UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
Intuit, Inc., a corporation,	)	Docket No. 9408
Respondent.	)	

ORDER ON MOTIONS *IN LIMINE*

I.

On February 10, 2023, Respondent Intuit, Inc. ("Respondent" or "Intuit") and Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed motions *in limine* seeking to preclude admission of certain evidence at the evidentiary hearing in this matter, scheduled to begin on March 27, 2023. Oppositions were filed on February 24, 2023. The specific motions *in limine* at issue and their respective resolutions are detailed *infra.*

II.

FTC Rules provide: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b). Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence, or if the evidence would be misleading. 16 C.F.R. § 3.43(b).

"'Motion *in limine*'" refers "'to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.'" *In re POM Wonderful LLC*, No. 9344, 2011 FTC LEXIS 79, at *6-7 (F.T.C. May 6, 2011) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). This practice has developed pursuant to the Administrative Law Judge's inherent authority to manage the course of trials, particularly as to the receipt of evidence. *See* 16 C.F.R. § 3.42 (c)(5), (8). *See also, e.g.*, *In re 1-800 Contacts, Inc.*, No. 9372, 2017 WL 1345288, at *1 (F.T.C. Mar. 30, 2017); *In re Telebrands Corp.*, No. 9313, 2004 FTC LEXIS 270 (F.T.C. Apr. 26, 2004); *In re Dura Lube Corp.*, No. 9292, 1999 FTC LEXIS 252 (F.T.C. Oct. 22, 1999).

As explained in *POM Wonderful*, motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly

inadmissible. *1-800 Contacts*, 2017 WL 1345288, at *1 (citing *POM Wonderful*, 2011 FTC LEXIS 79, at *6-8). Furthermore, evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *1-800 Contacts*, 2017 WL 1345288, at *1; *POM Wonderful*, 2011 FTC LEXIS 79, at *7-8. "'Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded.'" *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (F.T.C. April 20, 2009) (quoting *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000)). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *In re McWane, Inc*., No. 9351, 2012 WL 3719035, at *3 (F.T.C. Aug. 16, 2012).

In evaluating relevance of proffered evidence, the nature of the issues presented by the case is paramount. At issue in this case are alleged unlawful deceptive acts and practices in connection with Respondent's advertising, marketing, and promotion of its online tax preparation service, known as "TurboTax." Compl. ¶¶ 5-6, 119-22; *see* 15 U.S.C. § 45 (prohibiting "unfair or deceptive acts or practices"). Specifically, Complaint Counsel contends that Respondent, through various channels, including television advertising, online advertisements, and website representations, has repeatedly represented expressly and/or impliedly that consumers could file their taxes for free using TurboTax, but that, in fact, most consumers cannot do so. Compl. ¶¶ 4-6, 21-44, 104-109; Complaint Counsel's Pretrial Brief at 1, 8-20.

Respondent denies it engaged in any deceptive advertising, citing, among other reasons, Respondent's use of various disclosures and disclaimers in connection with TurboTax free filing promotions. Answer ¶¶ 119-121; Respondent's Opposition to Complaint Counsel's Motion for Summary Decision at 10-25. Respondent further asserts that it has discontinued the alleged deceptive advertising campaigns and, as of May 4, 2022, is bound by a consent order with the attorneys general of all 50 states and the District of Columbia with respect to its marketing of TurboTax products ("State Consent Order"), and that therefore injunctive relief in the instant case is unwarranted. Answer First Defense; Respondent's Opposition to Complaint Counsel's Motion for Summary Decision at 25-29.[1]

With the foregoing as background, the specific motions at issue are analyzed next.

III.

1. Respondent's motion to preclude admission of allegedly outdated advertisements

Respondent seeks to preclude admission of numerous proposed exhibits consisting of advertisements that Respondent contends are outdated. Respondent first contends that

[1] Respondent also alleges various legal defenses to the Complaint centered principally on due process claims. Answer at 24-25.

advertisements applicable to Tax Year 2017, running prior to March 2018, should be precluded because they fall outside an allegedly applicable three-year statute of limitations.

