No. 20-3379

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

INNOVATIVE DESIGNS, INC.,
Defendant-Appellee.

On Appeal from the U.S. District Court for
the Western District of Pennsylvania
No. 2:16-CV-01669
(Hon. Nora Barry Fischer)

REPLY BRIEF OF THE FEDERAL TRADE COMMISSION

DANIEL KAUFMAN
Acting Director

ALEJANDRO ROSENBERG
KATHERINE JOHNSON
Attorneys

Bureau of Consumer Protection

JAMES REILLY DOLAN
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-3579
iabyad@ftc.gov

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Innovative Designs, Inc. (IDI) advertised its premium-priced product as having R-values of either R-3 or R-6, established by "ASTM C518" testing. IDI admitted in pretrial stipulations, however, that tests conducted under that standard had *never* yielded those R-values. In other words, as we explained in our opening brief, the evidence showed that IDI's advertising claims were untrue, and the district court erred by failing to account for the import of IDI's admissions and holding the agency to an improper burden of proof that requires expert testimony to the exclusion of other kinds of evidence, specifically a party's factual admissions made through stipulation.

IDI does not dispute the premises on which the FTC's argument rests (and from which our conclusion necessarily follows). Instead, it seeks to sidestep them with three arguments that are fundamentally wrong. *First*, IDI contends that the FTC had to show that IDI's *test results* were false, which the agency could not do after the court struck its experts. That claim fails because the law is clear that what the FTC had to show is that IDI's *advertising claims* were false, which the FTC did by showing that IDI claimed Insultex's high R-values were based on the "ASTM C518" standard when—as IDI admits— they were not.

Second, IDI misstates its burden under the analytical framework for assessing the substantiation of advertising claims. The parties agree that courts first require the FTC to establish what the relevant scientific community would deem acceptable substantiation, after which the burden shifts to the advertiser to show that it had such proof. The district court found—and IDI does not challenge—that substantiation for R-value claims demands "ASTM C518" testing. IDI admitted both that it never had such testing showing R-3 and R-6, and that its proffered testing deviated significantly from the ASTM C518 standard by employing air gaps. IDI now asserts, incorrectly, that it could satisfy its burden by producing any evidence that it relied on to support its claims, whether or not that evidence meets the standard required by the scientific community. The law demands more than mere reliance; otherwise, proof of the scientific consensus would be superfluous.

Indeed, this Court has established that a marketer relying on *nonstandard* techniques must "well explain" its modification to the standard. IDI admits that its testing deviated from the ASTM C518 standard by including 3/4-inch air gaps. But IDI did not explain why its R-value results should be considered valid notwithstanding the air

gaps, nor did it tell consumers that the advertised Insultex R-values were the result of testing using air gaps. And IDI completely fails to address the FTC's R-value Rule's expressly barring the use of air gaps in R-value testing—a glaring failure given the court's finding of what constitutes appropriate substantiation.

Third, IDI attempts to evade the district court's pretrial rulings that exclude its substantiation evidence. It argues that the "truth or accuracy of the R-values in the BRC testing certificates"—the sole basis for its claims—is irrelevant to whether it could substantiate those claims. In other words, IDI apparently claims that it relied on the BRC test results in good faith, but good faith is not a defense to liability under the FTC Act, and IDI's machinations in securing those results belie a claim of good faith anyway.

The FTC has shown that IDI's admissions and the district court's pretrial rulings sufficed to show that IDI did not have support for its advertising claims. The court's failure to account for those stipulations and rulings was reversible error, and IDI's brief does nothing to alter that conclusion. This Court should reverse the judgment below and remand the case for further proceedings.

