

Case# XXXX (09/25/15)

SPRINT CORPORATION

Advertising by Sprint Corporation

Challenger: *T-Mobile USA, Inc.*

Product Type: *Telecommunications*

Issues: *Pricing/Discounts/Sales Claims*

Disposition: *Substantiated In Part/Modified-Discontinued In Part*

Basis of Inquiry: Pricing claims made in broadcast, print and Internet advertising by Sprint Corporation (“Sprint” or “the advertiser”) were challenged by T-Mobile USA, Inc. (“T-Mobile” or “the challenger”), a competing wireless service provider. The following are representative of the claims that served as the basis for NAD’s inquiry:

Express Claims:

“Get a Free Samsung Galaxy S6 when [consumers] sign up for the new Unlimited Plus Plan.”

“Get a FREE Samsung Galaxy S6.”

“Sign up for the new Unlimited Plus Plan and get a Samsung Galaxy S6 Free.”

“First FREE phone lease in the wireless industry.”

“Get a free Samsung Galaxy S6 and pay just \$80/mo.”

The accuracy of Sprint’s price comparison chart.

Implied Claims:

Consumers Will Receive a Samsung Galaxy S-6 for free.

Challenger’s Position:

I. “Free” claims

The challenger explained that phone ownership has been the predominant model for mobile phone service providers. According to the challenger, customers seeking mobile phone services from a carrier were required to purchase a phone to use on the carrier’s network if they did not already own one. Due to the high cost of mobile phones, many mobile phone carriers implemented a subsidy system—for example, consumers who signed a two-year service agreement with the particular carrier would pay a higher monthly service charge to offset the subsidized cost of the cell phone. Mobile phone subsidization arrangements created a consumer expectation of phone ownership because customers owned their wireless phones throughout their two-year service agreement with a carrier and could keep the phone after their contract expired.

According to the challenger, the advertiser introduced its Unlimited Plus Plan by featuring the highly anticipated Samsung Galaxy S6 smartphone (“Galaxy S6”) to attract new customers to its

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service plan and ultimately improve its position in the marketplace.¹ Capitalizing on enormous consumer interest in the Galaxy S6, the advertiser promises consumers a “Free” Galaxy S6 when they sign up for Sprint’s “new Unlimited Plus Plan.”

The challenger explained that the offer of “free” merchandise is an “undeniably strong marketing tool.”² As a result, the advertiser contended that free offers must be made with extreme care to ensure that consumers are not misled or deceived.³ The challenger further noted that the FTC prohibits advertisers from directly or indirectly marking up the price of any merchandise sold in connection with the “free” good in order to recoup its cost.⁴

The challenger argued that the advertiser’s Unlimited Plus Plan is a new and unusual phone leasing program. Under the plan, customers use, or “lease,” a Galaxy S6 for two years subject to an \$80 monthly service fee. After this two-year period, subscribers can either return their phone to Sprint, purchase their phone, or renew their lease.

It was the challenger’s position that the challenged advertising reasonably conveys that Unlimited Plus Plan subscribers would receive free *ownership* of a Galaxy S6 in accordance with a typical phone purchase plan. The challenger argued that while the word “free” was prominently emphasized in Sprint’s disputed advertisements, the word “lease” was not. For example, the challenger noted that the word “lease” is not mentioned in the advertiser’s Spanish-speaking television advertisements except in a fine-print disclosure. Additionally, the advertiser’s English-language television advertisements, which inform consumers that they can “sign up for the new Unlimited Plus Plan and get a Samsung Galaxy S6 free,” include only a fleeting reference to the nature of the “lease” through an on-screen disclaimer containing eight additional lines of text shown in conjunction with the distracting animation.⁵

The challenger also took issue with Sprint’s claims that its offer was the “First FREE phone lease in the wireless industry,” and that its Unlimited Plus Plan constituted the “*best* phone lease yet” (emphasis added). Because lease options are new in the phone industry, the challenger argued that these claims do not clearly emphasize the unique nature of this lease plan. According to the challenger, the advertiser’s portrayal of its lease plan as “better” conflates the advertiser’s “free” lease offer with a typical smartphone purchase plan.

¹ Because the Galaxy S6 ordinarily sells for \$648 under the advertiser’s regular service plan, the challenger maintained that the prospect of receiving the Galaxy S6 for “free” would be incredibly attractive to consumers.

² Coastal Contacts, Inc. (Coastal Contacts, Inc. Advertising), Report #5387, *NAD/CARU Case Reports* (October 2011).