The Complaint in this case contains a single count, alleging a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Congress did not provide for a statute of limitations for actions for a cease and desist order under Section 5. *Compare* 15 U.S.C. § 57b(d) (setting a three-year statute of limitations for claims under Section 19(a)). Respondent contends that a three-year statute of limitations, even if not expressly stated, should be held to be an implied provision of Section 5, and that the challenged advertising exhibits should therefore be precluded on this basis. The legal merits of Respondent's statute of limitations defense, to liability or to relief, has not yet been determined, and Respondent's invitation to do so in the context of a pre-trial motion *in limine* is declined. A similar effort to preclude admission of advertisements dating prior to an alleged applicable statute of limitations was rejected in *In re POM Wonderful LLC*, 2011 FTC LEXIS 79. Accordingly, Respondent's argument that the challenged exhibits should be precluded on the basis of its asserted statute of limitations defense is rejected.

Respondent next contends that proposed exhibits reflecting advertisements from 2014 through 2018 should be precluded as irrelevant. Respondent asserts that the challenged exhibits comprise advertisements that are no longer running and/or contain representations that Intuit has materially revised. Respondent further contends that the State Consent Order contains provisions that will prohibit running those advertisements in the future, and therefore those advertisements are not relevant to whether there is a cognizable danger of a recurring violation, for purposes of assessing the need for injunctive relief in this case. However, advertisements from 2014 through 2018 are relevant to show whether Intuit violated Section 5 during that time period. Moreover, admitting these older advertisements is necessary to review and compare them to later advertisements, and thereby test whether the later advertisements are in fact materially different, as Respondent contends. Accordingly, Respondent's assertion that the challenged advertisements from 2014 through 2018 should be precluded from admission as irrelevant is rejected. *See POM Wonderful*, 2011 FTC LEXIS 79, at *8-9 (denying motion *in limine* to preclude older advertisements as irrelevant).

Based on the foregoing, Respondent has failed to demonstrate that the challenged exhibits comprising advertisements from 2014 through 2018 are inadmissible for all purposes, and therefore its motion *in limine* to preclude admission of these exhibits is DENIED.

2. Respondent's motion to preclude admission of non-final or allegedly incomplete advertisements

Respondent seeks to preclude admission of various documentary exhibits reflecting advertisements that Respondent asserts are not final or, for various reasons, incomplete. Respondent argues that incomplete advertisements are irrelevant, to the extent they do not represent what a consumer would have actually seen; and that even if arguably relevant, such allegedly incomplete advertisements are "misleading" and could be "confused" with advertisements that consumers in fact would have seen. Motion *in Limine* to Exclude Non-final or Incomplete Advertisements at 3-4. The exhibits challenged by Respondent can be categorized

as: drafts of advertisements; screenshots from video advertisements; excerpted or "cropped" advertisements, including those omitting the contents of disclaimers; and internet search results.

Respondent argues that incomplete advertisements are inadmissible as a matter of law because the net impression of an advertisement must be determined by referring to the "entirety" of the advertisement. The principle that the meaning of an advertisement is determined by evaluating it in its entirety is well established. *See*, *e.g.*, *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (stating that it is necessary for the court "to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately"). However, it does not logically follow that advertisements such as drafts, screen shots, excerpts and search results have no relevance or are clearly inadmissible for any purpose.

For example, excerpts from an advertisement, such as a screen shot from Respondent's website that includes only a hyperlink to a disclaimer, but not the text of the disclaimer itself, could be relevant to show what the consumer would encounter. The fact that a hyperlink was required to view disclaimers is also relevant. Similarly, screen shots of results returned from an internet search for "free" tax filing services could be relevant to show consumers' initial exposure to Respondent's free tax filing representations and are also relevant context for Respondent's alleged overall advertising campaign with respect to its free tax filing product. As another example, drafts of television advertisements can be compared to final advertisements, and thereby might provide insight into Respondent's decision-making and, relatedly, its intent with respect to the alleged deceptive representations. At a minimum, this could be relevant, should a determination on this issue become necessary, to Complaint Counsel's request for "fencing-in" relief to constrain Intuit's future advertising practices broadly, beyond TurboTax, which requires proof, *inter alia*, of the deliberateness of the proven violation. *In re Telebrands Corp.*, No. 9313, 2005 FTC LEXIS 178, at **91 (F.T.C. Sept. 19, 2005).[2]