I. IDI's Pretrial Stipulations Alone Establish That IDI Made False Claims Concerning Insultex's R-Values.

As we explained in the opening brief (FTC Br. 36-42), IDI made both specific and non-specific establishment claims concerning the Insultex R-values. It made the *non-specific* marketing claims that Insultex had R-values of R-3 or R-6, implying that the claims rested on valid testing. Answer ¶11 (Appx228); *see also* J111 at 4 (Appx691); Op. 15 (Appx022). It also made the *specific* claim that those high R-values were based on the "ASTM C-518" standard, J74 at 3 (Appx687); *see also* J72 at 31 (Appx680); Op. 15-16 (Appx022-023). IDI's website and marketing materials claimed expressly that the advertised R-3 and R-6 values were based on the "Test Method" of "ASTM C-518." J74 at 3 (Appx687); J72 at 31 (Appx680); *see* Op. 16 (Appx023). IDI also widely distributed "Certificates of Analysis" claiming that Insultex's R-3 and R-6 were based on "R-Value Testing as per ASTM C518." J10-J13 (Appx617-624); *see* Op. 16 (Appx023); ECF_127 ¶¶30-31 (Appx243-244).

To lawfully make these specific establishment claims, IDI had to "possess the specific substantiation [it] claimed." *Pom Wonderful, LLC v. FTC*, 777 F.3d 478, 491 (D.C. Cir. 2015) (quoting *Removatron Int'l Corp. v. FTC,* 884 F.2d 1489, 1492 n.3 (1st Cir. 1989)); *see* Op. 31

(Appx038) (citing *FTC v. QT, Inc.*, 448 F. Supp.2d 908, 959 (N.D. Ill. 2006)). That is, IDI had to possess ASTM C518 tests showing insulating values of R-3 and R-6. IDI stipulated, however, that "[a] standard ASTM C518 test conducted on a single layer of R-3 *has never returned* an R-value of R-3," Joint Stipulations (ECF_127) ¶35 (Appx244) (emphasis added), and that "[a] standard ASTM C518 test conducted on a single layer of R-6 *has never returned* an R-value of R-6," Joint Stipulations (ECF_127) ¶36 (Appx244) (emphasis added). Those stipulations show that IDI's specific claims of R-values based on "ASTM C-518" were false.

As we showed in the opening brief, the district court's failure to take those admissions into account was reversible error. That is so because, in deciding a Rule 52(c) motion, "the district court applies the same standard of proof and weighs the evidence as it would at the conclusion of the trial." *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 272 (3d Cir. 2010). Yet the district court ignored this dispositive evidence of falsity. *See DLJ Mortgage Capital, Inc. v. Sheridan*, 975 F.3d 358, 371 (3d Cir. 2020) (in Rule 52(c) context, trial courts should

"not view the evidence through a particular lens or draw inferences favorable to either party") (citing *EBC*, 618 F.3d at 272).

IDI's brief completely ignores the fatal effect of its factual stipulations. IDI argues instead that the FTC did not prove the falsity of its marketing claims because "[t]here is no evidence in the record demonstrating that BRC's tests produced false results." IDI Br. 25. That contention fails because it ignores IDI's specific "ASTM C518" establishment claims.

In particular, IDI argues that its advertisements were not shown to be false because, after the district court excluded the FTC's expert testimony, the FTC could not show that the BRC test results were incorrect. IDI Br. 25-26. But the FTC, as to the specific establishment claims, was not required to show that the BRC test results were incorrect; it had to show only that the advertising claims of insulating value based on "ASTM C518" testing were untrue—which IDI admitted. There is no dispute that the BRC tests were not ASTM C518 tests; they were instead custom-designed modifications to the standard test, *see* Joint Stipulations (ECF_127) ¶¶27, 30 (Appx243), so their results are irrelevant to the specific "ASTM C518" claims.