³ See “Guide Concerning the Use of the Word ‘Free’ and Similar Representations,” 16 C.F.R. § 251.1(a)(2) (“Because the purchasing public continually searches for the best buy, and regards the offer of ‘Free’ merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.”).

⁴ 16 C.F.R. § 251.1.

⁵ Similarly, the challenger contended, Sprint’s animated Internet advertisements refer to the word “lease” fleetingly before transitioning to a static message informing consumers that they can get a “free Samsung Galaxy S6” without mentioning the word “lease.”

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The challenger explained that consumers will not own their “free” phone under Sprint’s Unlimited Plus Plan. Rather, they only receive a contractual right to use a phone for two years, and the challenged advertising fails to clearly and conspicuously disclose this and other material conditions of the plan.⁶ For example, if a subscriber purchases the Galaxy S6, upon the expiration of the two-year lease, he would be required to pay between \$100 and \$200 (the estimated market value for the Galaxy S6 in two years). Accordingly, the challenger contended, the Unlimited Plus Plan simply does not allow subscribers to keep their Galaxy S6 phones for free. The advertiser rejected the advertiser’s contention that its advertisements comply with the dictionary definition of “free” because its Unlimited Plus Plan allows consumers to use a Galaxy S6 for free. The challenger referred to the challenged advertising in which the advertiser states that consumers can “*get a free Samsung Galaxy S6*” by signing up for the Unlimited Plus Plan, not that they have free *use* of the Galaxy S6 during a required two-year service contract or that the phone comes with any temporal restrictions.

The challenger further argued that the advertiser’s “free” lease does not actually save consumers money when compared with Sprint’s alternative payment plans. According to the challenger, consumers pay a higher monthly service charge for the use of the Galaxy S6 and they are not informed of the important differences between competing payment plans and the advertiser’s lease.⁷

In further support of its contention that consumers are confused by the challenged advertising, the challenger commissioned a consumer perception survey designed to measure consumer expectations stemming from the challenged advertising. The survey’s results showed that over 50 percent of participants believed they could own *and* keep a Galaxy S6 by switching to Sprint’s Unlimited Plus Plan.⁸ Moreover, the challenger noted that study participants often reported confusion over the advertiser’s “free” phone claims, resulting in a net confusion between test and control groups exceeding 50 percent. According to the challenger, these results demonstrated that the advertiser’s claims both confuse and mislead consumers by failing to make it clear that the Unlimited Plus Plan offers free use, but not ownership, of the Galaxy S6.

⁶ Additionally, Unlimited Plus Plan subscribers are held liable by Sprint for any lost or damaged phones and for any “unreasonable or excess wear and use” of their phones over the course of the two-year lease—costs imposed on the consumer upon the termination of the lease. The challenger contended that “damage” in this context is defined broadly by the advertiser to encompass types of damage ordinarily experienced by phones in a two-year period of use.

⁷ In its response to the challenge, the advertiser informed NAD that it had discontinued its “free” phone claims for reasons unrelated to the challenger’s challenge. According to the challenger, the advertiser subsequently informed NAD that it intended to renew its use of the claim. The challenger argued that the advertiser has failed to modify its advertising in any meaningful way.

⁸ This study consisted of 400 individuals. A test group viewed Sprint’s current home page, and a control group viewed a modified version of Sprint’s home page that changed the headline claim from “Free Samsung Galaxy S6 to “Free 2-Year lease of Samsung Galaxy S6.” After viewing the advertising, test and control group respondents were asked the same series of questions. According to the survey expert, their answers demonstrate a high degree of consumer confusion stemming from the claim “Free Samsung Galaxy S6.” The survey expert reported that nearly 70 percent of the respondents indicated that they would expect “no” limits on how long they would get to use the Samsung Galaxy phone for free, in comparison to 13.5 percent of the control group respondents who anticipated such limits. As a result, there is a net confusion level of 55.5 percent.

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With regard to the advertiser's reliance on marketing examples such as "free car rental" and "free hotel stay" to illustrate the fact that "free" may accurately describe the limited "use" of a product or service, the challenger contended that "rentals" and "hotel stays" have inherent temporal limitations while a free phone offer does not. The challenger explained that consumers would not reasonably expect a free "rental" or "hotel stay" to confer long-term ownership. Rather, they understand these arrangements confer only temporary use of a product or service. The advertiser argued that consumers *do* expect that a "free phone" may be kept permanently without cost or charge as supported by the challenger's consumer survey and traditional phone ownership models.

