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

In the matter of: **Intuit Inc.**, a corporation, Respondent.	Docket No. 9408

COMPLAINT COUNSEL'S OPPOSITION TO INTUIT'S MOTION *IN LIMINE* TO EXCLUDE NON-FINAL OR INCOMPLETE ADVERTISEMENTS

At issue in this case are Respondent Intuit Inc.'s ("Intuit") widely-disseminated advertisements for its free TurboTax product, including advertisements and marketing materials like those that run on television, play on one's social media, and show up when you scroll through a website. Intuit now asks the Court to disregard evidence relating to those forms of advertisements if it is presented in still images, or excerpts, as Intuit refers to them—an argument that, if taken to its logical end, would mean that no litigant could introduce evidence of a video advertisement or a website in pleadings, or introduce those images at trial—an outcome that is not supported by case law or common sense. In supporting its position, Intuit gets wrong both the state of the law and the facts of the case. The Motion *in Limine* to Exclude Non-Final or Incomplete Advertisements (the "Motion") therefore should be denied.

I. Motion *In Limine* Standard

"Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible." *In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at *7 (May 6, 2011) (citations omitted). "Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds." *Id.* at *7-8. Rule 3.43, which governs the admission of evidence, states in part: "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 danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

II. Intuit's Case Law is Inapposite

While Intuit accuses Complaint Counsel ("CC") of "leaving out important contextual information that … Complaint Counsel would like the Court *not* to see,"[1] (Mot. at 3, emphasis in original), Intuit has misrepresented the state of the law and left out "important contextual information" about the cases it cites in support of its Motion. A discussion of each of those cases follows below.

Caselaw on the need to view ads in their "entirety." Intuit first argues that, in reviewing FTC actions prohibiting unfair and deceptive advertising under the FTC Act, "a court must consider the advertisement in its entirety." Mot. at 2 (citing *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232 (2d Cir. 2001)). In that case, however, the Second Circuit upheld the district court's ruling that the challenged advertisements depicting two sandwich bags—one leaking (the competitor) and one not (the company offering the ads)—were literally false in violation of the Lanham Act, 15 U.S.C. § 1125(a), and upheld the injunction issued against the defendant. In the first passage Intuit cites, the court, setting forth the standard of review it applies to the district court's holding that the ads were false because they misrepresented the propensity of a competitor's bag to leak (the question of completeness of the ads offered into evidence was never raised), stated: "fundamental to any task of interpretation is the principle that *text must yield to context*." *S.C. Johnson*, 241 F.3d at 23 (emphasis added). The Second Circuit cited *Avis Rent a Car System*, another case brought by a private corporation under the Lanham Act.

[1] Although Intuit suggests that CC has selectively excerpted its exhibits to hide certain information from the ALJ (which is not the case), it never explains why the exhibits shouldn't be allowed to come into evidence, followed by Intuit introducing the supposedly obscured information at trial or in post-trial briefing—achieving Intuit's dual goals of correcting the record and disparaging CC.

Id. (*quoting Avis Rent a Car Sys. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986)). To arrive at a case considering a violation of the FTC Act, one must follow the internal case citations back further from *Avis* to *FTC v. Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963). In that case, the Second Circuit affirmed the FTC's ruling that the defendant engaged in false advertising in violation of the FTC Act. In the passage from which Intuit selectively quoted, the court affirmed that a finding against a defendant is appropriate absent proof of actual deception "when the representations made have a capacity or tendency to deceive."

> [T]he cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader. It is therefore necessary in these cases 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. The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.

Id. at 674.