II. IDI's Pretrial Stipulations Alone Establish That IDI Made Unsubstantiated R-Value Claims.

IDI also failed to substantiate its non-specific marketing claims that Insultex had R-values of R-3 and R-6. *See* Answer ¶11 (Appx228); Joint Stipulations (ECF_127) ¶¶10-13, 22-23 (Appx241, 242). As we explained in the opening brief (FTC Br. 7-8), it is settled law that IDI's substantiation evidence for these claims must be testing that "would in fact establish such a claim in the relevant scientific community." *Removatron*, 884 F.2d at 1498; *accord Pom Wonderful*, 777 F.3d at 491; *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1150 (9th Cir. 1984). The district court found, and IDI does not dispute, that ASTM C518 is "the prevailing standard" for R-value testing in the home insulation industry, Op. 26 (Appx033), and has been incorporated in the FTC's R-value Rule. 16 C.F.R. § 460.5. The court thus held that the required substantiation for IDI's R-value claims is testing conducted pursuant to the ASTM C518 standard. Op. 26 (Appx033). As discussed above, IDI has stipulated that it never possessed ASTM C518 testing showing R-3 and R-6 for Insultex. *See* Joint Stipulations (ECF_127) ¶¶35-36 (Appx244). That is all that the law requires to show that IDI did not substantiate its non-specific claims. *See Pom Wonderful*, 777 F.3d at

490-91; *FTC v. Direct Mktg. Concepts*, 624 F.3d 1, 8 (1st Cir. 2010); *Removatron*, 884 F.2d at 1498.

IDI nevertheless asserts in its brief that it met its substantiation burden by virtue of the BRC test certificates, and it contends that "[t]he truth or accuracy of the R-values in the BRC certificates is not the essential point on the issue of whether IDI proffered substantiation evidence." IDI Br. 30. In other words, IDI's position is that the mere proffer of the BRC certificates—regardless of whether they meet the ASTM C518 standard—is enough to discharge its burden, and it is then up to the FTC to prove that those testing results are either false or constitute unreasonable substantiation. That argument defies both law and logic.

As we showed in the opening brief, courts use a three-part framework for analyzing a claim's substantiation evidence under the FTC Act: First, the FTC must demonstrate "what evidence would in fact establish such a claim in the relevant scientific community." *Direct Mktg. Concepts*, 624 F.3d at 8 (quoting *Removatron*, 884 F.2d at 1498). If the agency makes that showing, the advertiser must then produce substantiation evidence that satisfies *that* scientific community

standard. The FTC retains the ultimate burden, however, of proving the inadequacy of the proffered evidence—again, *in reference to* the standard set in step one. *Id.*; *accord Pom Wonderful*, 777 F.3d at 490-91; *Removatron*, 884 F.2d at 1498; *see* Op. 31-32 (Appx038-039). The FTC can, therefore, satisfy this third step by "compar[ing] the advertisers' substantiation evidence to that required by the scientific community." *Direct Mktg. Concepts*, 624 F.3d at 8 (quoting *Removatron*, 884 F.2d at 1498).

There is no dispute that the FTC satisfied its burden under the first step. The district court specifically found that the scientific community would require ASTM C518 standard testing to support claims of R-values. Op. 26 (Appx033). That showing shifted to IDI the burden to show that it had such evidence. In IDI's view, however, it merely had to show that it relied on some kind of evidence, whether or not that evidence met the scientific standard established in step one. That was enough, in IDI's view, to shift to the FTC the burden to show that IDI's evidence was scientifically unacceptable—not in reference to the standard already set in step one, but *ab initio*. IDI Br. 28.

If IDI's view were the law, any advertiser could provide support for any marketing claim by relying on its own subjective belief in the accuracy of the claim, no matter how far-fetched, unscientific, or untethered to the consensus view of the evidence required to support the claim. That conception of the nature of the advertiser's burden at the second step would render the first step of this framework entirely superfluous.

It is therefore unsurprising that IDI's position is not the law. Rather, once the court has determined, in step one, "what sort of evidence would scientifically establish the claims" at issue, the burden shifts to the advertisers to show that they "were actually possessed *of such evidence*." *Direct Mktg. Concepts*, 624 F.3d at 9 (emphasis added); *accord Pom Wonderful*, 777 F.3d at 491; *Removatron*, 884 F.2d at 1498. Here, IDI failed to carry out its burden.