The challenger argued that the advertiser's "free" Galaxy S6 offer is conditioned upon registration for the advertiser's Unlimited Plus Plan, which costs consumers \$80 per month—\$20 to \$30 more than the advertiser's existing unlimited service plans. In addition, the Unlimited Plus Plan includes additional features the majority of customers will not use, such as a "free" early phone upgrade and unlimited international texting.⁹ According to the challenger, the advertiser includes these additional features, increasing the cost of the Unlimited Plus Plan in order to offset the costs associated with offering a "free" phone lease.¹⁰ Consequently, nothing is uniquely "free" under the advertiser's Unlimited Plus Plan.¹¹ The challenger referred to the FTC's Free Guides which advises that retailers cannot "recover in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise or service, or otherwise."¹²

II. Sprint's Price Comparison Chart

The challenger also took issue with the advertiser's comparative pricing chart, which juxtaposed the two-year cost of Sprint's Unlimited Plus Plan lease with the two-year costs of the competing smartphone purchase plans offered by T-Mobile, Verizon, and AT&T. According to the challenger, the comparison chart misleads consumers as to the nature of the plans being compared and falsely disparages T-Mobile in characterizing the additional features included in its purchase plan as a "waste."¹³

⁹ The challenger further explained that "free" early upgrades lack value in the context of the Unlimited Plus Plan. This is because a customer exercising an early upgrade option will receive a new device from the advertiser, effectively waiving the benefit of a \$20 per month device credit that is currently offered *only* for the Galaxy S6.

¹⁰ Collectively, these benefits are worth \$20 per month, and are typically packaged as options to be purchased in addition to Sprint's normal Unlimited Plan. The challenger contended that very few wireless customers actually use international texting, either because they have no one to text in foreign countries, or because certain mobile applications permit customers to text internationally for free using data connections—in fact, this is why this feature is ordinarily sold as an extra option to the normal Unlimited Plan.

¹¹ The challenger noted that the advertiser's prior 2014 lease option with respect to the Samsung Galaxy S5, which was not characterized as "free," cost consumers exactly the same amount as Sprint's 2015 "free" lease under the Unlimited Plus Plan.

¹² See 16 C.F.R. §251.1(b)(1).

¹³ According to the challenger, T-Mobile customers receive a number of benefits not enjoyed by Sprint customers and which are not disclosed in the chart, such as 5 GB of high-speed data for tethering per month, international roaming in 120 countries (instead of 15 countries with Sprint), unlimited international SMS and MMS from the United States to over 200 countries (instead of 180 with Sprint), in-flight SMS/MMS with GoGo, and "Music Freedom," including Rhapsody unRadio.

The challenger also took issue with the following: 1) the failure to make clear that the chart compared a lease option to a purchase option, a material difference that should be clearly disclosed because many consumers are willing to pay higher prices for a purchase plan allows them to keep their smartphones; 2) the failure to clearly differentiate its lease from competing purchase plans, reasonably leading consumers to erroneously believe that they can keep their phone under the advertiser's Unlimited Plus Plan as they would with the purchase plans to which it is compared; and 3) as to the advertiser's "per year" savings claim, the failure to disclose the material fact that device payments imposed by T-Mobile's purchase plan cease after two years.

Advertiser's Position:

I. "Free" Claims

By way of background, the advertiser explained that as mobile technology has evolved, so too have payment plans for those devices. While purchasing a cell phone at a discounted price traditionally required the signature of a two-year service contract with a cell phone carrier, consumers can purchase their devices in installments without a two-year service contract. The advertiser asserted that it is the first major mobile service provider to offer mobile phone leasing, a competitive business differentiator that affords customers unique and comparatively inexpensive access to the newest smartphones. The advertiser explained that the comparative affordability of its leasing program is one of its key selling points and argued that it should be permitted to make truthful comparative pricing claims touting this important market advantage.

A. Advertisements

1) Television

In one television commercial, a mother and daughter are shown attending a live auction of a diamond encrusted feline figurine. The mother says "Sprint told us they cut our Verizon bill in half....We saved a bunch of money on our rate plan by switching to Sprint." After some humorous and idle banter between the affluent duo, the voiceover states: "Some people are stupid rich. Cut your bill in half. Just turn in your old phone or for a limited time, sign up for the new Unlimited Plus Plan and get a Galaxy S6 free. Only from Sprint." At the same time, two frames appear in rapid succession—the first features the following text: "Or get a Samsung Galaxy S6 for FREE on the Unlimited Plus Plan." The following disclosure appears below: "Galaxy S6 32 GB lease and unlimited talk, text, and high speed data, all while in the Sprint network plus international roaming in select countries including unlimited data, up to 26 speeds and messaging." The following text appears below this disclosure "w/ \$20/mo. Credit on 24 mo. lease." In the second frame, the word "FREE" appears below which it states "It's our best phone lease yet" as a gold light flashes over the claim.¹⁴

¹⁴ This frame features the same disclosure as in the prior frame.

