



FTC - Oral Argument Before the Commission- Home Advisor- Thursday, July 21

Speaker 1:

Oyez, oyez, oyez. All persons having business before the Federal Trade Commission are admonished to draw near and give their attention. God save the United States and this honorable Commission.

Lina Khan:

Good afternoon, everyone. The Commission is meeting today in open session to hear oral argument in the matter of HomeAdvisor, Docket Number 9407, on the Motion for Summary Decision filed by Counsel supporting the Complainant. The respondent is responded by Mr. Stephen Neuwirth, and counsel supporting the complaint is represented by Ms. Sophia Calderon.

Each side will have 45 minutes to present their arguments. Counsel supporting the complaint will make the first presentation and may reserve time for rebuttal. Counsel for the respondent will then make their presentation. Counsel supporting the complainant may conclude argument with a rebuttal presentation, because there are a large number of confidential documents referenced in this case, the commission voted last week to close portions of this meeting to discuss confidential information pursuant to 5 U.S.C. 552(B)(c)(4) and (10).

As a reminder, each side is permitted to reserve up to 20 minutes of their total presentation time for discussion of confidential information. You each should ensure that any discussion of confidential information occurs at the end of your presentations. When you are ready to discuss the confidential information, please let us know so that we can go into confidential session. During that time, the argument will not be webcast to the public. However, we will resume the webcast once any confidential discussion has ended.

Ms. Calderon, do you want to reserve any time for rebuttal?

Sophia Calderon:

Thank you, Chair Khan. I'd like to reserve 10 minutes for rebuttal, please.

Lina Khan:

Great. Please begin when you're ready.

Sophia Calderon:

Good afternoon, Chair Khan and Commissioners. This is a straightforward case about deception. For many years and across many advertising and marketing channels, HomeAdvisor has consistently and unabashedly misrepresented central aspects of its products so that home service providers, primarily small businesses, would buy them. As you know from the party's briefing, at a very basic level HomeAdvisor sells leads. Consumer contact information that service providers like plumbers and electricians can use to identify potential clients and land jobs. HomeAdvisor generates these leads primarily from its own website and from third party lead generators. Service providers buy these leads from HomeAdvisor without previewing them in advance, making HomeAdvisor's representations about their quality and their characteristics all the more important.

This case isn't about whether HomeAdvisor is a valuable business. It's not about whether HomeAdvisor is innovative. And it's not about whether HomeAdvisor's leads ever turn into jobs for service providers. This case is simply about whether the representations that HomeAdvisor made about its products were true. And they weren't. Specifically this case and complaint-

Noah Joshua Phillips:

Counselor, before we get into this, and my apologies for the interruption. Defense Counsel cite a number of cases for the propositions that questions of falsity and questions of materiality are factual questions. Do you agree with that proposition?

Sophia Calderon:

Thank you, Commissioner. Complaint Counsel would agree that there factual questions, but the overwhelming evidence in the record makes clear that there's no genuine dispute here as to what the facts are at hand in this matter.

Noah Joshua Phillips:

To the extent that we disagree with that proposition, if we were to believe that there were disputes as to falsity or as to materiality, would you agree that the proper resolution of this question would be to deny summary decision?

Sophia Calderon:

Commissioner, only if the conclusion is that those disputes are in fact genuine and that they concern issues that are material, which falsity would be an issue that is material here.

Noah Joshua Phillips:

Thank you, Counselor.

Sophia Calderon:

Thank you. Specifically, this case and Complaint Counsel's motion for summary decision is about three types of deceptive claims that HomeAdvisor has systematically made to service providers.

The first type of deceptive claims are what I'll refer to as the lead quality claims. Claims that HomeAdvisor's leads were homeowners who were ready to hire, concerned projects that matched service providers task and location preferences. And that the source of those leads were people who had sought out HomeAdvisor's assistance in finding a service provider. And as I'll explain in the confidential portion of my argument, all of those lead quality claims simply weren't true.

Indeed service providers received leads from HomeAdvisor concerning people who have no interest in getting any work done at all. Leads with patently fake information, and leads concerning people who have no idea how HomeAdvisor got their information. Those are the lead quality claims.

The second type of deceptive claims are what I'll refer to as the Win Rate claims. Claims that HomeAdvisor's leads converted into jobs for service providers at specific known rates. Despite the fact that HomeAdvisor had no substantiation whatsoever for these rates.

And the third type of deceptive claims are the mHelpDesk claims. Claims that HomeAdvisor's mHelpDesk subscription product was free for the first month, when in fact it cost \$59.99.

Christine Wilson:

Counselor, before you proceed, can I ask a question? Do we have evidence on the net impression that service providers took from the language that the leads were from customers "ready to hire", "ready to buy", or "looking to hire"?

Sophia Calderon:

Thank you, Commissioner. Yes. The record includes, for example, complaints made to the Better Business Bureau in which service providers specifically articulate that they were made these representations and that their complaint is that those representations were not true.

Christine Wilson:

And do you believe that a copy test would be necessary to facilitate figuring out what the net impression of the claims was?

Sophia Calderon:

Thank you, Commissioner. Not with the claims that are at issue in this case. These claims have a plain meaning that is readily apparent. Ready to buy. Looking to hire. Exactly what you want to do in the exact location you want to do it. And the commission has held before that it has both the common sense and the expertise to decide when, what claims are made when they are readily apparent as these are.

Christine Wilson:

So, although the words may have a plain language meaning, in the context of buying a lead, a service provider has to know that they need to convert the customer and the "ready to buy" assertion could mean different things to different people. So if this case were to litigate, would you expect to submit copy test evidence?

Sophia Calderon:

Complaint Counsel's position, at this point in the proceeding, is that copy testing is unnecessary to establish the claims that were actually made.

