Public

**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Lina M. Khan, Chair**
**Noah Joshua Phillips**
**Rebecca Kelly Slaughter**
**Christine S. Wilson**
**Alvaro M. Bedoya**

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

# REPLY IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

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## TABLE OF ABBREVIATIONS

| Abbreviation | Refers To |
|---|---|
| Mot. | Complaint Counsel's Motion for Summary Decision, filed August 22, 2022 |
| CCSF- | Complaint Counsel's Statement of Material Facts as to Which There Is No Genuine Issue for Trial, filed August 22, 2022 (citations followed by fact number) |
| GX- | Complaint Counsel's Exhibits (citations followed by exhibit number) |
| Opp. | Respondent Intuit Inc.'s Opposition to Complaint Counsel's Motion for Summary Decision, filed August 30, 2022 |
| ISF- | Respondent Intuit Inc.'s Statement of Material Facts as to Which There Exists a Genuine Issue For Trial, Part II: Statement of Material Facts as to Which There Exists a Genuine Issue For Trial (citations followed by fact number) |
| RX- | Respondent Intuit Inc.'s Exhibits (citations followed by exhibit number) |

## STATEMENT REGARDING ORAL ARGUMENT

Respondent Intuit Inc. has requested that the Commission hear oral argument before issuing a ruling on Complaint Counsel's Motion for Summary Decision. Opp. at vii. Complaint Counsel does not oppose this request. Complaint Counsel and Respondent have conferred and respectfully jointly request that, if the Commission holds oral argument on the Motion, that it do so in person.

## REPLY IN SUPPORT OF SUMMARY DECISION

### I. Introduction

To further distract from this straightforward deceptive advertising case, Intuit's Opposition to the Motion for Summary Decision buries the principle that "[t]he primary evidence of the representations that an advertisement conveys to reasonable consumers is the advertisement itself." *In re Pom Wonderful LLC*, 155 F.T.C. 1, 12 (2013). Intuit's arguments should not lead the Commission to miss the forest for the trees. The inquiry in this matter must begin—and can end—with the Commission's review of Intuit's advertising in light of its own "common sense and administrative experience." *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992).

Take this TV ad:

> LAWYER: Free free free, free free free freefreefree. …
>
> LAWYER: Free free free, Free free freefreefreefree. Free free freefreefreefreefreefree. …
>
> LAYWER: Free free, free free! Free! Free …
>
> JUROR: Free. …
>
> JUDGE: Free free free free!
>
> VO: That's right, TurboTax Free is free. Free, free free free.

RX-29; GX-300. For the last four seconds of this 30-second ad, the center of the screen shows a large logo proclaiming "[redacted]," while small print on the bottom of the screen reads: "[redacted]." RX-29; GX-300 (pictured below). In light of common sense and administrative experience, what representation does this ad convey to a reasonable consumer? Simple: TurboTax is free for me.

Intuit argues that, "on their face, Intuit's ads conveyed that the Free Edition product is free and that it serves the needs of consumers with 'simple returns' only." Opp. at 5. This is too clever by half. After saying "free" aloud 43 times, Intuit argues

that its 4-second fine print disclosure made clear to consumers that ads like this only pertain to one "Edition" of TurboTax, which was limited to consumers with "'simple returns' only." Putting aside the abysmal failure of such a purported disclaimer to beg clearness and conspicuousness, as was true of legions of its ad campaigns, Intuit's arguments fail as a matter of law.

No genuine issue as to any material fact is presented; only illusory issues on a myriad of immaterial matters. The Commission should grant summary decision.

## II. Legal Standard

The purpose of summary judgment is to prevent unnecessary trials. *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2d Cir. 1999). If the Commission finds that "there is no genuine issue as to any material fact regarding liability or relief," it may enter summary decision. Rule 3.24(a)(2).[1] Requests by the nonmoving party for additional discovery before summary decision "must demonstrate 1) why the movant needs additional discovery and 2) how the additional discovery will likely create a genuine issue of material fact." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535

[1] If the Commission finds that there is no genuine issue regarding some, but not all, of the issues, it may enter partial summary decision, which "serves as a useful tool to streamline litigation by establishing certain issues before trial where there is no genuine issue of material fact." *SEC v. Bankatlantic Bancorp, Inc.*, 661 F. App'x 629, 630 n.1 (11th Cir. 2016).

(5th Cir. 1999); *see also Dunning v. Quander*, 508 F.3d 8, 10 (D.C. Cir. 2007) (desire to test veracity of defendants' affiants' testimony was insufficient without some reason to question their veracity); *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1364 (Fed. Cir. 2008).

## III. Argument

### A. There Are No Genuine Issues of Material Fact on the Complaint's Claim

Intuit claims "overwhelming evidence that refutes Complaint Counsel's assertions," and "creates disputed issues of fact." Opp. at 12. However, at best, Intuit has provided irrelevant extrinsic evidence, and in many instances, evidence that wholly supports Complaint Counsel's factual assertions.

#### 1. Intuit Made "Free" Claims Conveying to Consumers that TurboTax is Free for Them; That Representation Is Likely to Mislead Reasonable Consumers

The Commission's first task is to determine "whether Respondents disseminated advertisements conveying the claims alleged in the Complaint." *Pom Wonderful*, 155 F.T.C. at 11. "The Commission will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message." *Id.* The Complaint alleges that Intuit "represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax." Compl. ¶ 119. The Complaint does not, as Intuit seems to believe, allege that Intuit represented that TurboTax was free for *everyone*. Much of Intuit's Opposition engages in a straw man fallacy, arguing against an imagined version of the Complaint premised upon this non-existent allegation. The Motion and the evidence accompanying it establish what the Complaint alleges: That Intuit's ads conveyed the message to reasonable consumers that TurboTax was free *for them*. *See* Mot. 7–21. Intuit's Opposition does not seriously controvert such a finding.

**Questions of Fact.** Intuit argues that the meaning of an advertisement cannot be decided on summary decision because it is a question of fact, and that Complaint

Counsel is merely asking the Commission to draw "inferences" on the relevant facts. Opp. at 5–7. All this boils down to is a restatement of the legal standard on summary decision. Intuit acknowledges that, in some cases, summary decision on the meaning of ads has been deemed appropriate. Opp. at 6–7. Intuit casts these cases as "inapposite" because, in Intuit's estimation, the FTC's case was stronger and/or the defense case was weaker than what the parties present here. But that is for the Commission to decide.[2]

As the Motion makes clear, Intuit has expressly claimed to consumers that TurboTax is free for them. Mot. at 17–18. No "inferences" are needed to interpret such an express claim. Deception Policy Statement, at 176. Intuit's Opposition does not address its express claims at all. And even if Intuit's claims are implied claims requiring an examination of their "net impression," the Commission can determine their meaning through "common sense and administrative experience," *Kraft*, 970 F.2d at 319—even on summary decision, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632 (6th Cir. 2014).[3] Further, "[w]hen a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation." Deception Policy Statement, at 178.

Though Intuit claims that it disputes the majority of Complaint Counsel's facts, a reading of its Response to the CCSF (see Table of Abbreviations) shows that Intuit does so mostly based on irrelevant extrinsic evidence and sweeping, unsupported

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[2] Intuit's examples of summary decision denials—*In re Natural Organics, Inc.*, No. 9294, 2001 WL 1478367 (F.T.C. Jan. 30, 2001) and *In re Homeadvisor, Inc.*, No. 9407, 2022 WL 3500430 (F.T.C. Aug. 2, 2022)—offer far less commentary and reasoning than Complaint Counsel's cases in which summary decision/judgment were granted. *E.g.*, *FTC v. Fleetcor Techs., Inc.*, No. 1:19-cv-5727, 2022 WL 3273286 (N.D. Ga. Aug. 9, 2022).