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In another commercial, the voiceover states “You don’t have to buy the Galaxy S6” (as the words “Don’t have to buy” appear onscreen), Sprint will just you give one for free” (as the word “FREE” appears onscreen). The following disclosure appears “After \$20/mo. credit on 24 mo. lease. Service plan is additional charge.” The voiceover continues: “Seriously. After a year, give it back and we’ll give you a brand new phone. And every year after that” as a picture of the Galaxy S6 appears next to the text “FREE on the new Unlimited Plus plan.”¹⁵ The voiceover continues: “Get the Galaxy S6 for free when you sign up for the new Unlimited Plus Plan” as the following text appears onscreen: “It’s the first FREE lease in the wireless phone industry” as the same gold light flashes across the words “first FREE phone lease.”¹⁶

2) Banner advertisement

The banner advertisement features the claim “Get a FREE Samsung Galaxy S6” which transitions to the following frames in rapid succession: 1) “With the NEW Unlimited Plus Plan”; 2) Get unlimited high-speed data, talk, text for \$80/month; 3) FREE Samsung Galaxy S6; 4) “It’s the first FREE lease in the wireless industry.”

3) Internet advertising

During the course of the challenge, the advertiser submitted its current advertising to NAD. On Sprint’s home page, there is a reference to the “Free Samsung Galaxy S6” below which it states: “When you sign up for the new Unlimited Plus Plan from Sprint.” Below the pictures of the Samsung Galaxy S6 is the following disclosure: “After \$20/mo. credit on 24 mo. lease. 32 GB only. Requires new line or eligible upgrade. Restrictions apply.” Similar claims appear at the bottom of Sprint’s homepage.¹⁷ On the “Promotions” page, there is a reference to the “Free Samsung Galaxy S6” below which it states: “With our new \$80 Unlimited Plus plan, get unlimited data, talk and text with the Samsung Galaxy S6 on a 24-month lease. It’s the first free phone lease in the wireless industry.” Similar claims appear elsewhere on the website.

The advertiser explained that while its “free lease” offer and related advertising for Galaxy S6 has run its course, it defended the challenged claims and argued that it should be allowed to truthfully advertise free phone leases to consumers.

It was the advertiser’s position that its premium Unlimited Plus Plan allows enrolled consumers to receive a two-year lease for the Galaxy S6, normally valued by Sprint at \$20 per month, at no cost. Unlike Sprint’s typical leasing offers in which consumers pay a monthly lease payment ranging from \$15 to \$25, under Sprint’s Unlimited Plus Plan, Sprint covers the cost of the device by applying a \$20 credit towards the device cost and subscribers pay nothing towards the cost of their Galaxy S6 devices, effectively rendering the lease “free.”

¹⁵ A similar disclosure appears onscreen: “Galaxy S6 (32GB) lease and unlimited talk, text and high-speed data all while on the Sprint network. Plus international roaming including unlimited data up to 20 speeds and messaging in selected countries.”

¹⁶ The text below states “The Sprint Unlimited Plus Plan. Upgrade to a new phone every year.”

¹⁷ E.g., “Get a FREE Samsung Galaxy S6 when you sign up for the new Unlimited Plus Plan from Sprint.” The same disclaimer appears beneath this claim.

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The advertiser defended the description of its Unlimited Plus Plan as “free” because it comports with common usage, FTC guidance, and NAD precedent. The advertiser argued that the word “free” qualifies the word “lease,” informing consumers that the plan offers free use (but not ownership) of the Galaxy S6.¹⁸ In addition, pursuant to FTC guidance and NAD precedent, it clearly and conspicuously discloses the significant limitations of its offer.¹⁹

The advertiser rejected the expert’s survey as insufficiently reliable to support the challenger’s contention that the challenged advertising reasonably conveys the message that consumers will receive a free Samsung Galaxy S6 for the following reasons: 1) the open-ended questions direct respondents to infer that the advertisement promotes the phone rather than the lease; 2) the survey cannot be extrapolated to demonstrate how consumers understand the advertising in the real world because consumers were only shown one webpage and were asked to focus on a single panel within Sprint’s homepage; and 3) respondents’ focus and attention to the survey was undermined based on the fact that more than 25 percent of the control group failed to understand that the term “free” modified the term “lease.”