Christine Wilson:

Thank you, Counselor.

Sophia Calderon:

Thank you.

Lina Khan:

If I could ask one follow up to that, you noted that this language really had clear plain meaning. What do you make of respondent's argument that these were sophisticated service providers that really understood how the business works and that it doesn't always entail actually seeing a ready job at the end of the day? How should we assess that if not through net impressions and what seems to be a very factual question?

Sophia Calderon:

Thank you, Chair Khan. The Complaint Counsel agrees that respondent has gone into great lengths going into the sophistication of the service providers. However, respondent has not connected the sophistication of the service providers to their interpretation of the actual claims, which Complaint Counsel in this case, contends have a very plain meaning. Respondent's Counsel focuses on the fact that leads are not guaranteed jobs. That is not a claim that Complaint Council is alleging HomeAdvisor made. What Complaint Council is alleging is that HomeAdvisor made claims about the leads, not about what a lead in and of itself, but adjectives that are applied to those leads. Ready to buy. Ready to hire. Exactly what you want to do in the exact location you want to do it. It is those additional qualifiers or descriptors of what a lead is, and descriptors that have a plain meaning that respondent has introduced no evidence that service providers would interpret those descriptors any differently from anybody else.

Lina Khan:

Okay. Thank you.

Sophia Calderon:

Thank you. Because this case is only about deception. There are only three issues that are relevant to the motion for summary decision. First, whether HomeAdvisor in fact made the three types of deceptive claims. Second, whether those claims were in fact false or misleading. And third, whether those claims were material to service providers.

As is apparent from the abundant evidence in the record, there is no genuine dispute about any of these three issues and the Commission should grant the motion. I will address each of the three issues in turn, but before I get started, I wanted to note that while this portion of my argument is open to the public, prior to discussing the falsity of each claim, I will need to transition to an in camera portion because the vast majority of the evidence relevant to the motion for summary decision was designated confidential by HomeAdvisor. I'll make clear to both the Commission and to the video conference operator when I'm transitioning to an in camera portion. The first issue relevant.

Noah Joshua Phillips:

[inaudible].

Sophia Calderon:

Yes.

Noah Joshua Phillips:

My apologies for another interruption. The defendants make a great deal in their briefing about Complaint Council's alleged failure, in their view, to show that the misrepresentations at issue, or the

alleged misrepresentations at issue, or a pattern, or that they were systemic in nature. What do you think is your burden in that regard? What do you need to show? Or what level of misrepresentation or commonality do you need to show under the case law to prevail here?

Sophia Calderon:

Thank you, Commissioner. Complaint Counsel's position is that we need to show a pattern. Basically, evidence that these were not isolated instances. That there was more than simply one off events. And as I will argue, during my argument, we believe that the record is replete with exactly that kind of evidence. That these claims appeared in HomeAdvisor's national advertising, HomeAdvisor's training materials, HomeAdvisor's internal guidance for its sales agents. And in fact were made in actual recorded sales calls to service providers.

Noah Joshua Phillips:

Thank you, Counselor.

Sophia Calderon:

Thank you. So the first issue relevant to the motion for summary decision is whether HomeAdvisor in fact made each of the three deceptive claims, and there is no genuine dispute that it did. As a preliminary matter, HomeAdvisor does not genuinely dispute, with actual evidence, that its national advertising consistently contained all of the lead quality claims. Its advertising, including its website and other marketing materials, regularly claimed that its leads concerned homeowners who are ready to hire a service provider.

For example, its website has stated, "HomeAdvisor connects contractors with homeowners who are ready to hire pros for their home projects." Another portion of its website said, "You won't have to waste your time with customers who just window shop. HomeAdvisor allows you to spend your time with the right ready to buy customers." And still another portion of its website said, "We'll connect you with homeowners looking to hire pros in your area."

In addition to its website, HomeAdvisor's other marketing materials, including its email marketing, its magazine marketing, and radio spots, also contained similar claims. These materials were designated confidential by HomeAdvisor, but the slide contains citations to where they are in the record. The plain meaning of these claims is clear. HomeAdvisor's leads don't concern people who are just poking around on the internet. They are homeowners who are actually ready to hire a service provider. Of course, that doesn't mean that they're ready to hire just anyone. It's not a guaranteed job. But they're ready to hire someone.

HomeAdvisor's advertising also regularly claimed that its leads matched service providers' task and location preferences. Its website stated, "Tell us what you do and where, and we deliver prospects that meet your exact needs." Another portion of its website said, "You're in control. Only get the leads you want. You pick your service types and location preferences, and we bring you prospects that match what you want." Again, the plain meaning of these claims is clear. HomeAdvisor's leads will match the task and location preferences of the service providers who receive them. An indoor painter in DC isn't going to get leads for outdoor painting in Baltimore.

And HomeAdvisor's advertising also claimed that the source of its leads were homeowners who had intentionally sought out HomeAdvisor for assistance in finding a service provider. For example, one portion of its website said, "While you're on the job, HomeAdvisor is finding qualified customers for you. We spend millions of dollars driving customers to our website." And another portion of its website said, "Over 30 million homeowners have trusted HomeAdvisor to help them find quality pros with the

expertise to turn their home improvement dreams into reality." The plain meaning of these claims is the same. HomeAdvisor's leads aren't bundles of consumer information that HomeAdvisor has somehow obtained from third parties. Instead HomeAdvisor's leads, concerned homeowners who knowingly came directly to HomeAdvisor for assistance in selecting a service provider.

As is evident from the multiple advertisements I've just displayed, there is no genuine dispute that HomeAdvisor made the deceptive lead quality claims in its national advertising. But HomeAdvisor's deception was not limited to its national advertising. HomeAdvisor's sales agents, in their sales calls with service providers, also regularly made all three of the deceptive claims. The lead quality claims, the Win Rate claims, and the mHelpDesk claims.