[3] Intuit's citation to comments by Judge Breyer at the hearing in the accompanying TRO case are neither evidence nor precedential. *Brit. Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("oral argument [is] not evidence, and [cannot itself] create a factual dispute sufficient to defeat a summary judgment motion"). The Court's *actual* order denying the request for a TRO made no findings on the merits; it was based on mootness and the existence of *this proceeding*. RX-74. Far from *res judicata*, Judge Breyer recognized the independence of the administrative process.

statements, creating no genuine issue of material fact.[4] Intuit also protests that it needs discovery, but it *does not* invoke Rule 3.24(a)(4) to seek a continuance to take that discovery. Moreover, litigants cannot rely on lack of discovery to delay summary judgment when the evidence necessary to respond is within their possession, custody or control. *First Specialty Ins. Corp. v. GRS Mgmt. Assocs.*, No. 08-cv-81356, 2009 U.S. Dist. LEXIS 72708, at *15 (S.D. Fla. Aug. 17, 2009). Here, the relevant information relating to the allegations in the Complaint is within the control of Intuit. This case is about Intuit's advertising, and Intuit demonstrates through the attachments to its Opposition that it should have all the information it needs to mount a defense.

**Extrinsic Evidence.** Intuit claims that Complaint Counsel has not put forth reliable extrinsic evidence, specifically criticizing Complaint Counsel's expert, Prof. Novemsky, and consumer complaint evidence. Opp. at 7–11. But extrinsic evidence is not required here. *See Pom Wonderful*, 155 F.T.C. at 13 ("Extrinsic evidence is unnecessary to establish the impression that consumers would take away from an ad if the claims are reasonably clear from the face of the advertisement."); Mot. at 18 (citing cases).[5]

**Disclaimers.** Intuit argues that its advertising disclaimers create a genuine issue of material fact over the claim conveyed to reasonable consumers in its advertising. Opp. 11–18. Here, again, Intuit brushes aside cases that have entered summary decision/judgment against advertisers, even when they used arguable disclaimers. *See supra* pg. 3-4. Cases cited by Intuit articulate that courts can determine the sufficiency of

[4] For example, in its Response to the CCSF, Intuit repeatedly claims that an issue of material fact relates to captures and screenshots taken by Investigator Diana Shiller. ISFR at 3-7. However, Intuit does not put forth any facts or evidence to show that Ms. Shiller's captures are unreliable; nor does it explain what facts it could discover from Ms. Shiller that could create a genuine dispute. *See supra* Part II.

[5] Regardless, Professor Novemsky's survey evidence is reliable. *See* GX-313 (Professor Novemsky's declaration explaining and defending his survey methodology). And the number of consumer complaints does not establish that representations were not deceptive. *See In re Consumers Products of America, Inc.*, 72 F.T.C. 533, 557 n.13 (1967); *see also FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995).

disclosures on the face an advertisement. *See, e.g., Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617 (D.N.J. Apr. 7, 2020) (deciding the sufficiency of disclosures on the pleadings). Intuit also focuses on "net impression," Opp. at 11, a doctrine related to implied claims, without addressing its express claims, *see* Mot. at 17–18. Those issues aside, Intuit quips that Complaint Counsel has only put forward its own "*ipse dixit*" on the insufficiency of its disclaimers, Opp. at 11, overlooking the *Commission's* pronouncements on the subject in policy statements, business guidance, and caselaw, *see* Mot. 27–33 (citing authority). Intuit also advances its own assertions that its disclosures were sufficiently prominent. Here too, the Commission can reach its decision by looking express meaning and net impression of the at the ads themselves. *E.g.*, *supra*, pg. 2. Intuit argues that its disclosures follow the pattern of other comparable companies, but this is no defense in determining whether *Intuit* violated the law. *See, e.g., Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961) (similar practices by others "would not excuse Exposition's unfair deception").

It is black letter law that disclaimers are not always effective and are not a defense where, as here, the ad is still misleading. First—and again assuming a disclosure were present and readable—no disclosure can cure a false claim; it "can only qualify or limit a claim to avoid a misleading impression." .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013),[6] at 5; *see also* Deception Policy Statement, at 180-81. If a disclosure "contradicts a material claim, the disclosure will not be sufficient," rather, "the claim itself must be modified." *Id.* at 5.

The cases Intuit cites as support that its ads contain sufficient disclosures are readily distinguishable, primarily because most do not involve Section 5 of the FTC Act. Intuit's argument that additional disclosures in its video advertising "would be unhelpful to consumers," *see* Opp. at 14–15, is unpersuasive. A misleading claim is not

[6] ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising

vindicated if disclaiming it would require so much additional information as to confuse consumers.

**Website Disclosures.** Intuit argues that, regardless of what advertising consumers may see, they have to use the TurboTax website or app to make a purchase, and that better disclosures are available there. Opp. at 16–18. Intuit does not address the "well-established" principle "that an advertiser cannot 'cure the deception' in one advertisement with different statements in another." *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015); *see also* Deception Policy Statement, at 180 & n.37; *Fleetcor*, 2022 WL 3273286, at *12 ("post-hoc disclosures cannot cure earlier misleading representations") (citing cases). Further, the Commission can determine, with common sense and experience, whether Intuit's website creates a misleading net impression given its use of hyperlinks for integral information, among other issues. *See* Mot. at 30–33.

**Survey and Satisfaction Evidence.** Intuit argues that its survey and customer satisfaction evidence create genuine disputes of material fact regarding the message that its ads convey. Opp. at 19–20. That is not the case.

- Prof. Hauser conducted a survey and opined that consumers do not rely on Intuit's advertising alone; they research tax preparation providers and readily switch between providers. These conclusions, even if true, are irrelevant. Even if some consumers take actions to dispel Intuit's deceptive claims, Intuit nonetheless makes the deceptive claims. *See Goodman v. FTC*, 244 F.2d 584, 603 (9th Cir. 1957) ("There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious.").
- Ms. Kirk Fair conducted a survey and opined that consumers do not feel locked in to TurboTax, knowing they have other options. Again, these findings are not relevant. Consumers preparing their taxes in TurboTax

likely have already been exposed to Intuit's deceptive marketing. What consumers do *after* they realize that they have been deceived, or awareness of other tax filing options, is immaterial to the net impression of Intuit's ads.[7] Moreover, Ms. Kirk Fair's survey provides evidence that consumers are *not* skeptical of Intuit's "free" claims.[8] Indeed, Intuit changed it advertising explicitly to address any such possible skepticism. *See* Mot. at 8 n.15.

- Intuit touts high "net promotor scores" and customer retention as evidence that consumers were not deceived. Opp. at 20. Intuit relies on *FTC v. DirecTV*, No. 15-cv-01129, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018) to support its claim that customer satisfaction shows a lack of deception. However, "[e]vidence of customer satisfaction is not relevant to determining whether the claims made are deceptive." *In re Daniel Chapter One*, 2009 FTC LEXIS 86, at *7 (F.T.C. April 20, 2009); *see also Wilcox*, 926 F. Supp. at 1099.

