Public

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COMPLAINT COUNSEL'S OPPOSITION TO INTUIT'S MOTION *IN LIMINE* TO EXCLUDE OUTDATED ADVERTISEMENTS[1]

This case is about Respondent Intuit Inc.'s ("Intuit") deceptive marketing of TurboTax as "free" when in truth TurboTax is not free for most American taxpayers. Intuit's ads and marketing communications are at the core of the case. *See e.g.*, *In re Daniel Chapter One,* No. 9329, 2009 WL 2584873, at *66 (F.T.C. Aug. 5, 2009) ("The primary evidence of the claims an advertisement conveys to reasonable consumers is the advertisement itself."). At trial, Complaint Counsel expects to present testimony and evidence regarding Intuit's pervasive and long running "free" TurboTax campaign. The evidence spans temporally from Intuit's 2015 TurboTax Super Bowl Boston Tea Party ad, the premise of which was that "the American Revolution is called off because the Brits allowed for easy and free tax filing,"[2] to ads that ran through at least 2022 such as Intuit's TurboTax Auctioneer commercial where the word "free" is repeated incessantly and a voiceover declares: "That's right. TurboTax Free Edition is free. Free, free, free, free." GX 202 (video of TurboTax Auctioneer Ad). While Intuit and its advertising agencies are very creative and generated dozens of unique and entertaining TurboTax free ads and other marketing communications, all of the marketing

[1] Exhibits referenced herein were previously submitted to the Court and Intuit with Complaint Counsel's Pretrial Brief and are not re-produced here for efficiency. The exhibits can be re-produced upon request.

[2] Ad Age Video, 2015: Super Bowl XLIX, TurboTax - Boston Tea Party, *available at* adage.com/videos/turbotax-boston-tea-party/129 (last visited Aug. 22, 2022).

Complaint Counsel expects to present at trial delivered the same inescapable message to consumers—TurboTax is free. Such evidence is clearly relevant, material, and reliable and should not be prematurely excluded on a motion *in limine*.

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) (citing *Bouchard v. American Home Products Corp.*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, No. 96-cv-1982, 1998 U.S. Dist. LEXIS 15431, at *6 (N.D. Ill. Feb. 28, 1998)). "Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds." *Id.* at *7-8. Commission Rule 3.43 governs the admission of relevant evidence. It 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.* Here, the free TurboTax ads in question are clearly relevant, material, and reliable. And Intuit has failed to demonstrate that such evidence is prejudicial or clearly inadmissible on all potential grounds, or that preclusion of the evidence, at this stage in the proceedings, is necessary to ensure evenhanded and expeditious management of the hearing. Thus, Intuit's motion *in limine* should be denied.

II. Argument

Intuit's motion *in limine* is based on two faulty premises: (1) a three-year statute of limitations applies; and (2) Intuit ads from Tax Years 2014 to 2018 differ substantially from "Intuit's recent, current, and future ads." Intuit is mistaken on both fronts.

No Statute of Limitations Applies. Intuit is wrong when it argues that a three-year limitation period is appropriate. Mot. at 5. No statute of limitations applies to claims brought under Section 5 of the FTC Act seeking injunctive relief, such as this case. *See, e.g.*, 15 U.S.C. § 57b(d) (setting three-year statute of limitations for claims under Section 19(a), not Section 5 actions); *see also*, *FTC v. Ivy Capital, Inc.*, 2011 WL 2470584, at *2 (D. Nev. June 20, 2011) (striking statute of limitations affirmative defense); *United States v. Bldg. Inspector of Am., Inc.*, 894 F. Supp. 507, 513 (D. Mass. 1995) (holding no statute of limitations applies); *see generally*, *In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at *8-9 (May 6, 2011) (denying motion *in limine* seeking to exclude advertisements that Respondents claimed were too remote in time). Contrary to Intuit's argument, Section 19's statute of limitations does not apply to other sections of the FTC Act. *See, e.g., FTC v. Sec. Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1315 (8th Cir. 1991); *United States v. Prochnow,* 2007 WL 3082139, at *5 (11th Cir. Oct. 22, 2007); *FTC v. Hornbeam Special Situations, LLC,* 308 F. Supp. 3d 1280, 1296 (N.D. Ga. 2018); *FTC v. J William Enters.*, 283 F. Supp. 3d 1259, 1262 (M.D. Fla. 2017). Moreover, "laches is not available against the federal government when it undertakes to enforce a public right or to protect the public interest." *FTC* v. *Bronson Partners, LLC,* No. 3:04CVI866, 2006 WL 197357, at *1 (D. Conn. Jan. 25, 2006); *see also Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 60-61 (1984); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *In re Rentacolor, Inc.*, 103 F.T.C. 400, 418 (1984) ("[N]either equitable estoppel nor laches is a defense to an action brought by the government in the public interest.").

Intuit attempts to concoct a statute of limitations through absorption citing *DelCostello v. International Broth. Of Teamsters*, 462 U.S. 151 (1983). However, *DelCostello* is inapposite and makes clear that statutes of limitations do not apply to federal causes of action, like this one, lying only in equity. *Id.* at 162. In *DelCostello*, the Court explained that in some cases involving actions at law it is appropriate to absorb or "borrow" statutes of limitations from other sources where there is no expressly

applicable federal statute of limitations. *Id.* at 158-59. But what Intuit omits from its argument is that the Court distinguishes cases in equity, like the instant case, where borrowing a statute of limitation would be inappropriate "because the principles of federal equity are hostile to the 'mechanical rules' of statutes of limitations." *Id.* at 162 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). Since the cease-and-desist order Complaint Counsel seeks in this case is equitable in nature, borrowing a statute of limitations would be inappropriate.