As a threshold matter, although IDI purports to rely on the BRC test certificates as substantiation for its claims, those tests were never admitted in evidence for their substance—as IDI concedes. *See* IDI Br. 32 n.3 (the BRC test reports "would be used only for notice"). In other words, there was no evidence in the record on which the district court

could properly rely to determine that IDI's R-value claims were in fact substantiated. Indeed, the only record evidence of any ASTM C518 test results that the court could—and should—have considered comes from IDI's stipulations that unmodified ASTM C518 testing of Insultex never returned an R-value of R-3 or R-6. Joint Stipulations (ECF_127) ¶¶35-36 (Appx244). At minimum, these admissions, along with the pretrial ruling that precluded substantive consideration of the BRC test results, necessarily precluded the district court from rendering judgment on IDI's Rule 52(c) motion.

Furthermore, even assuming *arguendo* that the district court could have considered the BRC test certificates as evidence of Insultex's R-values, IDI admitted that those test certificates were based on a *modified* ASTM C518 testing method. Joint Stipulations (ECF_127) ¶¶27, 30 (Appx243). In other words, the BRC tests admittedly did not comply with the substantiation standard that the court set in step one of the analysis. That admission is enough to render them unacceptable as substantiation for IDI's R-value claims.

To be sure, in some cases, the proffered substantiation evidence may seem initially compliant with the standard set in the first step, so a

more searching analysis may be necessary (under step three) to show the inadequacy of the proffered evidence under the standard set in step one. That is often the case, for instance, with challenging claims of disease prevention or treatment, where the standard of substantiation typically is well-conducted, randomized and controlled human clinical trials (or RCTs) that establish the claimed effect of the product at issue. In *Pom Wonderful*, for example, the challenged marketer claimed that its pomegranate juice could ameliorate or cure three particular ailments: heart disease, prostate cancer, and erectile dysfunction. 777 F.3d at 484. To substantiate those claims, Pom Wonderful proffered scientific studies that purported to be RCTs showing the claimed health benefits of its product, *id*. at 484-88, and the FTC had to demonstrate with rigorous analysis that those studies were inadequate because of poor study design, uncontrolled trial execution, or faulty interpretation of the clinical results, *id*. at 494.

But where the proffered substantiation evidence admittedly fails to meet the required standard set in step one, no further analysis is needed to show its inadequacy. Here, the court found that ASTM C518 testing is the required standard for substantiating R-value claims, and

IDI admitted that (a) such testing never produced the R-values that IDI claimed, and (b) the BRC testing on which IDI relied in fact deviated significantly from the ASTM C518 standard. Those IDI admissions suffice, without expert testimony or other test results, to show that IDI did not possess the necessary substantiation for its R-value claims. Nothing more was needed to establish IDI's liability under the FTC Act.

IDI argues that the record "does not show that the modifications by BRC would fail to satisfy the scientific community," and that "the FTC needed to compare the standard C518 testing to the modified C518 testing to prove that the modified method was not reasonable." IDI Br. 29. That claim fails in two critical respects. First, as the court below held, drawing upon precedent of this Court, IDI's *non*-standard testing techniques required *IDI* and not the FTC to justify its modifications to the prevailing industry standard. As the district court put it, employing testing techniques "that deviate from the R-value Rule or the [ASTM] C518 Standards[] need to be well explained." Op. 26 (Appx033) (quoting Daubert Op. (ECF_218) at 20-21 (Appx531-532); citing *In re Zoloft (Sertraline Hydrochloride) Prods. Liability Litig.*, 858 F.3d 787, 797 (3d Cir. 2017)).