**Consumer Understanding.** Intuit argues that reasonable consumers understand that there is some limitation to its free service because other companies use similar models and because consumers are skeptical of "free" claims. Opp. at 20–22. Intuit's extrinsic evidence shows that while some consumers *are* skeptical of the free offer, a significant minority are not, and are in fact "confident" that Intuit has a free option.[9]

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[7] The Commission does not have to reach any conclusions about the reliability of Intuit's expert materials to find them irrelevant. But Complaint Counsel also notes that much of Intuit's expert testimony is unreliable.

[8] 28% of consumers continued to think they could use Free Edition even when told they did not qualify for it. Kirk Fair Dec. Ex. 4a.

[9] ISF-93, n.534 ("22% of consumers were confident that Free Edition was truly free."); *see also* Golder Dec. ¶ 65 [redacted].

Complaint Counsel does not have to prove that all consumers are misled by Intuit's free claims, merely a significant minority. *See infra* n.12 and accompanying text.[10]

**Price Disclosures.** Intuit claims consumers were not deceived because they were made aware of the costs of its products *before* paying for them. Opp. at 22. But companies may not induce a first contact through deception, even if they subsequently cure the deception. *FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1010 (D. Nev. 2019), *aff'd* 827 F. App'x 653 (9th Cir. 2020); *see also Fleetcor*, 2022 WL 3273286, at *12. Intuit's reliance on *DirecTV* is misplaced. In *DirecTV*, the court found that reasonable consumers would understand that a flyer could not contain all relevant information "for a complex product like subscription satellite television services." *DirecTV*, 2018 WL 3911196, at *15. In contrast, while tax preparation itself is complicated, the TurboTax offerings are not. TurboTax offers four options at different price points, including a free version. *See, e.g.* RX-8. Intuit attempts to distinguish its conduct from well-established case law on deceptive door openers by relying on the fact that in many cases, in contrast with Intuit's conduct, "a *literal* door had to be opened." Opp. at 23. However, prohibited deceptive door openers can occur with telephone or internet transactions. *See, e.g., E.M.A. Nationwide*, 767 F.3d at 632.[11]

None of the extrinsic, irrelevant evidence discussed in Intuit's Opposition creates a genuine dispute as to the claim its ads conveyed to reasonable consumers—that TurboTax was free for them.

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[10] Intuit relies heavily on *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016)—a case about whether consumers understood how a tube of lip balm worked—for the proposition that consumers are unlikely to be misled because of their experience with and understanding of the tax preparation industry. But tax preparation is more complicated than figuring out how much lip balm is in a tube.

[11] Intuit itself refers to parts of its website as "[redacted]," *see, e.g.*, RX-46 at INTUIT-FFA-FTC-000485984, 89, and wanted to "[redacted]," RX-49 at INTUIT-FFA-FTC-000067015.

### 2. Intuit's "Free" Representation Is Likely to Mislead Consumers

After establishing that a claim has been made in the eyes of a reasonable consumer, the Commission must next determine "whether those claims were false or misleading." *Pom Wonderful*, 155 F.T.C. at 11. The Motion explains that Intuit's claim—*TurboTax is free for the reasonable consumer viewing Intuit's advertising*—is false and misleading because TurboTax is not free for most consumers (about two-thirds in recent tax years). Mot. at 20; *see also* ISF-13. Intuit argues that its marketing is not deceptive because many taxpayers do use TurboTax for free. But "[a] material practice that misleads a significant minority of reasonable consumers is deceptive." Deception Policy Statement, at 177 n.20; *see also Fanning v. FTC*, 821 F.3d 164, 170-171 (1st Cir. 2016); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).[12] Intuit's Opposition does not address "significant minority" caselaw at all. Indeed, Intuit provides facts showing that at least a significant minority of consumers who start their taxes in Free Edition do not file in Free Edition. *See, e.g.*, Opp. at 24 & ISF-62 ([redacted]).

Moreover, Intuit completely ignores consumers who are lured to turbotax.com by the free claims, realize that it is not free for them at that point, and then abandon TurboTax before they start their tax return (Intuit acknowledges that consumers come to its website and abandon before starting in statistics like those depicted in the "TurboTax Online Funnel," right, RX-52, at 4). Thus, the

[redacted]

[12] *See, e.g.*, *In re Telebrands Corp.*, 140 F.T.C. 278, 325 (10.5% is substantial); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (10-15% is substantial); *In re Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975) (14-33% is substantial, but 2-4% is not); *In re Benrus Watch Co. v. FTC*, 64 F.T.C. 1018, 1032, 1045 (1964), *aff'd*, 352 F.2d 313, 319-20 (8th Cir. 1965) (14% is substantial).

percentage of consumers affected by the free claims is likely much higher.

Nothing in Intuit's Opposition creates a genuine dispute as to likelihood to mislead.

**3. Intuit's Free Claims are Material**

Finally, the Commission must determine whether Intuit's "claims are material to prospective consumers." *Pom Wonderful*, 155 F.T.C. at 11. The Motion provides ample support for the fact that a free claim—a claim about cost—is material. Mot. at 22–25. Intuit attempts to distinguish the cases establishing materiality by arguing that a version of TurboTax "actually is free." Opp. at 24. But this argument assumes that the message its advertising conveys to consumers is *TurboTax "Free Edition" alone is free*—which the Commission can determine through common sense and experience is not the message that the ads convey. If the Commission finds that Intuit's ads conveyed a message to reasonable consumers that TurboTax would be free for them, the claim is material, as the Commission has long recognized. *E.g.*, *In re Book-of-the-Month Club*, 48 F.T.C. 1297, 1312 (1952). Intuit also ignores that express claims and intended implied claims are material. *See* Mot. at 24–25.

Intuit seeks to rebut the presumption of materiality by arguing, based on a survey by Ms. Kirk Fair, that "most users who began using Free Edition also finished in Free Edition." Opp. at 24. Based on this factoid, Intuit expects the Commission to somehow infer that Intuit's free claims "did not affect consumer conduct." *Id.* Intuit never cogently explains how this inference could be drawn from the Kirk Fair survey. In fact, another expert retained by Intuit, Dr. Hauser, submitted research proving that price is material to consumers. Hauser Decl. Ex. 6b, 8a, respectively (showing that over 70% of consumers indicated that price was "an important factor … when choosing a tax preparation method / provider"); *see also* ISF-102.

None of the evidence identified in Intuit's Opposition creates a genuine dispute as to materiality.

### B. Entry of a Cease and Desist Order is Appropriate

Intuit argues there is no "cognizable danger of recurrent violation," *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953), because its marketing practices have improved and will improve further after Intuit's multistate settlement. *E.g.*, Opp. at 25. But Intuit does not address the applicable legal test that examines scienter, history of infraction, contrition, and sincerity of assurances against future violations—bearing in mind that "[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). Evidence shows that Intuit intended the message its ads conveyed to consumers. *See* Mot. at 21. Its deceptive advertising ran for years, only improving under substantial scrutiny. *See W. T. Grant*, 345 U.S. 629, 632 n.5 ("beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption"). Indeed, Intuit chose to begin pulling its arguably most egregious commercials only after meeting with the FTC Chair. GX-352. As Intuit's Opposition shows, it has no contrition. Intuit's sincerity is questionable considering years of only incremental change. Intuit will continue to making "free" claims and the state settlement is not sufficient to prevent future deception. *See* Mot. at 35–36. Intuit also argues that the proposed order is vague and overbroad, Opp. at 27, but the Order proposed by Complaint Counsel merely tracks the Guide Concerning Use of the Word "Free" and Similar Representations 16 C.F.R. 251.1(c). The Commission should enter it.[13]

### C. Intuit's Defenses Are Meritless and Do Not Preclude Summary Decision

Intuit is mistaken when it argues that its defenses and the APA preclude summary decision. Opp. at 28. Where, as here, the respondent has the burden of proof

[13] If the Commission disagrees with Complaint Counsel's order it can, of course, enter a different cease and desist order without precluding summary decision.

on its defenses, the respondent must come forward with actual evidence in support of its affirmative defenses in opposing summary decision. *See e.g.*, *McCollough v. Johnson, Rodenberg & Lauinger*, 587 F. Supp. 2d 1170, 1176 (D. Mont. 2008). Here, Intuit has failed to come forward with actual evidence in support of any of its affirmative defenses.