In fact, HomeAdvisor sales agents were trained to make these claims. There is substantial evidence of this in the record and HomeAdvisor does not genuinely dispute it. I'll start with the lead quality claims. HomeAdvisor's sales agents repeatedly told service providers, in sales calls, that HomeAdvisor's leads concerned homeowners who were ready to hire, who had projects that matched service providers' task and location preferences, and who had sought out HomeAdvisor directly for assistance in selecting a service provider. As I'll explain in the confidential portion of my argument, all of these claims were misleading.

There are numerous examples in the record, of HomeAdvisor sales agents making these claims in recorded sales calls. I won't read any of the call transcripts allowed, but I would direct the Commission's attention to the Appendix to Complaint Counsel's Statement of Material Facts. The Appendix is filled with excerpts from sales calls, in which sales agents make the lead quality claims. As is apparent from the excerpts in the Appendix, sales agents' lead quality claims were predictably consistent with the claims made in HomeAdvisor's national advertising. But they were also consistent with HomeAdvisor's approved claims for its sales agents, and HomeAdvisor's sales scripts and training materials. And the slide shows citations to where these materials appear in the record.

The Appendix shows that in numerous instances, sales agents made the lead quality claims using practically the exact same phrasing that appeared in HomeAdvisor's advertisements, HomeAdvisor's scripts, and HomeAdvisor's training materials. In other words, HomeAdvisor's sales agents made the same claims that HomeAdvisor's advertisements made. And they did so because that is how they were trained.

I'd like to turn now to the Win Rate claims. But before I do so, unless the Commission has any questions so far that can be discussed on the open record, I'd like to enter an in-camera portion of oral argument. I'd like to reserve three minutes of the in-camera argument for rebuttal, which I understand means that I have 17 minutes of non rebuttal time. And can the video conference operator please confirm when-

Noah Joshua Phillips:

[inaudible].

Sophia Calderon:

Yes.

Noah Joshua Phillips:

[inaudible] Earlier in response to my question, you agreed that you would need to show a pattern of deceptive claims. Is the question of whether there is in fact a pattern, would you agree with me that's a factual question?

Sophia Calderon:

Yes, I would agree that that is a factual question.

Noah Joshua Phillips:

Okay. I understand your position is it's not in dispute, but I just wanted to ask. That's a factual question?

Sophia Calderon:

Yes. One that is not in genuine dispute.

Noah Joshua Phillips:

Thank you for correcting me, Counsel.

Lina Khan:

Okay.

You may begin, Mr. Network.

Speaker 2:

Thank you very much, chair Khan, and thank you commissioners for having this hearing today. The question before the commission today is not whether the FTC ultimately should prevail on its claims. Rather, the sole question is whether at this time, when every material fact is contested and the subject of conflicting evidence, when discovery on these material facts is ongoing, and when fact finding in an administrative law judge trial is just months away scheduled for November, the commission should short circuit and terminate the entire fact finding process and enter a summary decision as requested by complaint counsel, disregarding all of the documentary evidence, all of the fact witness testimony from complaint counsel's own witnesses as well as others, as well as expert opinion that has been submitted and not rebutted by complaint counsel that contradicts the FTC's claims.

The record evidence includes HomeAdvisor data, documents and witness testimony demonstrating that the leads HomeAdvisor provides to its service professional members are legitimate and provide real value and that HomeAdvisor has not made the misrepresentations asserted by complaint counsel, and certainly not in any widespread or systemic way. HomeAdvisor has submitted the opinions of a lead industry expert refuting the fundamental premises of the FTC's complaint, an expert opinion that remains wholly unanswered by complaint counsel. HomeAdvisor also has submitted the opinion of an expert statistician demonstrating the complete lack of standard statistical steps to confirm the representativeness of the sales call sample set that Ms. Calderon referred to today, and which comprises one of the few bits of actual evidence on which complaint counsel relies. Again, the expert opinion of our statistician remains wholly un-rebutted. Even more-

Noah Joshua Phillips:

Counselor.

Speaker 2:

Yes, I'm sorry.

Noah Joshua Phillips:

I think somewhere in complaint counsel's briefing, they raise a question, "What additional discovery you want?" Can you help explain to us what you hope to get in discovery?

Speaker 2:

Certainly. There are many matters that would be the subject of ongoing discovery. First, as I've mentioned, we've offered un-rebutted expert opinion, and we need to see what, if anything, complaint counsel can say in response to that. Second, there have actually been 23 declarations, not just the ones that Ms. Calderon mentioned, but also declarations of four FTC employees. One of the things that came out in the depositions that we took was that the declarations of the service providers, former employees and homeowners were all written by an FTC investigator, and the declarants testified that, in fact, their recollection was often different from what had been written in their declarations about what it was that they were told, what it was that was relevant to their decision to join HomeAdvisor, what happened with the leads that they received from HomeAdvisor.

Remarkably, the Federal Trade Commission complaint counsel took the position during the deposition of the investigator, who put in a declaration, that we were not entitled to ask her any questions about the preparation of those declarations, even though the other declarants, whose declarations they were, had testified about their communications with this investigator who wrote the declarations. The FTC complaint counsel took the position that we couldn't ask the investigator any questions about those declarations or the discrepancies that had come out between what was written and what these declarants were now testifying.

So, certainly, one of the things we want to do is go to the ALJ to get relief and to be able to inquire about the writing of these declarations and all of those discrepancies, and these are completely material discrepancies. It's hard to believe that complaint counsel would've submitted these declarations with the motion if they really didn't bear in any material way on the motion. They clearly were put forward with the intention to be evidence of how these misrepresentations worked and what effect they had on people, and all of these declarants actually ended up testifying either that the misrepresentations were not made in the way that complaint counsel's complaint suggests, that they weren't relied on in the way that complaint counsel's complaint suggests, that when complaints were made, they weren't even about the subject matter of this case, that they had to do with other issues.