IDI has admitted that the BRC tests on which it based its claims deviated from ASTM C518 by employing 3/4-inch air gaps on either side of the tested Insultex specimen. *See* Joint Stipulations (ECF_127) ¶27 (Appx243); IDI Br. 4. That modification to the testing standard was particularly significant considering the FTC's R-value Rule's express requirement that R-value testing "must be done on the insulation material alone (*excluding any airspace*)." 16 C.F.R. § 460.5 (emphasis added). IDI's only proffered reason for employing the air gaps was that they "were needed because the Insultex products are notably thin." IDI Br. 4.[1] But that explanation does not hold water. The industry already has developed techniques to test thin materials that are consistent with both the ASTM C518 standard and the R-value Rule. For example, multiple layers of the subject material can be stacked, providing a thicker testing specimen, or the subject material can be sandwiched between other layers of known R-value to provide the necessary thickness. *See* J2 (ASTM C518-10) §§ 7.2.1, 8.3 (Appx585, 586)

[1] Indeed, even that explanation could not be in the trial record after IDI's withdrawal of Robert Manni from its witness list and the district court subsequent ruling that he was barred from testifying. PTC Tr. (ECF_226) at 29:3-16 (Appx073). Manni, BRC's sole employee, was the only person who could explain BRC's nonstandard use of air gaps in its R-value testing. *See* Joint Stipulations (ECF_127) ¶¶26, 30 (Appx243).

(discussing stacking and sandwiching); *see also* 44 Fed. Reg. 50218, 50238 n.190 (Aug. 27, 1979) (R-values generally reflect the cumulative thermal properties of all substances being tested as an assembly).[2]

Second, even if IDI could somehow justify the use of air gaps in its testing, its R-value claims would still be deceptive. Those claims are not deceptive just because IDI employed the air gaps—although, to be sure, such use contravened the R-value Rule—but because IDI never accounted for the impact of using those air gaps when making its R-value claims. As we explained in the opening brief (FTC Br. 14-15), because air generally is an "excellent" insulator (as IDI itself has acknowledged, *see* J72 at 5 (Appx654)), enclosed air spaces can themselves have substantial R-values. *See* FTC Br. 15 n.5. In other words, the R-value readings in the BRC modified tests reflected the thermal properties of not just the Insultex material, but also the two air

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[2] IDI attempts to bridge this analytical gap using BRC's accreditation by PJLA, claiming that "PJLA was already aware that the C518 testing by BRC was a modified form." IDI Br. 5. IDI's naked assertion is contradicted by undisputed record evidence, however, including PJLA's testimony that the modifications it knew about at the time of accreditation were that BRC may employ industry-accepted methods to address the thinness of the Insultex material, like stacking or sandwiching—*not* that the BRC customized testing apparatus has built-in air gaps. *See* PJLA Dep. Tr. at 148:20-149:24 (Appx274-275).

gaps on either side of it—as an assembly. *See* 44 Fed. Reg. at 50238 n.190 (the R-value of an assembly reflects the cumulative thermal properties of *all* its elemental layers). Failing to account for the additional insulation provided by those air gaps significantly skewed the reported R-value readings for Insultex—negating any supposed accuracy of the BRC tests. IDI made that error worse by telling its customers to apply its house wrap "flat and tight" against the surface of the house. J72 at 18 (Appx667). Those instructions materially altered the real-world use conditions of Insultex from the conditions under which it was purportedly shown to have high insulation properties. *See* 44 Fed. Reg. at 50218 ("R-values must be determined … at a product's installed … thickness."). Thus, even if facially consistent with IDI's marketing claims, the BRC test certificates would not substantiate those claims.

Nor does IDI fare any better when it argues that "the standard C518 protocol contemplated adaptations." IDI Br. 29. As we explained in the opening brief (FTC Br. 40-42), neither the language nor purpose of the ASTM C518 standard supports the idea that marketers may customize their testing methodology to engineer support for their

predetermined R-value claims. More importantly, though, whatever the "adaptation" limits of ASTM C518 may be, they cannot justify IDI's failure to account for the impact of using air gaps in testing on the advertised Insultex R-values. Nor can they justify IDI's failure to inform its customers that those high R-values were achieved only through the use of air gaps.