**1. Mootness.** "The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide." *Tinoqui-Chalola Council v. Dep't of Energy*, 232 F.3d 1300, 1303 (9th Cir. 2000). Intuit has not done so. *See supra* Part III.B.

**2. Overbroad and Vague Relief.** This is not an affirmative defense. *See NR Grp. 3 Contractors, Inc. v. Grp. 3 Contractors, LLC*, No. 17-cv-21945, 2017 WL 7792718, at *4 (S.D. Fla. Sept. 26, 2017). The allegation that Complaint Counsel has not met its burden in seeking the proposed order is addressed *supra* Part III.B.

**3. Commission Did Not Vote for the Complaint.** Contrary to Intuit's assertion, the Commission voted 3-1 in favor of the final Complaint. *See* ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign.

**4. Laches/Estoppel.** The government is not subject to these defenses. *See Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 60-61 (1984); *see also 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.").

**5. Statute of Limitations.** No statute of limitations applies in Part 3 litigation. *See, e.g.*, 15 U.S.C. § 57b(d) (three-year statute of limitations for claims under Section 19(a), not Section 5 actions).

**6–10. Constitutional Defenses.** These affirmative defenses can be disposed of as a matter of law even if the Commission assumes that the factual averments they are based on are true.

- **Prejudgment.** Congress specifically vested the FTC "both with the 'power to act in an accusatory capacity' and with the 'responsibility of ultimately determining the merits of the charges so presented.'" *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.3d 583, 590 (D.C. Cir. 1970). The Commission may not judge a case in advance of hearing it; but voting to issue a complaint isn't prejudgment. *Id.* Similarly, the Commission has the authority, in the public interest, to alert the public to its actions by, for example, issuing press releases. *Id.* Adjudicators are presumed to be unbiased unless the challenger produces evidence to overcome that presumption. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Objectors like Intuit must produce at least some evidence showing that they are being deprived of a fair adjudication. It is not enough that the adjudicators also issued a complaint.[14]
- **Dual functions.** The Supreme Court has rejected the idea that the combination of investigative/prosecutorial and adjudicative functions "necessarily creates an unconstitutional risk of bias in administrative adjudication" that offends due process. *Withrow v. Larkin*, 421 U.S. 35, 47, 56 (1975). Courts have recognized this binding decision's application to the FTC. *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982).
- **Nondelegation.** Under the nondelegation doctrine, Congress may not delegate "powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality). By contrast, the government's decision to enforce the laws is a matter over which the "Executive Branch has exclusive authority and absolute discretion."

[14] If Intuit is serious about its accusation that Chair Lina Khan prejudged this matter because of a retweet of a press release and a mention in a symposium, it has the option of seeking disqualification. *See* 16 CFR § 4.17 (such motion "shall be filed at the earliest practicable time"). Denial of a meritorious motion for summary decision is not the correct remedy.

*United States v. Nixon*, 418 U.S. 683, 693 (1974); *accord Heckler v. Chaney*, 470 U.S. 821, 835 (1985). A Commission decision whether to pursue an enforcement action in federal court or in Part 3 constitutes a "forum choice" that is a classic exercise of prosecutorial discretion, which is an executive function. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1313 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016). Far from forum shopping, the FTC is adhering to the existing statutory scheme to ensure Intuit's compliance with the FTC Act while preserving the possibility of consumer redress available under Section 19—precisely what the Court recently described as a "coherent enforcement scheme." *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1349 (2021).

- **Separation-of-Powers.** The Supreme Court upheld the constitutionality of the FTC's removal protections over 85 years ago and has declined multiple times since to alter that binding holding. *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935). Moreover, whatever the constitutionality of those removal protections may be, that issue has no bearing on the validity of any cease-and-desist order issued in connection with these proceedings. Each participating Commissioner has been "properly appointed." *Collins v. Yellen*, 141 S. Ct. 1761, 1787–28 & n.23 (2021) (even unconstitutional removal restrictions do not "strip [an officer] of the power to undertake the other responsibilities of his office") (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207–11 (2020)).
- **APA.** Summary decision is consistent with the APA. In fact, courts have repeatedly upheld the use of summary decision in administrative proceedings. *See Kornman v. SEC*, 592 F.3d 173, 182 (D.C. Cir. 2010); *Gibson v. SEC*, 561 F.3d 548, 555 (6th Cir. 2009); *Brownson v. SEC*, 66 F. App'x 687, 688 (9th Cir. 2003). The FTC Part 3 Rules (including Rule 3.24 on summary

decision) are entirely consistent with 5 U.S.C. § 556(d). When read in context, it is clear that the last sentence in § 556(d) providing for submission of evidence in "written form" relaxes the rules so that in some instances matters can be conducted based on written evidence. This language in no way prohibits summary decision where a finding has been made that there are no genuine issues of material fact obviating a need for trial. *Cf.* ACUS Model Adjudication Rules, Rule 250, *available at* https://www.acus.gov/sites/default/files/documents/Model%20Adjudication%20Rules%209.13.18%20ACUS_0.pdf.

## IV. Conclusion

Pending before the Commission is a discrete false advertising case, the contours and meaning of which present no genuine issues of material fact. The Commission should enter summary decision.

Respectfully submitted,

Dated: September 8, 2022

/s/ James Evans

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**Counsel Supporting the Complaint**
**Federal Trade Commission**

**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Lina M. Khan, Chair**
**Noah Joshua Phillips**
**Rebecca Kelly Slaughter**
**Christine S. Wilson**
**Alvaro M. Bedoya**

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|---|---|
| In the matter of:<br><br>**Intuit Inc.**,<br>a corporation,<br><br>Respondent. | Docket No. 9408 |

# COMPLAINT COUNSEL'S RESPONSES AND OBJECTIONS TO INTUIT INC.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE FOR TRIAL

Pursuant to Rule 3.24 of the Commission's Rules of Practice, Complaint Counsel submits, in support of its Motion for Summary Decision, responses to Intuit Inc.'s Statement of Material Facts as to Which There Exists a Genuine Issue for Trial (Part II).

## I. General Responses and Objections

1. Complaint Counsel's responses and objections herein shall not waive or prejudice any further objections it may later assert. The failure to make a particular objection in a given response should not be construed as a waiver of that objection. Complaint Counsel reserves the right to supplement, amend, or qualify these responses and objections.

2. Complaint Counsel reserves the right to introduce evidence and testimony at any hearing or trial to controvert each fact set forth herein even if Complaint Counsel does not contest that fact for the purposes of Complaint Counsel's Motion for Summary Decision.