In addition, to the extent Respondent argues that additional text, such as a disclaimer, or additional context is necessary to understand a challenged advertisement, this goes to the weight to be given to the advertisement, not the advertisement's admissibility. Respondent's alternative argument that the presence of allegedly incomplete advertisements in the record will be confusing or misleading to the trier of fact underestimates both the trier of fact in this bench trial and the capabilities of Intuit's counsel. Respondent is fully capable of rebutting a contention as to the meaning of an allegedly incomplete advertisement by offering additional text and context, including in response to post-trial proposed findings of fact.[3]

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[2] "Fencing-in" relief refers to "provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful. Fencing-in remedies are designed to prevent future unlawful conduct." *Telebrands*, 2005 FTC LEXIS 178, at **110 n.3. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992) (noting that fencing-in relief includes orders constraining advertising for multiple products sold).

[3] In fact, Respondent notes that the parties' proposed exhibits already contain versions of the challenged advertisement exhibits that Respondent accepts as representing the complete advertisement. Motion *in Limine* to Exclude Non-final or Incomplete Advertisements at 5. Respondent's argument that this fact precludes admission of the allegedly incomplete advertisements as cumulative is unsupported and unpersuasive.

In short, the principle that the net impression of an advertisement must be judged by its entirety does not preclude as irrelevant admission of the types of advertisements Respondent is challenging. Respondent's argument assumes that each challenged advertisement to be offered is intended to, or must, demonstrate an independent violation of the FTC Act, in order to be relevant and admissible. Respondent fails to support such a proposition.

For all the foregoing reasons, Respondent's motion *in limine* to preclude admission of non-final or allegedly incomplete advertisements is DENIED.[4]

3. Respondent's motion to preclude admission of a survey and related opinions by Complaint Counsel's expert witness

Respondent seeks an order precluding Complaint Counsel from introducing a survey conducted by its proffered expert witness Nathan Novemsky, Ph.D., as well as any related opinions contained in his expert witness report or to be offered as testimony at trial.

As noted above, to be admissible, evidence must be relevant, material, and reliable. 16 C.F.R. § 3.43(b). When ruling on the admissibility of expert witness opinions in particular, courts consider whether the expert witness is qualified in the relevant field and examine the methodology the expert witness used in reaching the conclusions at issue. *McWane*, 2012 WL 3719035, at *3 (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)).

As explained by the court in *FTC v. LendingClub Corporation*:

> In determining whether expert testimony is admissible, the trial court acts as a gatekeeper and "must ensure that any and all scientific testimony or evidence is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). However, "the *Daubert* gatekeeping obligation is less pressing in connection with a bench trial," because "the 'gatekeeper' and the trier of fact [are] one and the same." *Volk v. United States*, 57 F. Supp. 2d 888, 896 n.5 (N.D. Cal. 1999); *see also FTC v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) ("When we consider the admissibility of expert testimony, we are mindful that there is less danger that a trial court will be unduly impressed by the expert's testimony or opinion in a bench trial."). Ultimately, courts "are entitled to broad discretion when discharging their gatekeeping function." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000).

No. 18-cv-02454, 2020 U.S. Dist. LEXIS 95703, at *34-35 (N.D. Cal. June 1, 2020). *See also McWane*, 2012 WL 3719035 at *3 ("[T]he court's role as 'gatekeeper,' pursuant to *Daubert*, to

[4] Respondent implies that some proposed exhibits are incomplete because they were intentionally cropped or redacted to omit information that in fact appeared on the face of the advertisement. Motion *in Limine* to Exclude Non-final or Incomplete Advertisements at 4, citing, *e.g*., GX201, GX459. In its opposition to the motion, Complaint Counsel denies any such intentional misrepresentation of the text of an advertisement. Although this Order denies Respondent's motion to preclude admission of allegedly incomplete advertisements as irrelevant, it does not preclude a challenge to admission of an advertisement at the time of trial on the grounds of authenticity, *i.e.*, that the proffered exhibit is not an authentic copy of what it purports to be.

prevent expert testimony from unduly confusing or misleading a jury, has little application in a bench trial." (citing *Daniel Chapter One*, 2009 FTC LEXIS 85, at *21-22)).

