enrollment agreements might have had is that the telemarketing scripts encouraged prospective customers to give the agreements short shrift by specifically stating the contents of the enrollment agreement did nothing more than repeat in writing what consumers already had been told in the telemarketing call. Telemarketers told prospective customers, "This agreement has everything we have talked about on paper. You'll need to initial the first two pages of the this agreement and then sign the last page." PX 186.9 at FFP 1192; *see also* PX 186.10 at FFP 1198. This "you already know what's in the agreement" representation is critical because consumers testified that they received the agreements either during or shortly after the telemarketing call (by email or facsimile) and felt pressured to sign and return the agreements promptly, without reviewing them in any meaningful way. Consumers were told if they did not act quickly it lessened the possibility that they would be accepted into defendants' program. *See* FTC Br. at pp. 17-18. A former FFA telemarketer confirmed that he used this threat as a strategy to encourage consumers to enroll as quickly as possible. *Id.*[24]

There is no evidence in the record that consumers read – much less understood – every term in the enrollment agreement. Even if one indulges in the assumptions that the agreements were set in a font size that was easily readable and that consumers read and absorbed every word of the enrollment agreement, an examination of the two critical paragraphs, ¶¶ 5 and 9, that defendants call out in

[24] Since they lack any citations to the record, the Findings & Conclusions are silent on what evidence the court below considered or relied upon, much less what testimony it found credible.

their brief at pp. 15-16 do not overcome defendants' initial deception of consumers concerning the typicality of the Claims. Paragraph 5 states that Savings Claims are based upon, "*Client's full participation in the FFA program and their outside savings account maintenance.*" *E.g.* DX 20 (*reproduced at* FTC Rec. Exc. Tab 8) (emphasis in original). This statement does not define "full participation," and gives no hint that such participation will be so onerous that only a small percentage of those who enroll and pay defendants' fees will ultimately complete the program. It therefore provides no disclosure – much less a clear and conspicuous one – that could disabuse consumers of the impression previously conveyed by defendants' marketing that typical enrollees enjoy the program's touted benefits.

Paragraph 9 provides that "the estimated savings does not include applicable fees," *see* Defs. Br. at p. 16. However, ¶ 9 must be read together with ¶ 6 of the agreement, which sets out the defendants' fees but is devoid of any mention of a relationship between the fees and the basis for defendants' calculation of the Savings Claims. *E.g.* DX 20 (*reproduced at* FTC Rec. Exc. Tab 8). At best, the language in ¶ 9 is not an unambiguous disclaimer; rather, it is confusing rather than clarifying since it is inconsistent with ¶ 6.

Defendants' other argument, that consumers understood the terms of the enrollment agreement because almost half the prospective customers to whom defendants sent an agreement failed to return it, is nonsensical. There is no basis beyond speculation for knowing why some consumers chose not to enroll with defendants. Moreover, even if defendants were unable to dupe every consumer with whom they had contact, they did dupe over 20,000 – a more than sufficient basis to find liability since this is at least a significant minority of reasonable consumers. *Pom Wonderful, LLC*, 2013 WL 268926 at *19 (FTC Jan. 16, 2013); *Telebrands Corp.*, 140 F.T.C. 278, 291 (FTC 2005), *aff'd* 457 F.3d 354 (4th Cir. 2006); *FTC Policy Statement on Deception*, 103 F.T.C. 174, 177 n.20 (FTC 1984) (a reasonable interpretation is one shared by more than an insignificant and unrepresentative segment of the persons to whom a claim was addressed).[25]

In light of this evidence, the district court's Findings ¶¶ 13 and 14 (FFP-3829, *reproduced in* FTC Rec. Exc. at Tab 5) are clearly erroneous. Defendants

[25] Defendants also suggest that the Commission misstated the record concerning the testimony of defendants' expert Carol Scott. Defs. Br. at pp. 44-46. This is not the case, and the Commission stands by its statements in its Opening Brief that the content in defendants' mass media advertisements – including the Savings and Timing Claims – was characterized by Scott as the "kicker" that formed consumers' initial impressions of the defendants and their programs. FTC Br. at p. 37. Scott ultimately – and unsurprisingly – opined that consumers interpreted the Claims in the manner urged by the defendants.

did not, through clear and conspicuous disclaimers, overcome their deception that the Savings Claims did not include their fees and were based upon a consumer's existing debt at the time of enrollment rather than a consumer's much higher level of debt at the time of settlements, if any.