## II. Specific Responses and Objections

1. TurboTax Free Edition is a completely free tax preparation and filing software.[414]

**Response:** Complaint Counsel admits the asserted fact.

2. Free Edition is made available by Intuit to the approximately 58 million American tax filers each year that file a "simple tax return."[415]

**Response:** Complaint Counsel admits the asserted fact.

3. Consumers that file a Federal IRS Form 1040 without any attached schedules (or, before 2019, by using IRS Form 1040EZ)—i.e., a "simple tax return"—can file for their federal tax return for free using TurboTax Free Edition.[416]

**Response:** Complaint Counsel admits the asserted fact.

4. For consumers with more complex tax returns, Intuit offers paid TurboTax products. For instance, consumers with mortgage and property deductions, charitable donations over $300, itemized deductions, unemployment income, and education expenses can file their taxes using TurboTax Deluxe.[417] Consumers with investment income and rental property income and refinancing deductions can file using TurboTax Premium.[418] And consumers with expenses from self-owned businesses can file their taxes using TurboTax Self-Employed, the most comprehensive TurboTax product.[419]

**Response:** Complaint Counsel admits the asserted fact.

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[414] Ryan Decl. ¶ 5.

[415] Ryan Decl. ¶ 6; *see also* RX 95 (showing that of the approximately 148 million electronic returns filed with the IRS in 2020, 57,671,912 returns included only Form 1040 with no Schedules1-6 or Schedule A attached).

[416] RX 63.

[417] RX 9.

[418] *Id.*

[419] *Id.*

5. Intuit's advertisements disclose, clearly and conspicuously, Free Edition's qualifications, using the disclosure "simple tax returns," or similar language in its advertisingand marketing for Free Edition.[420]

**Response:** Complaint Counsel admits that Intuit's advertisements use the disclosure "simple tax returns," or similar language in its advertising and marketing for Free Edition. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support and because it includes improper legal argument about the clarity and conspicuousness of Intuit's disclosures.

6. In Tax Year 2016 (i.e., calendar year 2017), 14,255,506 taxpayers filed their federal tax returns for free using Free Edition.[421]

**Response:** Complaint Counsel admits the asserted fact.

7. In Tax Year 2017, 14,815,137 taxpayers filed their federal tax returns for free using Free Edition.[422]

**Response:** Complaint Counsel admits the asserted fact.

8. In Tax Year 2018, 12,704,231 taxpayers filed their federal tax returns for free using Free Edition.[423]

**Response:** Complaint Counsel admits the asserted fact.

9. In Tax Year 2019, 14,105,532 taxpayers filed their federal tax returns for free using Free Edition.[424]

**Response:** Complaint Counsel admits the asserted fact.

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[420] *See, e.g.,* RX 15; RX 16; RX 17; RX 18; GX 324-25, GX 328-31, GX 334, GX 345-51; *see also* GX 152 at 48:22-49:5; GX 156 at 135:4-10; GX 155 at 52:3-53:14.

[421] RX 106.

[422] *Id.*

[423] *Id.*

[424] *Id.*

10. In Tax Year 2020, 13,853,576 taxpayers filed their federal tax returns for free using Free Edition.[425]

**Response:** Complaint Counsel admits the asserted fact.

11. During Tax Years 2016 through 2020, approximately one in five taxpayers who filed using any online service (not just TurboTax) filed their federal taxes for free with Free Edition.[426]

**Response:** Complaint Counsel admits the asserted fact.

12. In Tax Years 2016-2020, 41.88% of all TurboTax customers filed their federal tax return completely for free with Free Edition.[427]

**Response:** Complaint Counsel admits the asserted fact.

13. In Tax Year 2019 (calendar year 2020), approximately 39% of taxpayers that electronically filed a Form 1040 with no Schedules 1-6 or Schedule A attached were eligible to file their taxes for free using Free Edition.[428] Specifically, of the 148,496,552 electronic returns filed with the IRS in 2020, 57,671,912 returns included only Form 1040 with no Schedules 1-6 or Schedule A attached.[429]

**Response:** Complaint Counsel admits the asserted fact.

14. More taxpayers use Free Edition than any single TurboTax paid product.[430]

**Response:** Complaint Counsel admits the asserted fact.

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[425] *Id.*

[426] *Supra* Intuit SOF ¶¶ 6-10 (reflecting that over 69 million taxpayers filed their federal tax returnsfor free using Free Edition between Tax Years 2016-2020); *see also* RX 84 at 2, tbl. 4 (showing that over 151.1 million individual returns were filed electronically using any online service in 2021).

[427] RX 106.

[428] RX 95.

[429] *Id.*

[430] RX 106.

15. Intuit's free offering is intended to, and does, build goodwill with consumers.[431]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support and because it is irrelevant and immaterial.

16. Consistent with its objective to build goodwill with consumers, Intuit advertise its free product.[432]

**Response:** Complaint Counsel admits that Intuit advertises its free product. Complaint Counsel objects to the remainder of the asserted fact because it is irrelevant and immaterial.

17. Intuit's Free Edition advertisements do not state that all consumers can file their taxes for free with TurboTax.[433]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods. The best evidence of what Intuit's advertisements convey are the ads themselves. The ads cited by Intuit (RX 15; RX 16; RX 17; RX 18; GX 324-25, GX 328-31, GX 345-51) do not support the asserted fact. While Intuit's Free Edition advertisements do not expressly contain the phrase "all consumers can file their taxes for free with TurboTax," the net impression of the ads convey consumers can file their taxes for free using TurboTax.

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[431] *See* GX 152 at 122:18-123:8, 124:17-23.

[432] *See, e.g.*, GX 324-325, GX 328-331, GX 334, GX 345-351; Compl. Counsel's Statement of Material Facts As To Which There Is No Genuine Issue for Trial ("Compl. Counsel SMF") ¶¶ 25-44, 48-60, 100-102, 105-108, 111-112, 114-117.

[433] *See supra* note 420; Golder Decl. ¶ 56; GX 152 at 48:22-49:5; GX 156 at 134:25-135:10; GX 155 at 52:3-53:14.

18. Intuit advertises that it has a free product—TurboTax Free Edition—that is available for consumers who qualify.[434] Intuit's ads thus "communicate that the TurboTax *FreeEdition* is free."[435]

**Response:** Complaint Counsel admits that Intuit advertises that it has a free product—TurboTax Free Edition. Complaint Counsel further admits that TurboTax Free Edition is available for consumers who qualify. Complaint Counsel further admits that Intuit's ads communicate that the TurboTax Free Edition is free. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

19. Intuit conveys the message that TurboTax Free Edition is free with disclosures [redacted]

**Response:** Complaint Counsel admits that Intuit conveys the message that TurboTax Free Edition is free [redacted]. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

20. Intuit's video advertising for TurboTax Free Edition clearly and conspicuously discloses that Free Edition is available for consumers with "simple tax returns only" (or similar disclosure language).[437]

**Response:** Complaint Counsel admits that in many instances, Intuit's video advertising for TurboTax Free Edition included a written disclosure stating, "simple tax

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[434] GX 156 at 130:18-131:1; *see also id.* at 110:16-20 [redacted] (emphasis added)).

[435] GX 156 at 130:18-19; *see also id.* at 110:16-20.

[436] GX 156 at 130:25-131:1, 133:13-134:3.

[437] RX 15; RX 16; RX 17; RX 18; GX 324-325; GX 328-331; GX 334; GX 345-351; Ryan Decl. ¶¶ 18-19; Golder Decl. ¶ 56; GX 156 at 133:13-134:3 (explaining that the "Free Free Free" campaign ads contained a disclosure stating that Free Edition was for simple returns).

returns only" (or similar disclosure language). Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods. The best evidence of whether Intuit's disclosures in video advertising are clear and conspicuous are the ads themselves. The ads cited by Intuit (RX 15; RX 16; RX 17; RX 18; GX 324-325; GX 328-331; GX 345-351) do not support the asserted fact that the disclosures in the video advertisements were clear and conspicuous.