Complaint Counsel contends that the purpose of Professor Novemsky's survey was to measure the cumulative effect of Intuit's marketing and the impression that such marketing has left on consumers. To this end, the survey asked participants whether they believed they could file their 2021 income taxes for free using TurboTax and whether, and to what extent, these survey respondents point to TurboTax advertisements and the TurboTax website (or both) as playing a role in forming their impression. GX303 at 4-5 (Novemsky Expert Witness Report). The survey also inquired whether certain survey respondents had the impression that their tax returns qualified as "simple U.S. tax returns" eligible for TurboTax's free tax filing service, when these particular survey respondents' tax returns did not, in fact, qualify. *Id.*

Respondent asserts that the survey should be excluded as completely irrelevant because the survey did not present survey respondents with, or test their impressions of, particular TurboTax advertisements. In this way, Respondent argues, the survey's methodology is little more than a "memory test" that fails to replicate how survey respondents would respond to advertisements in the "real world." Motion to Exclude Survey and Opinions of Novemsky at 4. Professor Novemsky's report notes his determination that "a test / control framework would be inappropriate for the objectives of this survey – that is, to measure the extent of taxpayers' opinions and beliefs as to whether they can file their taxes for free using TurboTax online software" and that testing a single advertisement or stimulus would not realistically replicate "long running and pervasive marketing campaigns in which the allegedly deceptive messages were communicated to consumers repeatedly and over various communication channels." GX303 at 13-14.

The survey questions appear relevant to the contentions in this case that Respondent, through various channels, including television advertising, online advertisements, and website representations, conveyed the impression to consumers that they could file their taxes for free using TurboTax. Respondent's objections to the survey's questions go to the weight to be given to the survey's findings and the conclusions drawn therefrom by Professor Novemsky, and not to their admissibility. Accordingly, Respondent's argument that the survey and related opinions should be excluded as irrelevant is rejected.[5]

Respondent next argues that Professor Novemsky's survey and his opinions based thereon should be precluded because the survey sampling methodology resulted in bias and because the design did not include a control group or control question. However, as a general rule, flaws in methodology go to the weight to be given a test's results, not its admissibility.

[5] Respondent cites to trademark cases that are neither analogous to the instant case nor persuasive. *See, e.g., Mier v. CVS Pharm., Inc.,* No. 8:20-cv-01979, 2022 WL 1599633, at *3 (C.D. Cal. May 9, 2022) (holding that a survey that failed to show survey respondents the same labeling that consumers would see was "too attenuated" to prove that hand sanitizer label claim was material); *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 231, 236-37 (S.D.N.Y. 2010) (noting that where a trademark action contemplates a jury trial rather than a bench trial, the court should scrutinize survey evidence with particular care and rejecting survey designed to show consumer confusion as not sufficiently approximating the manner in which consumers encountered the parties' products in the marketplace). Moreover, as noted above, whether to exclude evidence in the discharge of a court's "gatekeeping" function is a matter of discretion. *LendingClub*, 2020 U.S. Dist. LEXIS 95703, at *35.

LendingClub, 2020 U.S. Dist. LEXIS 95703, at *37 ("'[I]ssues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility.'" (quoting *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001))). It cannot be concluded as a preliminary matter, outside the context of trial, that the flaws described by Respondent are so severe that the entire survey should be excluded as unreliable. In a bench trial such as this case, rather than excluding expert testimony based on allegedly flawed methodology, the "better approach . . . is to permit the expert testimony and allow 'vigorous cross-examination, presentation of contrary evidence' and careful weighing of the burden of proof to test 'shaky but admissible evidence.'" *McWane*, 2012 WL 3719035 at *3 (internal citation omitted). Therefore, Respondent's argument that Professor Novemsky's survey and his opinions based thereon should be precluded because of methodological flaws is rejected.

Based on the foregoing, Respondent's motion *in limine* to preclude Complaint Counsel from introducing a survey conducted by Professor Novemsky and any expert witness report or testimony related thereto is DENIED.