So, what could be more important than follow-up discovery after all of these depositions, which showed that the declarants didn't really believe or feel what it was that their declaration stated? Moreover, it's critical to note that I believe Commissioner Wilson asked about whether the FTC complaint counsel had any further discovery that they wanted to do. It has to be noted that complaint counsel has served 46 document requests in the ALJ proceeding, including many with multiple parts, which must have some materiality to the case, or it's hard to understand why they would've served them. All of that discovery is still underway. HomeAdvisor has served many document requests on the government as to documents and material, which is relevant to the claims and the affirmative defenses.

So, we would respectfully submit, Commissioner Phillips, that we are just at the beginning of this multi-month discovery process that the ALJ proceeding contemplated, and that it really makes no sense with the ALJ hearing just a couple of months away to now short circuit all of that and jump to summary decision. In fact, if we look at our demonstrative number nine, which I believe will be put up now, when this action started, the commission publicly represented that the allegations against HomeAdvisor quote, "Will be tried in a formal hearing before an administrative law judge."

It's difficult to understand why now at this point in the process, we would suddenly abandon that, as complaint counsel suggests, and just have a short circuiting of it and rush to judgment, which really would be a rubber stamping of the complaint, because all that Ms. Calderon presented to you

today was a graphic version of the complaint and statements about how to interpret the complaint. There was no evidence beyond the complaint's allegations that was put forward to the commission today.

If we look at our tab number eight, certainly, the procedure here really raises a question about what complaint counsel is trying to do is an end-run to sidestep the Supreme Court's mandate in AMG Capital, because, as we know, AMG held that the FTC cannot obtain monetary relief without first finding that a practice violates Section 5, and AMG Capital expressly contemplated that the commission would only take action under Section 5 following an ALJ trial on a fully-developed record. In fact, AMG Capital talks four times about an ALJ trial in the decision.

So, what complaint counsel is now asking the commission to do is to have a rush to judgment when all we have to do is wait a couple of months to complete the process before the ALJ and be able to have a fully-developed record on which the commission can rule.

Noah Joshua Phillips:

Counselor, this argument struck me as rather novel, and I just want to make sure I understand what you're saying. Your position is that Section 19 would not be available ultimately later on in the process, unless there had been a trial before the ALJ?

Speaker 2:

What we are saying is that ... I think that the fair way to characterize it is that the Supreme Court clearly said that no action could be started in district court under Section 19 unless there was first a finding that a practice violated Section 5.

Noah Joshua Phillips:

Right, right-

Speaker 2:

And what we're suggesting-

Noah Joshua Phillips:

And the issuance of the order ... but it's not ... the statute doesn't speak to how we get there, and we're clearly able under the statute to make rules for how we conduct our proceeding. Am I wrong about that?

Speaker 2:

Well, what I would say is that you're not wrong about the notion that you can do fact finding, but what AMG Capital said is that there needs to be a fully-developed record. So, the question here is, would granting summary decision here take place on a fully-developed record? Clearly, not. The ALJ process that this commission mentioned when it brought this case is the one that allows you to have a fully-developed record here. That's all we're suggesting, that AMG contemplates a fully-developed record before the commission would bring a case in federal court under Section 19. What complaint counsel is asking for here would short circuit that and prevent us from having a fully-developed record.

Speaker 3:

Counsel, I have a question to follow up on this point. You started out by saying that the issue before the commission here on a motion for summary judgment is whether there's any genuine issue of material fact. But, now, what I hear you to be saying ... and therefore summary judgment is not appropriate in this particular case. But, it seems that the argument you're making now is that summary judgment is never appropriate for the commission to issue under AMG. Is that your argument?

Speaker 2:

No. Our argument is that, under the circumstances here, to grant the summary decision would fly in the face of AMG, which contemplates a fully-developed record, and here, the record is not fully developed. We're not-

Speaker 3:

So, what would be a situation where summary judgment would be appropriate for the commission under the standard that you're reading into AMG?

Speaker 2:

I don't have a case before me to be able to evaluate that, but it would certainly have to be a case unlike here where there's not any material facts, any ongoing discovery or any issues that require further fact finding. But, we're so far from that here and here, certainly where discovery hasn't even closed in this case. One could imagine a situation further in the process, but here we're still at the initial stages of discovery in the ALJ proceeding. So, I don't know that we have to reach that ultimate question to know that where we are in this case is in a zone that would fly in the face of what's contemplated by AMG Capital.

If we can turn to our slide number one, the burden is on complaint counsel to establish with-

Noah Joshua Phillips:

Counselor?

Speaker 2:

Yes.

Noah Joshua Phillips:

Sorry to interrupt you. One more question. You also make these constitutional arguments. It's not your motion, but what you're seeking here is for denial of the motion for summary decision. Is that correct?

Speaker 2:

That is correct.

Noah Joshua Phillips:

Okay. Thank you.

Speaker 2:

That is all we are seeking, and we believe that's the only issue that the commission needs to decide today.

Lina Khan:

In light of that, I'd like to just ask you a little bit about ... in addition to the constitutional argument, you also raise a defense under the Communication Decency Act.

Speaker 2:

Yes.

Lina Khan:

And I want understand if you're raising that defense across the board, or if it's specific to some of the claims and not others. So, specifically, the claims relating to the source of the leads and the mHelp Desk subscription don't appear, to me, to touch in any way on information that consumers or customers are submitting. So, I wouldn't see how the CDA defense would apply there. Do you agree with that? And if not, could you explain why those two claims would also be protected under CDA? Would just like to understand the scope of the defense that you're alleging there.