4. At the Very Least, this Court Should Remand this Case to the District Court Due to Inadequate Findings

To comply with Fed. R. Civ. P. 52(a)(1), a district must go beyond just setting out its ultimate factual findings – it must also plainly set out the subordinate factual foundations that led to and support the ultimate findings. *See* FTC Br. at pp. 57-59 and cases cited therein. Otherwise, the appellate court is left to guess how a court below reached its decision. Here, the court below failed to set out any subordinate facts that could support its ultimate factual findings, Findings ¶¶ 12, 13 and 14 (FFP-3829, *reproduced in* FTC Rec. Exc. at Tab 5) and thereby failed to address the most fundamental aspects of a consumer deception claim.

The district court's findings are deficient as to subordinate facts in at least four ways. *First*, the district court failed – as the "net impression" standard requires – to make any findings as to a how a reasonable consumer would interpret the intrinsic content of the express, unqualified core Savings and Timing Claims made in defendants' media advertisements and by their telemarketers. *Second*, in Finding ¶ 7 (FFP-3827, *reproduced in* FTC Rec. Exc. at Tab 5), the district court failed to identify what disclaimers, if any, were made and why such disclaimers were sufficiently clear and conspicuous as to overcome the deceptive impressions initially created by defendants' marketing. *Third*, in Finding ¶ 8 (FFP-3827-28, *reproduced in* FTC Rec. Exc. at Tab 5), the district court similarly failed to identify any disclaimers made in the enrollment agreement or explain why they were curative. *Fourth*, in Finding ¶ 15 (FFP-3829, *reproduced in* FTC Rec. Exc. at Tab 5), while the court below correctly concluded that the Savings and Timing Claims were true for the majority of customers who completed the programs, the court made no findings indicating how a reasonable consumer could possibly understand that these claims were atypical and that only a small percentage of defendants' customers completed the programs. *See* Conclusion ¶ 3 (Savings and Timing Claims "were not likely to mislead consumers acting reasonably under the circumstances.") (FFP-3831, *reproduced in* FTC Rec. Exc. at Tab 5).

As a result, the deficiencies in the district court's findings are not, as defendants' contend, either minute nor harmless. Defs. Br. at p. 57. And while the defendants suggest that there is evidence in the record (sales scripts, language in the enrollment agreements, and self-serving testimony by the defendants themselves and the experts they retained), their brief fails to identify any such evidence with specificity. *Id.* at pp. 56-58. Moreover, the findings of the court below cite to no such evidence – the court did not even indicate what evidence it considered or how it weighed that evidence in getting to its ultimate decision. Based on the spare Findings & Conclusions, this Court can only speculate how the district court reached its ultimate findings and should vacate the judgment and remand this action to the district court for further proceedings.

CONCLUSION

For the reasons stated above and in the Commission's Opening Brief, 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 applying the proper legal standards regarding consumer deception.

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for
Litigation

/s/ John Andrew Singer
JOHN ANDREW SINGER
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3234
jsinger@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2013, I served the preceding Reply Brief of Plaintiff-Appellant Federal Trade Commission by Federal Express, postage prepaid, and by electronic mail on:

Robert Kenneth Wise, Esq.
Lillard Wise Szygenda, P.L.L.C.
Suite 1255
5949 Sherry Lane
Dallas, TX 75225
bwise@lwsattorneys.com

/s/ John Andrew Singer
John Andrew Singer

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains 6,663 words.

/s/ John Andrew Singer
John Andrew Singer