Far from a prescriptive measure against excerpts of an advertisement being introduced as evidence, then, *Sterling Drug* and its progeny can better be understood as a mandate that courts weighing a violation of the FTC Act should consider the overall message the challenged ad conveyed to the consumer. *See FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2009) (rejecting defendant's argument that the fine print on the back side of a check setting forth the terms of a contract that would be accepted upon deposit precludes FTC Act liability, as "[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures"); *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 154-158 (2d Cir. 2007) (upholding the lower court's finding that defendant engaged in false advertising in violation of the Lanham Act over defendant's argument that the message of the challenged ad was limited to the spoken words "settling for cable would be illogical,"

since the "message conveyed by the commercial as a whole," includes its accompanying images); *Am. Home Prod. Corp. v. FTC*, 695 F.2d 681, 887-88 (3d Cir. 1982) (holding that the FTC is not required to present "direct evidence that consumers were in fact misled," and instead has the right to scrutinize "not only the words used" in a television ad, but also "visual and aural imagery" contributing to the "impression made by the advertisements as a whole"). In this line of cases, then, the courts are concerned not about whether the FTC has excerpted an ad in a misleading way, as Intuit suggests, but instead is an admonition to *defendants* against focusing on a prescriptively narrow "tile" in an ad (such as a disclosure) when the "mosaic" of the ad that the consumer encounters is misleading.

Caselaw on Incomplete Evidence. Intuit next cites, in summary fashion, two cases that stand for the uncontroversial principal that courts should not be presented with incomplete evidence where proscribed from doing so by the Federal Rules of Evidence, such as where the omission would be misleading. *See* Mot. at 2-3. Nothing in either of these cases, however, supports excluding the specific exhibits Intuit challenges, particularly before CC has sought to introduce them at trial. In *United States v. Thiam*, an appeal stemming from a defendant's conviction in a money laundering scheme, the Second Circuit affirmed the lower court's ruling precluding the defendant from playing at trial certain excerpts of his post-arrest interview with the FBI. 934 F.3d 89, 96 (2d Cir. 2019). The court *rejected* Thiam's argument that the lower court erred when it admitted portions of the FBI interview while excluding others, holding that the doctrine of incompleteness *does not require* that an entire document be introduced, and, because Thiam testified at trial regarding the same facts, "the jury had before it the information," rendering any potential error harmless. *Id.* (Notably, Intuit, too, will have the opportunity to test the exhibit through cross examination or by use with its own witnesses.). *Laurel Rd. Bank v. CommonBond, Inc.*, is no more helpful to Intuit. In that case, the court in its published opinion reproduces an image of the defendant's

advertisement, and includes a footnote to the advertisement wherein the court notes that, at oral argument, the defendant objected to the admissibility of the ad because the image omitted some text. *See* 2019 WL 1034188, at *1 n.3 (S.D.N.Y. Mar. 5, 2019). In the court's footnote, it addresses the rule of completeness, including an analysis of the purpose for which the advertisement was introduced, and concludes that the challenged image of the advertisement "convey[ed] enough of the advertisement that the omission of the footnote text does not render it inadmissible." *Id*. These cases demonstrate that a portion of a document *can* come into evidence, as long as the "incomplete statement conveys the substance and context of the statement as a whole," *id*.—a test best determined at trial and not in a preemptive motion *in limine*.

Bracco Diagnostics. In the end, Intuit cites *a single case* where a court held that a document should be excluded on the basis that it had been excerpted or otherwise edited: *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F.Supp.2d 384, 452 (D.N.J. 2009). In *Bracco*, a case brought under the Lanham Act, the court considered a post-trial challenge to an expert's trial testimony, as well as that expert's survey designed to test the impact of medical marketing materials, on the basis that the survey itself was flawed because it "withheld from the [survey] respondents large amounts of … essential visual, contextual and informational portions" of brochure it was designed to test. *Id*. at 452-53. In designing the survey, for example, the expert selected three "snippets" from the marketing brochure and presented them to survey participants orally, even though the brochure (and therefore each snippet) was meant to be read. *Id*. In excluding the expert testimony and survey, the court reviewed the specific language of the survey questions and engaged in a highly specific analysis analyzed how the brochure had been excerpted, citing to specific details (such as graphs and bullet points) the omission of which meant that the survey (and therefore the expert's testimony about the survey) had no probative value as to whether the brochure itself was false or misleading. *Id*. At best, then, *Bracco* demonstrates that the admissibility of evidence that

relies, in part or in whole, on an excerpt of an advertisement is a highly specific factual inquiry that requires close examination of the challenged exhibit.