It was the advertiser’s position that the challenger has arbitrarily restricted the use of the word “free” only to items that may be kept indefinitely, effectively barring Sprint from using the word “free” to describe leased devices. According to the advertiser, consumers are well accustomed to the extremely common practice of leasing. For example, the advertiser noted that the average consumer understands that a “free car rental” naturally requires the eventual return of the car. Similarly, consumers understand that a “free hotel stay” does not confer permanent ownership of a hotel room. Likewise, leased phones do not naturally confer or imply permanent ownership.²⁰ The advertiser asserted that its statement “upgrade to a new phone every year,” which appeared in several of its challenged advertisements, makes clear that the Unlimited Plus Plan entailed “trading in” phones rather than long-term ownership.

The advertiser argued that the mere fact that a customer must satisfy certain lease conditions does not obviate the “free” nature of a lease. According to the advertiser, wireless carriers have routinely promoted “free” phones that were only “free” upon the customer’s satisfaction of numerous conditions, including many of the conditions applying to Sprint’s lease. For example, if customers elected to cancel a carrier’s service before the expiration of the service contract, an

¹⁸ The advertiser asserted that “free,” according to Merriam-Webster, simply means: “not costing or charging anything.” The advertiser explained that neither the FTC nor the NAD have intimated that the term “free” cannot apply to leased items.

¹⁹ The advertiser explained that neither the FTC nor the NAD have intimated that the term “free” cannot apply to leased items. The advertiser explained that in Coastal Contacts, *supra* note 2, the NAD’s central concern regarding “free” claims was whether the terms and conditions relating to the free offer were clearly disclosed. The advertiser argued that it has acted in accordance with NAD precedent by prominently qualifying its “free” offer as a “phone lease.” In addition, the advertiser noted that its advertising informs consumers that they may upgrade their phone every year by turning in their old one at no additional cost.

²⁰ The advertiser took issue with the challenger’s argument that there is nothing inherent in a lease requiring that the leased product be returned. The challenger pointed to “lease to own” arrangements whereby the leased item need not be returned. However, the advertiser argued that the very existence of qualifiers such as “lease to *own*” and “rent to *own*” (emphasis added) concede the fact that ordinarily, “leasing” and “renting” arrangements preclude ownership. Thus, the advertiser contended that its “free lease” offer appropriately conveyed its temporary nature.

early termination fee would apply. Similarly, if a customer's phone was lost, stolen, or broken and he was uninsured, he could no longer enjoy "free" phone use. The advertiser contended that these traditional "free" phone offers are analogous to its "free" lease offer, and that it should not be barred from touting these arrangements as "free" based on speculative future contingencies. According to the advertiser, the challenged advertisements clearly and conspicuously qualify the "free Samsung Galaxy S6" offer with the word "lease."

The advertiser also rejected the challenger's contention that it raised the price of its regular unlimited rate plan to allow recovery of the expense associated with subsidizing consumers' monthly phone leases. The advertiser explained that the \$20 per month credit offered customers who lease the Galaxy S6 through the Unlimited Plus Plan eliminates the phone's lease cost for consumers and exists in *addition* to extra benefits included within Sprint's Unlimited Plus Plan.²¹ According to the advertiser, these additional features have a combined value of \$20 per month, and are available at an additional cost under the advertiser's normal Unlimited Plan. Consequently, the advertiser maintained, Unlimited Plus Plan subscribers receive a \$40 benefit between Sprint's lease credit and these extra features, or a net \$20 benefit when compared to the advertiser's regular Unlimited Plan.

III. Price Comparison Chart

The advertiser also represented in writing that it has permanently discontinued its challenged comparative pricing chart but contended that it reserves the right to make lease-versus purchase pricing comparisons.

The advertiser explained that one of the key selling points of its leasing program is its affordability relative to competing purchase plans. Given the pervasive nature of purchase and leasing price comparisons on the Internet, and that such comparative advertisements are widely permissible across many advertising mediums, consumers are entitled to be apprised of such pricing comparisons.