21. Each TurboTax "free" advertisement stated that the product being advertised wasTurboTax Free Edition.[438]

**Response:** Complaint Counsel disputes the asserted fact. Intuit offered and advertised other TurboTax products and services for free. For example, Intuit offered and advertised TurboTax Live for free in Tax Year 2021. *See e.g.,* GX 307-310. In those ads, Intuit did not state that the product being advertised was TurboTax Free Edition.

22. In Tax Year 2021, Intuit's television ads for Free Edition included a text disclosure stating that "TurboTax Free Edition is for simple U.S. returns only" and inviting consumers to "See if you qualify at turbotax.com."[439] The disclosures in the Tax Year 2021television ads for Free Edition were set out in white font on a dark blue background withoutaccompanying images that might distract the viewer.[440]

**Response:** Complaint Counsel admits that in Tax Year 2021, Intuit's television ads for Free Edition included a text disclosure stating that "TurboTax Free Edition is for simple U.S. returns only" and inviting consumers to "See if you qualify at

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[438] *See, e.g.*, GX 324-325; GX 328-331; GX 334; GX 345-351.

[439] Ryan Decl. ¶ 19.

[440] *Id.*

turbotax.com." The disclosures in the Tax Year 2021 television ads for Free Edition were set out in white font on a blue background. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

23. Intuit's Tax Year 2021 television ads also included a voiceover that stating that"TurboTax *Free Edition* is free."[441]

**Response:** Complaint Counsel admits the asserted fact.

24. The voiceover in Intuit's Tax Year 2021 television ads also encouraged consumers to "see details at turbotax.com."[442]

**Response:** Complaint Counsel admits that the voiceover in Intuit's Tax Year 2021 television ads also stated, "see details at turbotax.com." Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

25. In prior years, Intuit's television ads also contained the "simple returns" or similar disclosure language and directed consumers to the TurboTax.com website for more details.[443]

**Response:** Complaint Counsel admits the asserted fact.

26. For example, each television advertisement for TurboTax Free Edition that ran during Tax Years 2019 and 2020 included a disclosure stating that "TurboTax Free Edition is for simple U.S. returns only" and asked consumers to "[s]ee if [they] qualify at turbotax.com."[444]

**Response:** Complaint Counsel admits the asserted fact.

27. In Tax Years 2017 and 2018, each television advertisement included a disclosure that stated that the offer was for the "Free Edition product only" or for

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[441] *Id.*

[442] *Id.*

[443] *See supra* note 72. [in Respondent's original filing]

[444] RX 15; RX 16; *see also* GX 156 at 135:8-14 ([redacted]).

"AbsoluteZero." All of the disclosures stated that the offer was for "[f]or simple U.S. returns" and encouraged consumers to "See details at turbotax.com."[445]

**Response:** Complaint Counsel admits that in Tax Years 2017 and 2018, each television advertisement included a disclosure that stated that the offer was for the "Free Edition product only" or for "AbsoluteZero." Complaint Counsel also admits that all of the disclosures stated that the offer was for "[f]or simple U.S. returns" and stated, "See details at turbotax.com." Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

28. Prior to Tax Year 2017, the disclosure stated, "TurboTax Federal Free Edition is for simple U.S. returns only."[446]

**Response:** Complaint Counsel admits the asserted fact.

29. As reflected above, Intuit updated its television advertisement disclosures in TaxYear 2019 to convey Free Edition's qualifications more prominently to consumers.[447] Beyond changes to the disclosure language itself, the disclosure's color and font were also changed to make the language more prominent and easier to read.[448] And the primary text at the end of theadvertisement was updated to refer to "TurboTax Free Edition."[449]

**Response:** Complaint Counsel admits that Intuit updated its television advertisement disclosures in Tax Year 2019. Complaint Counsel also admits that Intuit changed the disclosure language itself, and the disclosure's color and font. Complaint Counsel also admits that the primary text at the end of the advertisement was updated to refer to "TurboTax Free Edition." Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

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[445] *Id.*

[446] *See, e.g.,* RX 17; RX 18.

[447] *See supra* Intuit SOF ¶¶ 26-27.

[448] *Compare* GX 328, *with* RX 15.

[449] *Id.*

30. In Tax Years 2020 and 2021, paid search advertisements for TurboTax Free Edition on Google contained the language "Free for Simple Returns Only" immediately under the link itself.[450]

**Response:** Complaint Counsel admits the asserted facts.

31. In Tax Year 2021, paid search advertisements for Free Edition placed on Bing likewise contained the language "Free for Simple Returns Only" immediately under the link itself.[451]

**Response:** Complaint Counsel admits the asserted facts.

32. Consumers must visit the TurboTax website or app in order to use TurboTax FreeEdition.[452]

**Response:** Complaint Counsel admits the asserted facts.

33. Intuit clearly, conspicuously, and repeatedly disclosed Free Edition's eligibility limitations throughout the TurboTax website and mobile application, including before consumers enter any personal information.[453]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support.

34. [redacted][454]

**Response:** Complaint Counsel objects the asserted fact based on an absence of evidentiary support. The best evidence of whether Intuit's website disclosures were clear and conspicuous are the websites themselves as they appeared as part of Intuit's

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[450] Ryan Decl. ¶ 24.

[451] Ryan Decl. ¶ 25.

[452] *Id.* ¶ 28.

[453] *See infra* Intuit SOF ¶¶ 34-59.

[454] RX 62 at INTUIT-FFA-FTC-000490076–77; *see also id.* at -0081.

TurboTax free campaigns (see, e.g., RX 19, RX 2, GX 240, GX 342 (Shiller Dec.) ¶¶ 94-97, 124-127.

35. [redacted].[455]

**Response:** Complaint Counsel objects the asserted fact based on an absence of evidentiary support. The best evidence of whether Intuit's website disclosures, [redacted], were clear and conspicuous are the websites themselves as they appeared as part of Intuit's TurboTax free campaigns (see, e.g., RX 19, RX 2, GX 240, GX 342 (Shiller Dec.) ¶¶ 94-97, 124-127.

36. Intuit's Free Edition offer on its website included a disclosure that the offer was for "Simple tax returns only." The "Simple tax returns only" disclosure was in close proximity to the Free Edition offer, with font color-contrasted to the surrounding text, and acted as a hyperlink consumers could click on to learn more about Free Edition's eligibility limitations.[456]

**Response:** Complaint Counsel admits that Intuit's Free Edition offer on its website included a disclosure that the offer was for "Simple tax returns only." Complaint Counsel admits that the "Simple tax returns only" disclosure was in color-contrasted font and acted as a hyperlink consumers could click on to learn more about Free Edition's eligibility limitations. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

37. Users that clicked the hyperlinked "simple tax returns" in Tax Years 2019 to 2021(until August 1, 2022) saw a pop-up screen stating, "A simple tax return is Form 1040 only."[457] The screen also lists the situations covered by TurboTax Free Edition, including "W-2 income, Limited interest and dividend income reported on a 1099-INT

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[455] RX 62 at INTUIT-FFA-FTC-000490070.

[456] Ryan Decl. ¶ 30.