III. IDI CANNOT INVOKE A GOOD FAITH RELIANCE DEFENSE UNDER THE FTC ACT.

We explained in the opening brief (FTC Br. 47-48) that IDI could not use the BRC test results to substantiate its R-value claims because that evidence was rendered inadmissible by the district court's pretrial rulings. The court ruled that R-value test reports will be admitted for their substance *only if* those tests could be explained to the court at trial. *See* Op. 29-30 (Appx036-037); Daubert Op. (ECF_218) at 22 (Appx533). Under that admissibility standard, and after IDI withdrew BRC's Robert Manni from its witness list, causing the district court to bar his testimony, PTC Tr. (ECF_226) at 29:3-16 (Appx073), the BRC test reports were not in the record for their substance—i.e. for the R-values they reported—when the court ruled on IDI's Rule 52 motion.

IDI does not challenge the court's pretrial rulings. *See* IDI Br. 32 n.3. It argues instead that the "truth or accuracy of the R-values in the BRC certificates" is irrelevant to whether it satisfied its burden to substantiate its claims. IDI Br. 30. Those test certificates, in IDI's view, "served as evidence that BRC conducted tests, that IDI knew of—was on notice of—those tests, and that IDI relied on those tests." IDI Br. 31. As we demonstrated above, however, IDI's burden is not simply to point to what it relied on, but to actually show that what it relied on substantiates its R-value claims. Under the court's pretrial rulings, the BRC test certificates could not be used to show that Insultex's R-value is R-3 or R-6, so IDI seems to be arguing that, because those certificates *say* that Insultex has those R-values—regardless of whether or not that was true—IDI was entitled to rely on them. In other words, IDI seeks to invoke a good-faith reliance defense to making its deceptive R-value claims. Such a defense has no basis in law or fact.

First, there is no "good faith" defense to liability under the FTC Act.[3] Section 5 of the Act prohibits "unfair or deceptive acts or practices

[3] A marketer's good faith may be considered for the limited purpose of ascertaining the likelihood of recurrence in fashioning injunctive relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *See FTC v.*

in or affecting commerce." 15 U.S.C. § 45(a)(1). This Court has long held that "[a]n intent to deceive is not an element of a deceptive advertising charge under § 5." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *accord Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). Because Section 5 does not require proof of intent to deceive, good faith is not a defense to making deceptive marketing claims. *See, e.g.*, *FTC v. Hope Now Modifications, LLC*, No. 09-1204, 2009 WL 3682057, *1 (D.N.J. Nov. 4, 2009) (striking defense of good faith reliance on counsel in deceptive marketing of mortgage modification services); *FTC v. Davison Assocs., Inc.*, 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006) (no need to show intent to deceive for deceptive marketing of invention services). This core principle of FTC law has been uniformly recognized by the courts of appeals. *See, e.g.*, *Curtis Lumber Co., Inc. v. La. Pac. Corp.*, 618 F.3d 762, 779 (8th Cir. 2010); *FTC v. Verity Int'l, Ltd.,* 443 F.3d 48, 63 (2d Cir. 2006); *Removatron*, 884 F.2d at 1495; *FTC v. Bay Area Bus. Council, Inc.,* 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir.1988); *Chrysler Corp. v. FTC*, 561

AbbVie Inc., 976 F.3d 327, 381 (3d Cir. 2020) (citing *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 158 (3d Cir. 2019)).

F.2d 357, 363 n.5 (D.C. Cir. 1977); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *Koch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953).

Moreover, even if the defense were available, IDI's pervasive role as the architect behind the engineering of those now-inadmissible BRC test results belies any claim of good faith. As we detailed in the opening brief (FTC Br. 12-17), IDI disregarded multiple test results—including the results of studies that IDI itself commissioned—showing that Insultex had a negligible R-value. Joint Stipulations (ECF_127) ¶¶ 35-37 (Appx244). After failing to get the desired R-values from experienced labs using standardized tests, "IDI went looking for a test" that would secure it those R-value readings. ECF_226 (Pretrial Hearing Transcript) at 25 (Appx069). It chose BRC for the task—knowing that BRC was a water-testing lab that had never conducted, was not accredited to conduct, and did not even possess the equipment to conduct, any type of thermal testing. Joint Stipulations (ECF_127) ¶¶24-26 (Appx242-243). IDI then paid a significant premium to finance the building of a customized testing apparatus that employed air gaps to achieve the R-values it sought—even when that contravened an

express regulatory prohibition. Joint Stipulations (ECF_127) ¶27 (Appx243); 16 C.F.R. § 460.5.