Decision:

I. "Free" Claims

Leasing in the wireless phone industry is a very new concept. It is undisputed that the traditional model was one of phone ownership—i.e., consumers pay for their phone upfront when they sign up for a particular service plan. It is against this backdrop that NAD reviewed the challenged advertising. In light of the newness of the concept of mobile phone leasing, the key issue before NAD is whether the challenged advertising reasonably conveys the message that consumers receive a free Galaxy S6 that they will own outright when they sign up for the Unlimited Plus Plan instead of the intended message: that consumers receive free use of the Galaxy S6 via a 2-year lease.

²¹ E.g., free annual upgrade to the latest available mobile phone, international roaming capability, and unlimited international texting.

At the outset, NAD noted that none of the challenged “free” claims was permanently discontinued prior to the commencement of this challenge. While the advertiser identified the current iterations of the challenged advertising (which has since run its course), the claims are the similar to those initially identified by the challenger.

A. Consumer Perception Survey

The challenger commissioned a online consumer perception survey of an advertisement on the advertiser’s homepage in support of its contention that the challenged advertising reasonably conveys the message that Sprint offers a free Samsung Galaxy S6 for consumers who sign up for its Unlimited Plus Plan. Consumer perception surveys can be a valuable tool in determining whether consumers perceive implied claims in a given advertisement. According to the expert, who conducted the survey, the results of the survey showed the advertising “communicates to a significant percentage of consumers that the offer is for a free phone they would own rather than a 2-year lease that would require consumers to pay to keep the phone beyond the lease period or to pay for a lost or damaged phone.”

NAD determined that the survey consisted of sufficient sample size (400 respondents equally divided among the test and control groups), a relevant universe of individuals who had signed up for or switched mobile plans within in the past 12 months, was geographically representative, and tested the relevant advertising.²² Unlike the test group—which saw the advertisement with the headline “Free Samsung Galaxy S6”—the advertisement for the control group substituted the “Free Samsung Galaxy S6” claim with “Free 2-Year Lease.”

An effective control ensures that the survey measures the messages that survey respondents receive from the test stimulus alone. The control stimulus should closely resemble the test stimulus and remove only the offending claims or phrases—for example, where a test advertisement is comparative, an effective control should also be comparative.²³ NAD determined that this control was appropriate because it removed the offending claim—“Free Samsung Galaxy S6”—and included the advertiser’s intended message: a free two-year lease.

As for the survey questions, NAD determined that there was an appropriate progression from open-ended main message questions to more focused open-ended questions and ending with a closed-ended question.²⁴ The survey also included a filter question to ensure that participants saw an element or express message actually contained in the advertisement.²⁵ Respondents who

²² All of the respondents were shown the entire homepage after which they were shown the specific section of the homepage containing the challenged advertising.

²³ *Bausch & Lomb Inc./Wal-Mart Stores, Inc. (Equate MPS and Moisture Last)*, Report #5808, *NAD/CARU Case Reports* (February 2015).

²⁴ See Shari Seidman Diamond, *Reference Guide on Survey Research*, at 247

(https://bulk.resource.org/courts/fjc/sciam.8.sur_res.pdf) (noting that “[t]he value of any open- or closed-ended question depends on the information it is intended to elicit. Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent’s mind, but closed-ended questions are suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives.”)

²⁵ “Did the advertising communicate anything about a Samsung Galaxy Phone?”

answered “yes” to the filter question were then presented with the following, focused open-ended questions:

“Please tell us as specifically as possible what the advertisement said about a Samsung Galaxy phone. Please be as complete and detailed as possible and tell us any terms or conditions the advertising communicated.”

“Based on the advertisement, is there any limit on how long you would get to use the Samsung Galaxy phone for free?” If respondents answered “yes” to the filter question, respondents were then asked:

“Based on the advertisement, for how long would you get to use the Samsung Galaxy phone for free? Please be as complete and detailed as possible.”

NAD determined that these questions afforded the respondents the opportunity to explain the nature and terms of the offer and then to mention whether or not there is a durational limit on the free use of the phone and, if so, to specify what it is.

The survey ended with the following closed-ended question, the first two answer options of which were randomized:

“Which of the following best describes the terms of the offer for a Samsung Galaxy phone?

- You receive a free Samsung phone that you own with no limitations
- You receive a Samsung phone that you can use for free for two years but would have to pay to keep it after that.
- Don’t know/not sure

NAD determined that the first two answer options accurately reflect reasonable takeaways of the challenged advertising.