[457] RX 3.

or 10999-DIV, Claiming thestandard deduction, Earned Income Tax Credit (EIC), Child tax credits, and Student Loan Interest deduction."[458]

**Response:** Complaint Counsel admits the asserted fact.

38. Likewise, during Tax Years 2019 and 2020, TurboTax's homepage included a color-contrasted, hyperlinked disclosure stating that TurboTax Free Edition is for "simple tax returns."[459] After clicking on that hyperlinked disclosure, consumers were again provided with a pop-up screen informing them in detail the tax situations covered by Free Edition.[460]

**Response:** Complaint Counsel admits that during Tax Years 2019 and 2020, TurboTax's homepage included a color-contrasted, hyperlinked disclosure stating that TurboTax Free Edition is for "simple tax returns." Complaint Counsel also admits that if the hyperlink was clicked, a pop-up screen appeared with details about the tax situations covered by Free Edition. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

39. Before Tax Year 2018, Intuit stated that its free product applied to filers with"Forms 1040EZ/1040A."[461]

**Response:** Complaint Counsel admits the asserted fact.

40. In Tax Years 2016 through 2018, the home page invited consumers to click a separate hyperlink to either "See why it's free" or "No catch, here's why."[462] Again,

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[458] *Id*. Consumers saw a substantially similar pop-up screen in earlier years. *See, e.g.*, RX 25.

[459] Ryan Decl. ¶ 56; RX 19.

[460] RX 20; RX 21.

[461] *See, e.g.*, RX 23.

[462] In Tax Years 2017 and 2018, the hyperlink stated, "See why it's free." *See, e.g.*, RX 23 (Tax Year 2017); RX 22. In Tax Year 2016, the hyperlink stated, "No catch, here's why." *See, e.g.*, RX 24.

these hyperlinks directed consumers to a pop-up screen with detailed information about the tax situations covered by Free Edition.[463]

**Response:** Complaint Counsel admits that in Tax Years 2016 through 2018, the Intuit homepage included a hyperlink stating either "See why it's free" or "No catch, here's why." Complaint Counsel also admits clicking these hyperlinks directed consumers to a pop-up screen with detailed information about the tax situations covered by Free Edition. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

41. The next page consumers see on the TurboTax website when they click to start filing their taxes is the Products & Pricing page.[464] That webpage allows consumers to view the full suite of commercial TurboTax products, including their prices, and select which product theywish to use.[465]

**Response:** Complaint Counsel admits the asserted fact.

42. [redacted].[466]

**Response:** Complaint Counsel admits the asserted fact assuming that the term [redacted]" refers to an individual who creates a new Intuit account and that the term as used in the asserted fact is not intended to cover all visitors to the TurboTax website.

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[463] *See, e.g.*, RX 23.

[464] Ryan Decl. ¶ 42.

[465] RX 9.

[466] RX 52 at 36; Golder Decl. ¶ 120.

43. [redacted].[467]

**Response:** Complaint Counsel admits the asserted fact.

44. [redacted].[469]

**Response:** Complaint Counsel admits [redacted]. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

45. The baseline version of the Products & Pricing page included multiple additional hyperlinked disclosures of Free Edition's eligibility limitations that provided access to the samedetailed description of Free Edition's qualification.[470]

**Response:** Complaint Counsel admits the asserted fact.

46. The current Products & Pricing page discloses qualifications for Free Edition in at least four prominent locations and asks consumers to "see if you qualify" with contrasted, hyperlinked text.[471]

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[467] RX 52 at 36; Golder Decl. ¶ 120.

[468] RX 53 at 73, 75; Golder Decl. ¶ 121.

[469] RX 53 at 73, 75; Golder Decl. ¶ 121.

[470] RX 9.

[471] *See* RX 9; *see also* GX 155 at 211:17–20.

**Response:** Complaint Counsel admits that the current Products & Pricing page includes hyperlinked disclosures for qualifications for Free Edition in at least four locations that state, "see if you qualify" with contrasted, hyperlinked text. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

47. Prior to Tax Year 2021, Intuit made changes to its website to improve consumers'experiences. For example, the TurboTax website no longer referenced "Free Guaranteed" or makes any other free guarantee and references to "free" were followed by "simple returns only" in close proximity and in larger, contrasting font.[472]

**Response:** Complaint Counsel admits that prior to Tax Year 2021, Intuit made changes to its website. Complaint Counsel admits that the TurboTax website no longer referenced "Free Guaranteed" or makes any other free guarantee and references to "free" were followed by "simple returns only" in close proximity and in larger font than in prior years, in contrasting font. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

48. On August 1, 2022, Intuit again updated the TurboTax website.[473] The Free Edition landing page, for instance, now includes disclosures in multiple locations stating that Free Edition is "For simple tax returns only," with hyperlinked text asking consumers to "See ifyou qualify." Clicking on the "See if you qualify" hyperlink reveals a pop-up screen with detailed information about the tax situations covered by Free Edition.[474] The Free Edition webpage also discloses that "Not all taxpayers qualify" to use Free Edition.[475]

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[472] *Compare* RX 19 *with* RX 7.

[473] *See, e.g.,* RX 5; RX 9.

[474] RX 5.

[475] *Id*.

**Response:** Complaint Counsel admits that on August 1, 2022, Intuit again updated the TurboTax website. The Free Edition landing page, for instance, now includes disclosures in multiple locations stating that Free Edition is "For simple tax returns only," with hyperlinked text stating, "See if you qualify." Clicking on the "See if you qualify" hyperlink reveals a pop-up screen with detailed information about the tax situations covered by Free Edition. The Free Edition webpage also states that "Not all taxpayers qualify" to use Free Edition. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

49. The Free Edition webpage also now includes the question, "Why use TurboTax Free Edition?" Under that text, the webpage explains, "If you have a simple tax return, you canfile your taxes online for free with TurboTax Free Edition." The "simple tax return" in that sentence is a hyperlink that again leads to a pop-up screen with detailed information about the tax situations covered by Free Edition.[476]

**Response:** Complaint Counsel admits the asserted fact.

50. The Products & Pricing page was also updated to include additional disclosures. Directly under "Free Edition," the page discloses that the product is for "Simple tax returns only," and provides a link to "See if you qualify."[477] At three other prominent locations, the webpage states that Free Edition is for "simple tax return[s] only," with links to additional information about Free Edition's qualifications.[478] The webpage further discloses that "Not alltaxpayers qualify."[479]

**Response:** Complaint Counsel admits that the Products & Pricing page was also updated to include additional disclosures. Complaint Counsel also admits that directly under "Free Edition," the page states, "Simple tax returns only," and provides a link to

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[476] *Id*.

[477] RX 9.

[478] *Id*.

[479] *Id*.

"See if you qualify." Complaint Counsel also admits that at three other locations, the webpage states that Free Edition is for "simple tax return[s] only," with links to additional information about Free Edition's qualifications. The webpage further states "Not all taxpayers qualify." Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

51. Moreover, in the top panel of the Products & Pricing page, there is an initial set of screening questions about taxpayers' income and expenses. As was the case in earlier tax years, the screening questions allow the TurboTax software to determine which TurboTax product fits the potential customer's needs, recommending Free Edition if the customer qualifies.[480]

**Response:** Complaint Counsel admits that in the top panel of the Products & Pricing page, there is an initial set of screening questions about taxpayers' income and expenses. Complaint Counsel also admits that the screening questions allow the TurboTax software to determine which TurboTax product fits the potential customer's needs. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

52. Users that click the hyperlinked "simple tax return" or "See if you qualify" text onTurboTax webpages see a pop-up screen asking, "What qualifies as a simple tax return?"[481] The pop-up then explains, "If you have a simple tax return, you can file with TurboTax Free Edition …. A simple tax return is one that's filed using IRS Form 1040 only, without having to attach any forms or schedules. Only certain taxpayers are eligible."[482] The screen also lists the situations covered by TurboTax Free Edition, including "W-2 income, Limited interest and dividend income reported on a 1099-INT or 10999-DIV, IRS standard deduction, Earned Income Tax Credit (EIC), Child

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[480] *See, e.g.,* RX 10; RX 11; RX 12; *see also* RX 8, 13; Golder Decl. ¶ 118 & Fig. 13.