Speaker 2:

Right. Well, we certainly allege that the CDA would apply anywhere, as you said, Chair Khan, with respect to anything that is providing information that would've come from homeowners or some outside party, and that is, obviously, a very substantial part of what is being alleged here. To the extent that there are claims that are just related to what was said about mHelp Desk or other matters that just relate to HomeAdvisor's own representations, I don't think we would be claiming that it applies there.

Lina Khan:

Okay. So, both with mHelp Desk and presumably the source of the leads, which only relate to HomeAdvisor's representations and not at all dependent on information submitted by customers, you would not be claiming a CDA defense with those two counts. Is that right?

Speaker 2:

Well, with respect to the second count, on the sources of the lead, I'm not sure that we could say today that there's no allegation, that there's some connection to information that was provided by homeowners, but I certainly agree with your premise that, to the extent the claim does not relate to the information from homeowners, we would not be asserting that the CDA applies there.

Lina Khan:

Okay, thank you.

Christine Wilson:

To pick up on Chair Khan's questions about the CDA respondent. You stated in your brief that if information is entered by a customer, you're merely the conduit passing along that information to the service provider, and you're not responsible for inaccuracies, and you're entitled to immunity as a publisher under the act, but your materials also emphasize that HomeAdvisor uses a vetting process to ensure the leads are accurate and from quote, "Serious buyers." So, I'm wondering that conducting this review and vetting these submissions by customers would make immunity less likely. So, can you help me understand where the line should be drawn?

Speaker 2:

Yes. Well, I believe that the case law we cite, Commissioner Wilson, suggests that the immunity under the CDA would apply regardless of what HomeAdvisor may have done subsequently. But, we certainly believe that whether the CDA did or did not apply, all the steps that HomeAdvisor took to vet the leads is one of the key facts here, that is a material fact that complaint counsel has not responded to, demonstrating that the representations that HomeAdvisor made were not false.

I think we can see this clearly, if I could ask, if we could put up what I believe was slide 13 from complaint counsel's presentation, because one of the things that has been glossed over today is whether the statements here were even false to begin with. The starting premise here was that these were false, that these were misrepresentations, but why don't we look at this here. For example, under the third representation here, how it works, it says, "Over 30 million homeowners have trusted HomeAdvisor to help them find quality pros with the expertise to turn their home improvement dreams into realities. It's just one of the reasons you can depend on us to bring you highly-targeted prospects that will grow your business."

Now, Ms. Calderon told you that that statement is false and a misrepresentation because it would lead one to think that every lead comes from HomeAdvisor itself, and that no leads come from affiliates. This statement doesn't say anything about affiliates. It is a fact issue whether someone would interpret this statement to mean that HomeAdvisor gets no leads from affiliates. It is absolutely true that over 30 million homeowners have trusted HomeAdvisor to help them find quality pros with the expertise to turn their home improvement dreams into a reality. That is an absolutely true statement. Only 15% of HomeAdvisor leads come from affiliates.

Ms. Calderon did not show you a single statement other than this one, and there is nothing false about this statement. The first statement that's up here, "Will connect you with homeowners who are looking to hire pros in your area," that's not a false statement. There are certainly homeowners who may say they want to hire someone tomorrow. There are certainly some homeowners who say that they're looking for an estimate. Those are types of information that HomeAdvisor provides.

Ms. Calderon didn't have an ability to tell you what it is that HomeAdvisor tells people when they get their leads. That information about whether someone wants an estimate, or whether someone says, quote, "Ready to hire," that information is provided when the lead is given to the service provider, and we had testimony from the FTC's own witnesses that when someone gets a lead from someone who's looking for an estimate, that can be someone who is ready to hire. When someone says, "I need an estimate," that is one of the steps that you take when you decide to go forward with a job. I think we all have had the experience of wanting to do a job like a car repair, but first getting an estimate.

So, the witnesses here testified that someone who says that they want an estimate might be ready to hire, and one of the great examples of this is one of the people who was a declarant for the FTC was a service provider who provided pest elimination services like termites. They testified that what happens in their business is that someone who wants to have work done has to ask for an inspection, which is usually done for free. If the inspection doesn't yield any termites, there won't be any work to do, but they testified that is a completely legitimate lead in their business because that's the way the business works. Somebody says, "I need to have an inspection," and it's only after the inspection that they decide whether to have a job.

We had one witness, one service provider, who actually testified, "I don't ever want to have to negotiate on price. I don't want people who have an interest in low prices. I want people who will only pay high prices for my good services." Now, that's fine. It's a free country. People can do that, but if certain leads decided not to hire that person, that doesn't mean that they weren't ready to hire. It just

means that they were interested in someone who was going to give them a competitive price, and this service provider wasn't willing to do it. So, there was no misrepresentation.

Finally, in the middle category here, which says, "You're in control. Only get the leads you want." Look at the quote. "You pick your service types and location preferences, and we bring you prospects that match what you want." That's a true statement. The service providers pick the location and the service types they want, and HomeAdvisors system works to get them homeowners who have selected their service type or have selected

.... selected and their geographic location.

Now, are there sometimes things that don't work out where there can be mistakes where somebody enters the wrong information or where there's an inadvertent lead sent? Sure. But remember, there are hundreds of thousands of leads every year, probably millions over the time period we're talking about, and the fact that there are isolated instances that Complaint Council has provided here of where a lead didn't match, either the location or the type of job that a service provider had selected, doesn't mean that there's something wrong with the system or that false statements are being made. What is left out here as well is that HomeAdvisor has a clear policy of providing credits to any service provider who can demonstrate that they received a lead that was not for their service area or for their service type.