Significantly, despite being well aware of that modification to the standard testing, IDI continued to claim high Insultex R-values without any qualification in its marketing materials about the use of air gaps in the substantiating tests. Op. 15 (Appx022). And it continued to instruct its customers to install Insultex without air gaps—contrary to how the high R-values were purportedly achieved during the testing. J72 at 18 (Appx667).

Finally, when IDI sought to buttress the credibility of BRC's test results with accreditation, it selected a firm—Perry Johnson Laboratory Accreditation, Inc. (PJLA)—that had never before accredited any lab for thermal resistance testing, and has not done so since. Joint Stipulations (ECF_127) ¶¶33-34 (Appx244); Op. 14 n.18 (Appx021). IDI paraded the PJLA accreditation as a marketing tool for Insultex even though it knew that PJLA "never actually observed any testing" at BRC and was indeed "unaware" that BRC used air gaps when it accredited that lab's testing. Op. 14 (Appx021); PJLA Dep. Tr. at 155:15-157:21 (Appx276-277).

IDI all along was both the planner and principal driving force behind the BRC R-value results. With a pattern of disregarding more reliable but undesired test results, affirmatively skirting standards and regulations, seeking out labs with no relevant expertise, and failing to disclose to consumers the circumstances under which those high R-values were secured—which should have raised serious doubts about their accuracy and reliability—IDI can hardly claim good faith reliance on them as if it had no idea how they were achieved.

IV. IDI's Stipulations Suffice to Establish Its Liability for Providing the Means and Instrumentalities for Deceptive Claims.

Count III of the Complaint alleged that IDI provided others with "the means and instrumentalities" to disseminate false or misleading claims to consumers, in contravention of the FTC Act. *See Cmplt*. ¶33 (Appx223). IDI has admitted to providing its sales representatives and independent resellers with promotional materials that included the challenged R-value claims, which those representatives and resellers in turn disseminated to consumers. Joint Stipulations (ECF_127) ¶¶16-17, 31 (Appx241-242, 243-244). As we showed above—and contrary to IDI's assertion in its brief, IDI Br. 34—those challenged R-value claims were

false or deceptive. Accordingly, IDI's admissions that it provided others with the means to disseminate those claims to consumers suffice *a fortiori* for establishing IDI's liability under the FTC Act. The district court thus also erred in granting judgment to IDI on Count III of the FTC's complaint.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the judgment of the district court should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

DANIEL KAUFMAN
Acting Director

ALEJANDRO ROSENBERG
KATHERINE JOHNSON
Attorneys

Bureau of Consumer Protection

JAMES REILLY DOLAN
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ Imad Abyad
IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-3579
iabyad@ftc.gov

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COMBINED CERTIFICATIONS

COMPLIANCE WITH VOLUME, TYPEFACE AND STYLE

1. This brief complies with the type-volume limit of Fed. R. App. P. 37(a)(7)(B) because it contains 4,650 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it was prepared in 14-point Century Schoolbook proportionally spaced font using Microsoft Word 2010.

BAR MEMBERSHIP

All signatories to this brief are federal government attorneys.

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I certify that the text of the electronically filed brief is identical to that of the paper copies mailed to the Clerk of the Court of the U.S. Court of Appeals for the Third Circuit.

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I certify that on April 13, 2021, I performed a virus check on the electronically filed copy of this brief using 2018 Windows Defender Antivirus Version 1.335.740.0 (protection definitions last updated 1:56 AM April 13, 2021). No virus was detected.

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I certify that on April 13, 2021, I filed the foregoing brief via the Court's CM/ECF system. All parties will be served by that system.

April 13, 2021

/s/ Imad Abyad

Imad D. Abyad
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 2058