III. All Challenged Exhibits Should be Admitted

As set forth above, Intuit has not demonstrated that any basis in law exists to grant the kind of broad relief it seeks, excluding entire categories of documents before trial. Instead, to the extent any of the cases Intuit cites have bearing on the actual exhibits it seeks to exclude, the weight of the authority strongly implies that a decision to exclude an exhibit because it is not probative or is misleading should not be granted as to general categories of documents, such as still captures of video ads, and is most appropriately granted at or after trial, when the purpose for which the evidence is offered can be evaluated. By seeking to exclude more than sixty exhibits, in whole or in part, based on summary, often unsupported challenges, Intuit cannot show that the challenged exhibits are "clearly inadmissible on all potential grounds." Specifically, Intuit seeks to exclude the following:

- **Draft Scripts for Television Ads**: In two sentences, Intuit asks this court to exclude exhibits that it purports are draft advertisements because the exhibits depict ads that, according to Intuit, were never disseminated to consumers. Intuit has provided no support that CC should be precluded from entering into evidence drafts of Intuit's own advertisements, nor is it implausible that such evidence could be admitted. In fact, this Court has held that drafts of advertising materials are relevant, *see In re Natural Organics*, 2001 FTC LEXIS 31, *3 (March 15, 2001), and has admitted ads at trial without establishing whether they were disseminated, *In re Rentacolor, Inc.*, 1984 FTC LEXIS 66, *26 (April 16, 1984). One can imagine, for example, CC introducing a draft advertisement to an Intuit witness and eliciting testimony on the changes between a draft ad and a final ad.
- **Screenshots of Intuit's (1) Website and Web Ads, (2) Marketing Emails, (3) Videos Ads, and (4) Social Media ads**: The thrust of Intuit's argument is that

the challenged exhibits depict a still image of otherwise dynamic information, such as a website, hyperlink, or video, so that the exhibit does not convey the advertisement or website as it would appear to consumers. *See* Mot. at 3-4.[2] As an initial matter, Intuit deposed the investigator who made the captures and had ample opportunity to develop evidence that the captures were taken in a manner to make them unreliable. To the extent Intuit worries that the screenshots "might be confused with complete ads," this is mitigated both because Intuit can correct any confusion at trial or in post-trial briefing but, more importantly, because this is not a jury trial, and the Court is equipped to understand and weigh the evidence. Finally, Inuit argues that these exhibits are cumulative of the complete ads. Mot. at 5. It would be a waste of judicial resources, however, to require CC to show an entire television ad, or walk a witness through a live website, each time it wants to introduce evidence of the ad or website. It would, moreover, be impossible to do those things in post-trial briefing, such that it is not cumulative to have both a dynamic and still frame of the same website or ad.

- **Screenshots of Third-Party Websites that Host Free TurboTax Video Ads**: Intuit never addresses these exhibits in the body of its motion other than to list their GX numbers, and therefore has not met its burden to exclude them.
- **Excerpts from Search Engine Results**: Intuit objects to the captures of search engine results because the search result pages "provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link." Mot. at 4 (citations omitted). What Intuit ignores, however, is that search engine results contain both organic and *paid advertising* for Intuit's free product *in the text of the search results*—marketing that is captured in these exhibits. Intuit's argument is irrelevant and ignores its own advertising channels.

[2] In important respects, Intuit's argument is factually wrong—consumers certainly see the top portion of a website in their browser, but there is no guarantee they will actually scroll down or click on links.

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For each of the categories of documents Intuit seeks to exclude, it has failed to demonstrate that the more than sixty exhibits are "clearly inadmissible," and Intuit's motion *in limine* should be denied.

Respectfully submitted,

Dated: February 24, 2023

/s/ Sara Tonnesen

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2023, I electronically filed the foregoing Complaint Counsel's Opposition to Intuit's Motion *In Limine* to Exclude Non-Final or Incomplete Advertisements electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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I further certify that on February 24, 2023, I caused the foregoing document to be served via email on:

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