So after two years of investigation and all the work that's been done, look at the statements that you've been shown here, what is false about these statements?

Speaker 4:

Counsel?

Speaker 2:

Yes?

Speaker 4:

Counsel, if I may, page six of Complaint Council's presentation public, says, "Can Home Advisor increase the service professional's profit?" Absolutely. You won't have to waste your time with customers who just window shop. HomeAdvisor allows you to spend your time with the right ready-to-buy customers. Particularly that first sentence, you won't have to waste your time with customers who just window shop, doesn't that imply that the customers are ready to buy and that there's not people in there who are just getting estimates or just budgeting?

Speaker 2:

Well, there's a very big space, Commissioner, between window shopping and ready to buy. Window shopping is someone who has-

Speaker 4:

I agree. Yeah. Yeah.

Speaker 2:

Window shopping is someone who has no interest whatsoever, but someone who says they want a budget estimate or somebody who says they want an inspection for termite services, those people are ready to buy.

Remember, the way this system works, and it's fully disclosed, and every service provider knows this and has to make affirmative statements that they agree, is that HomeAdvisor sends leads to several service providers at a time. So the service providers have to make their own efforts to reach out. As Ms. Calderon acknowledged today, a lead is not a job, a lead is an opportunity to convert a lead into a job. So service providers are competing with each other, as they all understand, to get this work and very often... And you are not sure-

Speaker 4:

One followup if I could. So another thing that's public is the interface, which is the customers who want service can specify ready to buy versus just planning and budgeting. When you send these leads from both of those sources to the service providers, do you specify these folks at ready to buy, these folks at just planning or do you not distinguish between those two?

Speaker 2:

That information is absolutely provided and it shows up in the lead-

Speaker 4:

Okay, so you tier them somehow. You let the service provider know these folks are ready to hire, these folks are on the planning and budgeting process?

Speaker 2:

Right. But what I think is very critical, Commissioner, is that the testimony of the FTCs own witnesses made clear that when someone says that they are planning and budgeting for many types of jobs, that is considered ready to hire because there are some jobs that are very straightforward, somebody wants to have a cleaning job done. But for example, when somebody wants to repair the entire roof of their house, they're not normally going to be ready to make that decision without first talking to service providers about what would be involved in the job, what type of work would be done.

So for certain jobs, when somebody says they want information about the budget and the plans, the service providers understand that that's someone who is ready to hire but they're not going to make the decision in 24 hours. It might take them several days or even weeks to select someone to do that work. So again, all of this information is provided, and what could be a more telling issue about the need for more fact finding than Miss Calderon when she-

Speaker 5:

Counselor?

Speaker 2:

Yes?

Speaker 5:

On the survey that the customer fills out, information from which eventually allows leads to be sent to the number of SPs, what's the highest level on the dropdown menu of interest that the customer can convey? What's the phrasing that the company [inaudible]? Isn't it something like ready to hire?

Speaker 2:

I believe that there is some version of ready to hire, which would be the highest.

Speaker 5:

So one question that jumps to mind is whatever our collective commission judgment of the meaning of that phrase is, if only a subset of customers are indicating ready to hire, and you are sending leads that you have said will be ready to hire, even if for purposes of this argument you're characterizing other things like budgeting as ready to hire, by your own definition, in terms of what people are telling you when they're inputting their desire, only a subset are in fact, ready to hire.

Speaker 2:

Well, I-

Speaker 5:

Why isn't that deceptive?

Speaker 2:

First of all, we are getting the exact language now that we can share with you but-

Speaker 5:

Okay. And I apologize if-

Speaker 2:

No, it's a perfectly legitimate question. But I think the critical thing here, and I think this is laid out in detail in our expert report, which is unrebutted right now in the record, what our expert report from Mr. Hidalgo, who is an expert with decades of experience in the lead industry and has actually written one of the leading books on lead generation, what he points out is that for different types of jobs, it is well understood that being ready to hire has different meanings, and HomeAdvisor as company is covering a wide array of services here. So we would respectfully submit that what the evidence will show when a full record is presented to the commission is that it was well understood that for many of the types of jobs that were covered by the HomeAdvisor services, that someone who said they were interested in different types of steps in the process, like budgeting or planning, were ready to hire.

Again, I think part of the issue here is what type of job is it. And I think we all understand that there are certain major types of home improvement jobs that require several steps in the planning process. We know that this is true because the very declarance that the Complaint Council put forward here said that this was true in their testimony, and these are declarants... One of the declarants made 1.8 million from his HomeAdvisor leads. Other declarants made 50,000 or more. Almost all of them had a positive return on their investment that was very substantial. And the reason for that was because they understood that in their respective areas of work, these leads were very, very valuable, and I think that's the critical theme here.

The Complaint Council is asking you just to accept all of the assertions that they've made. One of the big problems with what Complaint Council was doing is that they've said to you, "Look, we've got thousands of complaints at the Better Business Bureau, this proves that there were misrepresentations." It doesn't prove that at all. First of all, there's been no demonstration that the complaints to the Better Business Bureau actually concern the subject matter of the complaint here. And in fact, we will be able

to demonstrate that only a small fraction of those complaints had to do with the subjects of the complaint here. Many of them have to do with issues like billing that are not even an issue in this case.

Second, Miss Calderon told you in her presentation that one of the reasons that you should understand that these supposed false statements were widespread is because of all of the recorded phone calls that are in the appendix to her briefing. The problem is we've now demonstrated through an expert report that there is nothing representative about the isolated sales calls that had been selected here.

Remember, there were hundreds of thousands of sales calls a year, and over the relevant period here, millions of sales calls, they've given you a small sample of just a couple of thousand that their economists admitted were selected without any sort of statistical steps that are normally taken in Federal Trade Commission cases. That's what he testified. And we put in a declaration from a statistics expert that in the absence of those steps, what we have here is a set of random examples of things that were said in phone calls that don't give you any basis to make a general conclusion about what representations we're making.