4. Respondent's motion to preclude or limit admission of consumer complaints

Respondent moves to exclude Complaint Counsel from introducing any evidence or testimony related to consumer complaints received by the FTC's Consumer Sentinel Network ("Sentinel Complaints"). Respondent argues that most of the Sentinel Complaints are not relevant to the allegations of the Complaint; are hearsay and unreliable; and are made by individuals whom Complaint Counsel has not demonstrated are unavailable to testify in person.

Complaint Counsel states that the Consumer Sentinel Network is a repository of consumer reports maintained by the FTC in the ordinary course of its consumer protection mission and that the network has received information from hundreds of consumers who have complained about their experiences with TurboTax. Complaint Counsel contends that the Sentinel Complaints are relevant, material, and reliable.

As summarized above, the Complaint alleges that Respondent represents expressly and/or impliedly that consumers can file their taxes for free using TurboTax, but that, in fact, most consumers cannot do so. Respondent denies these allegations. Evidence from consumers reporting their experience with Intuit's free tax filing representations about TurboTax, including their inability to use TurboTax for free or to obtain a refund from Intuit thereafter, would be relevant to the allegations of the Complaint. Evidence of consumer complaints that are unrelated to the alleged deceptive acts and practices – including, without limitation, complaints regarding the amount of the complainant's tax refund, delays in receiving tax refunds, the purported deletion of TurboTax customer accounts, issues accessing data on adjusted gross income, issues importing tax data into paid products, rideshare and other non-income-related discounts, and TurboTax Canada – are not relevant to the allegations of the Complaint and are inadmissible for that reason.

"Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." 16 C.F.R. § 3.43(b). Courts have found consumer complaints submitted to the FTC to be reliable and trustworthy because they "were

sent independently to the FTC from unrelated members of the public," "reported roughly similar experiences," and "the declarants had no motive to lie to the FTC . . . ." *FTC v. Figgie Int'l*, 994 F.2d 595, 608 (9th Cir. 1993). Indeed, relevant consumer complaints are routinely admitted in FTC consumer protection cases. *See, e.g., FTC v. Ewing*, No. 2:07-cv-479-PMP, 2014 WL 5489210, at *2-4 (D. Nev. Oct. 29, 2014) (granting FTC motion *in limine* to admit 162 consumer complaints and three consumer declarations under Federal Rule of Evidence 807); *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536, 2014 WL 317781, at *15-16 (D. Nev. Jan. 28, 2014) (holding that written complaints, transcripts and recordings by employees and consumers were admissible under Federal Rule of Evidence 807); *FTC v. Instant Response Sys., LLC*, 2015 U.S. Dist. LEXIS 49060 at *13-15 (E.D.N.Y. Apr. 14, 2015) (holding that elderly consumers' caretakers' declarations and complaints to Better Business Bureau satisfied Federal Rule of Evidence 807 and admitting them into evidence); *FTC v. Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, at *13 n.5 (W.D. Wash. July 10, 2002) (holding that consumer e-mails and complaint letters were admissible), *aff'd*, 453 F.3d 1196 (9th Cir. 2006). Thus, the Sentinel Complaints will not be precluded from admission on hearsay grounds.

Moreover, contrary to Respondent's assertions, Complaint Counsel is not required to establish that the complainants are unavailable to testify. *See Ewing*, 2014 WL 5489210, at *3 ("Bringing each consumer into court to testify, under oath, that his or her statements were true would be burdensome and would not necessarily result in testimony that is any more trustworthy than the complaints themselves[.]"); *FTC v. Magazine Sols., LLC*, No. 7-692, 2009 U.S. Dist. LEXIS 20629 at *7 (W.D. Pa. Mar. 16, 2009) ("Admission of the consumer complaints would also eliminate the needless expense of bringing in hundreds of consumers from across the country to testify to what is essentially already written down in complaint form.").

Respondent's arguments relating to whether the complaints were made with any degree of precision or care, whether the complainants were potentially biased, whether Complaint Counsel investigated the validity of the complaints, or whether the complaints are sworn or corroborated by documentary evidence all go to the weight to be given to the Sentinel Complaints, not their admissibility.