Intuit's Tax Year 2014-18 TurboTax Ads are Relevant and Material. Intuit also misses the mark when it argues "ads from Tax Years 2014-18 have little relation to Intuit's more recent ads" and "are irrelevant and immaterial." Mot. at 1 & 6-8. First, the TurboTax free ads from Tax Years 2014 to 2018 are relevant and material in that they are the advertisements themselves and constitute the primary evidence of the claims the advertisements convey. *See e.g.*, *Daniel Chapter One,* 2009 WL 2584873, at *66. Since there is no applicable statute of limitations and the ads from Tax Years 2014 to 2018 include deceptive free claims, each of these ads constitutes a violation of Section 5(a) of the FTC Act even if Intuit is somehow able to show that the more recent ads were not deceptive.

Second, to substantively evaluate Intuit's contention (that the ads from Tax Years 2014 to 2018 have little relation to Intuit's more recent ads) at trial, it is necessary for the Court to admit these ads into evidence, review them, and compare them to the more recent TurboTax free ads. This is reason alone to deny Intuit's motion *in limine*.

Third, Intuit's Tax Year 2014 to 2018 ads are substantially similar to Intuit's more recent ads in the only way that matters for purposes of this case—they convey the inescapable and singular message that TurboTax is free. Whether the ads feature the Boston Tea Party, RX 200 (TY14 Boston Tea Party Super Bowl ad), Anthony Hopkins sipping tea with his dog, GX 323 (TY15 "Never A Sellout" Super Bowl ad), a fisherman being speared by a swordfish, GX 776 (TY17 Fish ad), a spelling bee, GXs 807 & 821

(TY18 & TY19 Spelling Bee ad), a dog show, GX 848 (TY21 Dog Show ad), or a dance instructor, GX 849 (TY21 Dance Workout ad), the central message communicated to consumers is the same—you can file for free with TurboTax. The fact that some of the ads included disclaimers and that the disclaimers varied over time is of no moment. As Professor Novemsky opines, the disclaimers were ineffective and failed to correct the misimpression held by a substantial portion of consumers not eligible for TurboTax Free Edition that they could file for free using TurboTax. *See* GX 303 (Novemsky Expert Report) at ¶¶ 8, 10, 69, 85 & Figures 1 & 3.

Intuit is also mistaken when it argues that "the Complaint does not even purport to address alleged misconduct from Tax Year 2014, instead limiting the allegations to advertising 'since … 2016.'" Mot. at 7 (selectively quoting Compl. ¶21). In conjuring this argument, Intuit omits the following key language contained in the Complaint that leaves open the possibility the allegations reach back before 2016:

- "Since **at least** 2016, Intuit has promoted TurboTax through advertising that represents that consumers can file their taxes for free using TurboTax." (Compl. ¶ 21) (emphasis added).
- "In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of online tax preparation products or services, Respondent represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax." (Compl. ¶ 119)

Moreover, in responding to Intuit's written discovery and in connection with the motion for summary decision filed by Complaint Counsel on August 22, 2022, Complaint Counsel made clear that Intuit's Boston Tea Party 2015 Super Bowl Ad (covering Tax Year 2014) was at issue. *See* Complaint Counsel's Motion for Summary Decision at p. 1-2 (citing and quoting GX 321 (Intuit's 2015 Boston Tea Party Super Bowl

Ad)). Intuit has had every opportunity to defend that ad and other Tax Year 2014 to 2018 TurboTax Ads if it can.

Intuit's Consent with States is irrelevant to whether the Tax Year 2014 to 2018 TurboTax Ads should be admitted into evidence. Finally, Intuit makes the puzzling argument that a Consent agreement it entered with the states and the District of Columbia (collectively, the "States") after the filing of this case somehow requires the Court to exclude ads predating it. Mot. at 8. In making this argument, Intuit points out that Complaint Counsel must show a "cognizable danger of recurring violation" in order to secure a cease and desist order, and then claims that the Tax Year 2014 to 2018 TurboTax Ads are not relevant and should be excluded as they don't specifically go to that question. Mot. at 8. This argument skips the liability phase of the proceeding altogether. Whether Intuit is liable for deception is still very much a part of this proceeding and, as explained above, the ads themselves constitute the primary evidence of the claims the advertisements convey. *See, e.g.*, *Daniel Chapter One,* 2009 WL 2584873, at *66. Thus, all of the ads at issue, including the Tax Year 2014 to 2018 TurboTax ads, are a necessary component of the proof at trial and should not be excluded. Moreover, Intuit's own expert relied on ads from Tax Year 2017 in constructing a copy test, which Intuit presumably intends to rely on for trial. *See* RX 1017 (Hauser Report) at ¶ 90.

After liability is established, the question of whether there is a "cognizable danger of recurring violation," *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953), then becomes relevant in determining whether a cease-and-desist order is an appropriate remedy. On that front, the Tax Year 2014 to 2018 TurboTax ads are also relevant because "[t]he existence of past violations may give rise to an inference that there will be future violations; and the fact that the defendant is currently complying with the … laws does not preclude an injunction." *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and its violations, and it

considers factors such as the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of its conduct; the likelihood, because of defendant's industry or occupation, that future violations might occur; and the sincerity of its assurances against future violations. *Id.* Considering Intuit's long running and pervasive deception is part of assessing the totality of the circumstance and the Tax Year 2014 to 2018 TurboTax ads are directly relevant to that inquiry.

Conclusion. For the foregoing reasons, Intuit's *motion in limine* should be denied.

Respectfully submitted,

Dated: February 24, 2023

/s/ Roberto Anguizola

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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 Outdated 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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