Let me tell you why this is so important, the Federal Trade Commission Complaint Council put in a declaration from a former sales representative, and the declaration that was drafted by the FTC investigator said that sales agents always made certain representations. When this former sales representative was deposed, he testified that he had no basis to say anything about what other sales representatives did that he really didn't know. And when we asked him why that was in his declaration, he said he didn't know.

So all of this is subject to further fact finding. We have critical issues here, were the statements even false? Complaint Council has had all this time to show you the greatest hits of their false statements, and what we just looked at are three statements that they focused on that on their face are not false. And there are all sorts of questions, legitimate material questions, about whether these statements are even false to the extent that they are arguably false to whom were they made and when-

Speaker 6:

Counselor, I'm so sorry to interrupt, I do want to note that you have around 11 minutes left, so wanted to see at what point you wanted to go in camera.

Before we do that, I did want to ask something that can be asked publicly. So you argue that Complaint Council failed to prove proximate causation. On my reading of the deception statement in cases like Figgy, seems clear that once the Complaint Council has proven that a respondent has made a material or misrepresentation, and that it was widely disseminated such as on a website, that there is a presumption of injury to consumers. Do you dispute that reading of the law? Your proximate cause defense suggests that it's Complaint Council that carries this burden in the first instance, and I just wanted to get more clarity on-

Speaker 2:

Right. Well, at this stage in the proceedings, the issue with proximate cause has to do with, among other things, whether this misrepresentation was understood in any way by the recipients of the information to cause them to take any action. And we believe that just the depositions of the FTCs own declarants demonstrate that they did not rely on any statements by HomeAdvisor in the way that Complaint Council is suggesting that they would have.

Speaker 6:

I understand. But your argument is that discovery is needed to get at, for example, [inaudible] materiality rather than in the first instance, issues of injury. Because as a Complaint Council claim, they have already, for example, shown that there was a representation that was material and that was widely disseminated that they would have a presumption of injury there.

Speaker 2:

Well, we don't think we're anywhere near getting to a presumption of injury because we don't believe the Complaint Council has demonstrated any of the elements that would be necessary to get there. And I think this comes back in part to what several commissioners asked about earlier when Miss Calderon was speaking about net impression. This is clearly a-

Speaker 6:

I understand. I guess I'm just trying to understand what is that defense getting you at this stage, given that your argument really seems to be about discovery being needed for material misrepresentation rather than really getting at this issue of proximate cause.

Speaker 2:

I don't disagree with your point that proximate cause is not necessarily something that would come into play on these threshold questions that we're talking about right now at this stage in the proceeding, but it is an affirmative defense that we have to put forward on the question of whether any of these statements would've had any effect on any of the service providers that the Federal Trade Commission would be looking to address.

But I do, if I could, I don't mean to... If I could Commissioner, Chair Khan, I do have certain information that I think is important to respond to a question that was asked earlier by Commissioner Phillips. When someone specifies planning and budgeting when they're signing up as a homeowner, they then have to answer a question, which is when would you like the work to be completed? And they have to make a choice. They have to say flexible timing, within one week, within one to two weeks or more than two weeks. And all of that information is provided to a service provider. So clearly ready-to-hire for different jobs can have different timing, and when the information is provided the timetable of someone who's even initially looking for planning and budgeting information, they have to specify when they expect to be ready to do the job. They can't just say planning and budgeting and nothing else and-

Speaker 7:

Council, I appreciate your following up with Commissioner Phillip's question. I want to follow up something that you've talked a couple times about, net impression. It seems to me that the core of your argument is even if we don't dispute the fact of these representations, we dispute whether they create a net impression and you... In a certain way, and you have said that's a question of fact that needs to be determined. I'm wondering if you have any case law citations that you could point us to as to whether net impression, when there's no dispute as to the substance of the representation, is a question of fact rather than law.

Speaker 2:

Yes, absolutely. And if we could put up slide number three.

One of the cases we cite here is the *In re Horizon* court case, which is a Federal Trade Commission case from 1981, which says, "In evaluating whether advertising is deceptive, the total

impression created by the pictures, words and oral representations must be considered in the context in which they are used and in light of the sophistication and understanding of the persons to whom they were directed."

The Heinz W. Kirchner case, that's also cited below, says, "A representation does not become false and deceptive merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."

And as we know here as well, the FTC is regularly recognized, [inaudible] the federal courts, that in cases of consumer deception, which are based largely as here on non-uniform oral statements, they are necessarily fact intensive and ill-suited for summary decision. And, as the FTC itself has said, isolated instances of misrepresentation are not to establish a general pattern or practice.

I think if we look at slide number four-

Speaker 6:

Counselor, I'm really mindful of the time, and I know several of my colleagues have questions that are only appropriate for in-camera. So unless you have strong objections, I'm going to recommend that we move to that portion. Is that okay with you?

Speaker 2:

That's fine. If I could just take about 15 seconds just to follow up on Commissioner Slaughter's question. I think it's very important to note the Natural Organic's case, which says that the general rule is that when the meaning or effective words or acts is fairly disputed, the question is for the trier of facts to be decided after hearing on all material evidence. And here clearly, this argument today has demonstrated there are significant questions about the meaning of terms that have been identified by Complaint Council as supposedly-

Speaker 6:

Counselor, I'm so sorry to cut you off, I really want to make sure we get to my colleagues' question so let's move into in-camera.

Lina Khan:

Great. Ms. Calderon. I'll turn it over to you for the rebuttal presentation, and I'll remind you that if you have any confidential information, you can reserve it for the end of the presentation and just let us know when to go back into confidential session.