Based on the foregoing, Respondent's motion *in limine* to preclude Complaint Counsel from introducing at trial evidence of consumer complaints is GRANTED in part and DENIED in part. The consumer complaints that would be relevant, as described above, are admissible; those that are not relevant, as described above, are inadmissible and are therefore precluded.

5. Complaint Counsel's motion to preclude admission of evidence of customer satisfaction

Complaint Counsel moves to preclude Respondent from introducing any testimony or other evidence of customer satisfaction with Intuit's TurboTax products as a defense to liability. Complaint Counsel contends that the existence of satisfied customers is not probative of whether consumers were deceived by Respondent's marketing, nor is the lack of actual consumer deception a defense to liability as a matter of law.

Respondent contends that customer satisfaction evidence demonstrates that customer expectations are met and thus is relevant to show that no deception occurred. Respondent further argues that such evidence is admissible to rebut Complaint Counsel's evidence of consumer complaints. In addition, Respondent argues that Complaint Counsel has failed to sufficiently specify the evidence that would constitute prohibited consumer satisfaction evidence and that therefore granting Complaint Counsel's motion will only cause confusion and create disputes at trial over what evidence must be excluded.

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) ("[T]he existence of [satisfied] customers is not relevant to determining whether consumers were deceived and the magistrate was correct to exclude [such evidence]."); *In re Intuit, Inc.*, 2023 WL 1778377, *at 12 (F.T.C. Jan. 31, 2023) (citing *In re Daniel Chapter One*, 2009 FTC LEXIS 86, at *7 (Apr. 20, 2009). Because proof of actual deception is not necessary for purposes of Section 5 liability, *see, e.g., FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 424 (9th Cir. 2018), evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. *FTC v. Capital Choice Consumer Credit Inc.*, No. 02-21050, 2004 WL 5149998, at *34 (S.D. Fla. Feb. 20, 2004).[6]

Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, "the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website." *Intuit*, 2023 WL 1778377, at *12.

Furthermore, Intuit's argument that Complaint Counsel's motion should be denied as overbroad is unconvincing. The category of evidence Complaint Counsel seeks to preclude – evidence of customer satisfaction offered to show the absence of deception, as a defense to liability – is sufficiently specific to guide trial preparation and to conduct proceedings at trial. *See, e.g., Daniel Chapter One*, 2009 FTC LEXIS 86, at *9 (granting motion *in limine* to preclude "evidence of satisfied consumers to show the claims were not deceptive").

[6] Respondent's citation of *FTC v. DIRECTV, Inc.*, No. 15-cv-01129, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018) to argue that high customer satisfaction scores should be considered in determining whether a company violates the FTC Act is not on point. There, the court considered consumer satisfaction scores as part of its assessment of evidence proffered by the FTC regarding findings made by DIRECTV's Customer Experience Steering Committee. 2018 WL 3911196, at *18. The court did not conclude that high consumer satisfaction scores meant that the company did not violate the FTC Act. Rather, the court found that the FTC's evidence regarding the Committee failed to support a finding that the Act was violated. *Id.; see also Intuit,* 2023 WL 1778377, at *12 n.13 (discussing *DIRECTV*).

Based on the foregoing, Complaint Counsel's motion *in limine* to preclude Intuit from introducing at trial evidence of purported customer satisfaction as a defense to liability is GRANTED.

IV.

In summary, as explained above, it is hereby ORDERED:

1. Respondent's motion to preclude admission of allegedly outdated advertisements is DENIED;

2. Respondent's motion to preclude admission of non-final or allegedly incomplete advertisements is DENIED;

3. Respondent's motion to preclude admission of a survey and related opinions by Complaint Counsel's expert witness Nathan Novemsky, Ph.D. is DENIED;

4. Respondent's motion to preclude or limit admission of consumer complaints is GRANTED IN PART and DENIED IN PART; and

5. Complaint Counsel's motion to preclude admission of evidence of customer satisfaction is GRANTED.

As noted at the outset of this Order, denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. *Daniel Chapter One*, 2009 FTC LEXIS 85, at *20. Thus, denial herein of a request to preclude evidence shall not be construed as a determination that any particular document, testimony, or other evidence that may be offered at the hearing will be admitted.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 7, 2023