As for the results, NAD noted that the expert grouped together the responses to main message open-ended questions, the filter question and the follow-up open-ended question. By so doing, NAD could not ascertain the results in response to the main message questions. Accordingly, NAD tabulated the results to the main message questions which showed that 72 percent of the respondents in the test group took away the message that they would receive a free phone with no limitations versus 14 percent of respondents in the control group, a net result of 58 percent. This is well above the 20 percent threshold of evidence of consumer confusion recognized by NAD and the courts.²⁶ NAD observed that of the 14 percent in the control group who took away a “free phone” message, nearly half mentioned that it was free for two years, a temporal

²⁶ NAD noted that 72 percent of respondents took away this message in response to the closed-ended question. According to the survey expert, in response to the closed-ended question, only 18 percent of the control group respondents answered that they would receive a free Samsung phone with no limitations.

limitation that was not as readily apparent in the test group.²⁷ In addition, 72 percent of respondents in the test group took away the message that they would receive a free phone with no limitations in response to the closed-ended question compared to 18 percent in the control group, a net result of 54 percent. NAD concluded that the survey responses to the test advertisement demonstrated that there was a confusion rate of well more than 20 percent as compared to the control advertisement.

NAD considered, but was not persuaded by, the advertiser's argument that the survey was materially flawed. Consumer perception surveys typically test one advertisement (as was done in this survey). Allowing consumers to peruse the Sprint website not only creates an uncontrolled situation, but it does not effectively gauge consumer takeaway of an advertisement in the manner in which they would typically be exposed to it. In addition, NAD was not troubled by the instructions to survey respondents to focus on a portion of the home page which features the advertisement given that the surrounding text does not reference the Unlimited Plus Plan or the Samsung Galaxy S6, both of which are the focus of the instant challenge. As to the control, NAD noted that the references to the two-year duration of free use of the phone and the fact that it is a lease are appropriate given that this information is precisely the message the advertiser intended to convey.²⁸

Based on the foregoing, NAD determined that the challenged Internet advertising reasonably conveyed the message that consumers who sign up for Sprint's Unlimited Plus Plan receive a Samsung Galaxy S6 for free—i.e., they sign up for the Unlimited Plus Plan will own the phone free and clear at the end of the two-year plan period—a claim which is not accurate.²⁹

With respect to the television commercials which were not the subject of the perception survey, NAD used its own independent judgment to determine whether any implied messages were reasonably conveyed. In this advertising, the references to a "free" Galaxy S6 are also bold and

²⁷ The survey expert noted that in response to the question "Based on the advertisement, is there any limit on how long you would get to use the Samsung Galaxy phone for free?" 17.5 percent of the test group respondents answered that the ad communicated a limitation on how long they would be able to use the phone for free versus 74.5 percent in the control group.

²⁸ NAD did not deem the advertiser proposed alternative language for the control (e.g., "Free 2-Year Use of Samsung S6) to be more appropriate. Other criticisms cited by the advertiser included the lack of a pretest, the failure to report completion rates, the failure to use coders who were blind to the purpose of the study, none of which NAD determined were fatal flaws that would render the survey unreliable.

²⁹ The references to "free" are bold and prominent and qualify Samsung Galaxy S6. This is particularly true in the television commercials with the voiceover and onscreen text referring to the "free Samsung Galaxy S6" or getting a Samsung Galaxy S6 for "free." The references to the "lease" which appear onscreen are fleeting which, along with the gold steak of light flashes across the "lease" reference, make it difficult to read and understand. The disclosures in the television advertising are several lines long, making them impossible to read and understand. While certain iterations on the advertiser's website make clearer that a lease is involved (and refer to a "free phone lease), the headline/main claim refers to a "Free" Samsung Galaxy S6 when consumers sign up for Sprint's Unlimited Plus Plan. In fact, consumers do not receive a free phone. Rather, they receive free *use* of the phone during the two-year lease period. Moreover, at the end of the two-year lease period, consumers do not own the phone free and clear. Instead, consumers have a purchase option at the end of the lease term, which reflects the fair market value of the phone at that particular time. As to the disclosures which refer to the terms of the lease, they are not clear and conspicuous but even if they were, they cannot be used to change the messages reasonably conveyed by advertising—i.e., that consumers will receive a free Samsung Galaxy S6 outright.