Sophia Calderon:

Thank you, Chair Khan. HomeAdvisor, in its opposition briefing and again in its argument, attempts to distract the commission from the simplicity of this case by alleging facts that aren't material, disputes that aren't genuine given the actual evidence in the record, and procedural issues that have no bearing on the Commission's ability to grant the motion for summary decision. I'll start with the things that I can discuss on the open record. With respect to the summary decision standard, HomeAdvisor argues that the motion for summary decision is too early, too late, and that resolving the case on summary decision should never be permitted at all. It's plainly permitted, pursuant to Rule 3.24, 20 days after issuance of the complaint and a summary decision motion is the equivalent of a motion for summary judgment, which, of course, is ubiquitous in Federal District Court proceedings.

As I stated earlier, what matters with respect to outstanding discovery is when the party opposing the motion articulates specifically what discovery is needed and how that discovery would help them defeat the motion for summary decision. When respondent's counsel was asked that question of what discovery HomeAdvisor needs, respondent's counsel identified two things. Respondent's counsel said that they wanted to know how complaint counsel would respond to their expert testimony. So they didn't need additional affirmative discovery on their end. They just want to know how complaint counsel will respond to respondent's expert testimony. That was the first piece of outstanding discovery that respondent's counsel identified.

The second was, vaguely, discovery concerning the declarants. As I argued earlier, the declarants provide helpful real life, contextual examples of HomeAdvisor's deceptive practices, but not a single one of them is necessary for the Commission to grant the motion for summary decision. They are consistent with all of the other evidence in the record, the vast majority of which is HomeAdvisor's own internal documents. The Commission need not look to the declarants to find that the motion for summary decision should be granted. Excuse me.

Noah Joshua Phillips:

If we credit your argument that none of that discovery is necessary for purposes of summary decision, if we still view there being a material dispute with respect to the underlying fact constituting the basis for liability, would you agree that summary decision would be inappropriate?

Sophia Calderon:

Yes.

Noah Joshua Phillips:

Thank you.

Sophia Calderon:

Yes, thank you. I do want to make one final point with respect to the declarants though, and I'll do so very briefly, which is that, although the declarants' testimony is not necessary to the motion for summary decision, I do want to flag, as complaint counsel flagged in our reply brief. That on several occasions, respondent's counsel has miscast their testimony. And so I would urge the Commission not to accept respondent's counsel's representations about that testimony at face value without actually looking at the testimony that was provided by these declarants. Finally, still with respect to the summary decision standard, HomeAdvisor's argument that the parties are on the eve of trial and therefore should go forward, that, of course, contradicts with the argument that the summary decision motion is premature, it also negates the entire purpose of the summary decision mechanism, which is to avoid the expense and the burden of trial on the parties, on the Commission, when issues can fairly be decided without one.

With respect to the sample of calls and respondent's counsel's reference to expert testimony regarding whether it was representative of all of HomeAdvisor's sales calls, complaint counsel did not introduce the sample of calls, the 100 calls, as a representative sample. It may be representative. It may not be representative. It was not introduced by complaint counsel under the understanding that it was representative and it does not need to be here. In this forum, the Commission is not identifying quantitative analysis of how many times injury occurred. The analysis here is whether there was a pattern or practice of misrepresentations. The representations made in those recorded sales calls, and again, I would direct the Commission to the Appendix to the Statement of Material Fact, those

representations in combination with HomeAdvisor's national advertising, in combination with HomeAdvisor's internal training materials, HomeAdvisor's scripts, HomeAdvisor's approved claims for its sales agents, HomeAdvisor's internal guidance from its Quality Assurance Department, all of that together establishes substantial evidence of a pattern or practice. With respect to Mr. Hidalgo, HomeAdvisor's-

Noah Joshua Phillips:
Counselor?

Sophia Calderon:
Yes.

Noah Joshua Phillips:
Sorry for the interruption. I just want to follow up. Did you just say that the sample of calls, the question or the answer to the question, whether it is representative, isn't relevant because there are also other kinds of statements. So it doesn't matter if it's a representative sample for purposes of our decision.

Sophia Calderon:
That's correct, Commissioner Phillips. What matters is that sample indicates that the claims were actually made to service for providers.

Noah Joshua Phillips:
Thank you.

Sophia Calderon:
With respect to Mr. Hidalgo's report, Mr. Hidalgo being HomeAdvisor's industry expert, again, I wanted to emphasize that what Mr. Hidalgo concludes is that service providers know and understand that leads are not guaranteed jobs. Again, complaint counsel does not allege that HomeAdvisor stated the claim that leads are guaranteed jobs. And nothing about Mr Hidalgo's report changes how a service provider would interpret the very clear plain meaning of the claims that were made here, ready to hire. Briefly, I wanted to touch on the CDA. The case that HomeAdvisor relies upon in its briefing is the Match Case. Even the broad immunity set forth in Match concerned very specifically representations made by third parties.

This here, this case, is about HomeAdvisor's representations. In every single instance, it's about HomeAdvisor's representations about HomeAdvisor's own products, and even under the broad immunity set forth in Match, that is not applicable to the facts here where the representations are made by HomeAdvisor. Unless the Commission has any questions that can be discussed on the open record, I would like to turn now to the remaining time that I have in camera. And I did want to clarify whether complaint counsel has any additional time other than the almost three minutes that I originally had.

April Tabor:
Yes. Ms. Calderon, yes, you have an additional 14 minutes and three seconds on your confidential time.

Sophia Calderon:
Thank you. Can the video conference operator please confirm when public access has been blocked?

Lina Khan:

Thank you so much, Ms. Calderon and Mr. Neuwirth, for your presentations. We are adjourned.