prominent. This is particularly true in the television commercials with the voiceover and onscreen text referring to the “free Samsung Galaxy S6” or getting a Samsung Galaxy S6 for “free.” NAD observed that the references to the “lease” which appear onscreen are fleeting and appear onscreen while a gold streak of light flashes across the “lease” reference, make it difficult to read and understand. As for the disclosures in the television advertising, they are several lines long, making them impossible to read and understand during the short time they appear onscreen. Adding to the potential for consumer confusion is the novelty of mobile phone leasing. At the present time, most mobile devices are purchased, and consumer awareness and understanding of the leasing alternatives is at a nascent stage. Finally, even if the disclosures were clear and conspicuous, they cannot contradict the main claim—i.e., that consumers will receive a free Samsung Galaxy S6 outright. While certain advertisements on advertiser’s website make clear that a lease is involved (and refer to “the first free phone lease”), the headline/main claim prominently refers to a “Free” Samsung Galaxy S6 when consumers sign up for Sprint’s Unlimited Plus Plan rather than a “free lease.” A “free lease” of a phone is fundamentally different from a “free phone.”

For all the foregoing reasons, NAD recommended that the advertiser discontinue its “Get a FREE Samsung Galaxy S6” claim.

NAD next assessed the truthfulness and accuracy of the claim “First FREE phone lease in the wireless industry,” and, specifically, whether the lease itself can be characterized as “free.” The FTC’s “Free” Guides state that “an offer of ‘Free’ merchandise or service is based upon a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be ‘Free’.... Thus, a purchaser has a right to believe that the merchant will not directly and immediately recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise or service, or otherwise.”³⁰

Consumers who are enrolled in Sprint’s Unlimited Plus Plan and those who are enrolled in the Unlimited Plan and lease the Samsung Galaxy S6 pay \$80/month.³¹ On the \$80 Unlimited Plus Plan, consumers are charged an additional \$20 for the use of the Galaxy S6 and then credited \$20. The question for NAD was whether the additional \$20 charged to consumers on the Unlimited Plus Plan as compared to the Unlimited Plan constitutes a “mark-up” whereby Sprint recovers the cost of the free lease by marking up the price of its plan to recover the cost of the phone lease. NAD determined that it does not. The Unlimited Plus Plan provides additional features, including a free annual phone upgrade and unlimited international texting. As for whether these benefits are of little to no value to consumers, there was no evidence demonstrating that consumers rarely (if ever) avail themselves of these features. Based on this record, NAD could not conclude that the features are inconsequential to consumers.

³⁰ 16 C.F.R. § 251.1(b)(1).

³¹ For the Unlimited Plus Plan, a \$20 charge is added to the existing \$80 per month lease cost and after a \$20 credit, the total cost per month is \$80; as for the Unlimited Plan, it is \$60 per month plus \$20 per month for consumers who wish to lease the Galaxy S6 for a total monthly cost of \$80.

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For all the foregoing reasons, NAD determined that the claim “First FREE phone lease in the wireless industry” is supported.

II Price Comparison Chart

The advertiser advised NAD in writing that, instead of submitting substantiating evidence, it had elected to permanently discontinue the comparative pricing chart. In reliance on the advertiser’s representation that the comparison chart has been permanently discontinued, NAD did not review it on its merits. The voluntarily discontinued comparison chart will be treated, for compliance purposes, as though NAD recommended its discontinuance and the advertiser agreed to comply.³²

Conclusion:

NAD recommended that the advertiser discontinue the inaccurate “Get a FREE Samsung Galaxy S6” claim. NAD determined that the claim “First FREE phone lease in the wireless industry” is supported. Lastly, NAD did not review the price comparison chart on its merits in reliance on the advertiser’s representation that it had been permanently discontinued.

Advertiser’s Statement:

Sprint is pleased that NAD determined that Sprint supported the claim “First FREE phone lease in the wireless industry.” Sprint is also pleased that NAD recognized the additional benefits included in Sprint’s Unlimited Plus Plan, rejecting T-Mobile’s argument that the higher cost of that plan, as compared with Sprint’s Unlimited Plan, constituted a “mark up.”

With respect to Sprint’s “Get a FREE Samsung Galaxy S6” claim, NAD correctly noted that this claim--as well as Sprint’s entire “free lease” campaign for the Galaxy S6--had run its course prior to the issuance of NAD’s decision. Sprint respectfully disagrees with NAD’s recommendation that Sprint should discontinue the claim “Get a FREE Samsung Galaxy S6,” but Sprint will take NAD’s decision into consideration when formulating future advertising.

³² NAD noted, however, that nothing in this decision precludes the advertiser from using a truthful price comparison chart in future advertising provided it clearly and conspicuously discloses any material difference between the products being compared.