[481] RX 4.

[482] *Id*.

tax credits, and Student loan interest deduction," as well as situationsthat are not covered.[483]

**Response:** Complaint Counsel admits the asserted fact.

53. The updated TurboTax website also includes a webpage displaying all material limitations for Free Edition.[484] That page provides that "[a] simple return is one that's filed usingIRS Form 1040 only, without attaching any schedules," and includes a button with the text "See if you qualify" that directs consumers to detailed information about the tax situations covered by Free Edition further down that same webpage.[485]

**Response:** Complaint Counsel admits that the updated TurboTax webpage states that "[a] simple return is one that's filed using IRS Form 1040 only, without attaching any schedules," and includes a button with the text "See if you qualify" that directs consumers to detailed information about the tax situations covered by Free Edition further down that same webpage. Complaint Counsel objects to the remainder of the assertion based on an absence of evidentiary support, and because it contains an improper legal argument.

54. The information included on the Free Edition disclosure webpage explains at length the "Situations covered" by Free Edition, as well as the "Situations not covered."[486]

**Response:** Complaint Counsel admits that the information included on the Free Edition disclosure webpage includes "Situations covered" by Free Edition, as well as the "Situations not covered." Complaint Counsel objects to the remainder of the assertion based on an absence of evidentiary support.

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[483] *Id*.

[484] RX 6.

[485] *Id*.

[486] *Id*.

55. Every other webpage on the TurboTax website, including the homepage was also updated to include "Important Details about Free Filing for Simple Tax Returns" without having to click a link. That disclosure provides, "If you have a simple tax return, you can file with TurboTax Free Edition, TurboTax Live Basic, or TurboTax Live Full Service Basic. A simple tax return is one that's filed using IRS Form 1040 only, without having to attach any forms or schedules. Only certain taxpayers are eligible." It then details the tax situations covered by FreeEdition.[487]

**Response:** Complaint Counsel admits that the TurboTax homepage was updated to include "Important Details about Free Filing for Simple Tax Returns" without having to click a link. Complaint Counsel also admits that the disclosure provides: "If you have a simple tax return, you can file with TurboTax Free Edition, TurboTax Live Basic, or TurboTax Live Full Service Basic. A simple tax return is one that's filed using IRS Form 1040 only, without having to attach any forms or schedules. Only certain taxpayers are eligible." Complaint Counsel also admits that the webpage also states the tax situations covered by Free Edition. Complaint Counsel objects to the remainder of the assertion based on an absence of evidentiary support.

56. Prior versions of the "Important Details" disclosures found on every page of the TurboTax website included hyperlinked text stating, "Important offer details and disclosures." When users click that link, they access a dropdown field including another disclosure that FreeEdition is available for simple tax returns only.[488]

**Response:** Complaint Counsel admits the asserted fact.

57. In addition, the TurboTax website includes multiple TurboTax Blog posts and Support FAQs describing Free Edition's qualifications. For instance, in a Support FAQ entitled"Is TurboTax Free Edition right for me?," Intuit explained that "Free Edition is an online-only product that supports simple tax returns that can be filed on

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[487] RX 5; RX 7; RX 9.

[488] Ryan Decl. ¶ 41; *see, e.g.,* RX 8.

Form 1040 without any attached schedules," and went on to explain the specific tax situations covered by Free Edition.[489]

**Response:** Complaint Counsel admits the asserted fact.

58. Intuit's website contains blog posts and articles regarding Free Edition that"[s]pecify that this offer is for people with 'simple tax returns,' and link to the appropriate Simple tax returns tool tip."[490]

**Response:** Complaint Counsel admits the asserted fact.

59. Thus, before even registering a username or inputting any information, consumers are presented with multiple webpages with repeated, clear disclosures about Free Edition's limitations.[491]

**Response:** Complaint Counsel admits that before registering a username or inputting any information, consumers are presented with multiple webpages. Complaint Counsel objects to the remainder of the assertion based on an absence of evidentiary support.

60. [redacted].[492]

[489] RX 63.

[490] RX 64.

[491] *See supra* Intuit SOF ¶¶ 32-58; *see also* Golder Decl. ¶ 120.

[492] RX 51 at 13 (showing that in Tax Year 2019, only 20% of TurboTax customers encountered arequired upgrade screen); Golder Decl. ¶ 124.

[redacted].[493]

**Response:** Complaint Counsel admits that [redacted]. Complaint Counsel also admits that [redacted]. Complaint Counsel objects to the remainder of the assertion based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

61. [redacted].[494] [redacted].[495]

**Response:** Complaint Counsel admits the asserted fact.

62. [redacted].[496]

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[493] RX 48 at 100; *see also* RX 37 at INTUIT-FFA-FTC-000316307 (noting that in Tax Year 2016, by the week ending in April 22, only 16% of users encountered an upgrade screen); *see also* Golder Decl. ¶ 123.

[494] *See, e.g.*, GX 155 at 213:7-15; GX 152 at 129:4-13.

[495] RX 54 at 30; Golder Decl. ¶ 122.

[496] *See* RX 65; GX 295 at INTUIT-FFA-FTC-000003255863 [redacted]; RX 37 at INTUIT-FFA-FTC-000316307 [redacted]; Golder Decl. ¶ 123.

**Response:** Complaint Counsel admits the asserted fact.

63. Consumers may begin using Free Edition even if they understand they likely do not qualify.[497] Indeed, some third-party reviewers like the New York Times' Wirecutter expressly recommend that consumers start their tax returns using Free Edition, regardless of theirtax situation.[498]

**Response:** Complaint Counsel admits that consumers may begin using Free Edition even if they understand they likely do not qualify. Complaint Counsel also admits that the New York Times' Wirecutter expressly recommended that consumers start their tax returns using Free Edition, regardless of their tax situation. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

64. [redacted].[499] [redacted].[500] [redacted].[501]

**Response:** Complaint Counsel admits that [redacted]

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[497] RX 80.

[498] *Id.*

[499] GX 155 at 40:15-25; GX 152 at 129:25-130:10; *see also* RX 55 at 1; *see also* Golder Decl. ¶ 128.

[500] *See* RX 55 at 1; *see also* Golder Decl. ¶ 134.

[501] RX 55 at 1; *see also* Golder Decl. ¶ 131.

[redacted]. Complaint Counsel also admits that [redacted]. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support

65. Intuit's website design "makes price points transparent, limits distracting factors in the disclosure, and repeats the relevant disclosure."[502]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

66. The FTC's ".com Disclosure" guidelines recommend keeping a disclosure short and prominently displayed because it increases the likelihood that consumers notice the disclosure and are able to understand and recall this information.[503]

**Response:** Complaint Counsel admits the asserted fact.

67. Intuit maintains a customer-retention rate of approximately 80%.[504]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

68. [redacted].[505]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

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[502] Golder Decl. ¶ 114.

[503] Golder Decl. ¶ 72; RX 96.

[504] RX 50 at INTUIT-FFA-FTC-000526548; GX 150 at 131:10-13; RX 58 at 81; Golder Decl. ¶ 173.

[505] *Id.*

69. Intuit's "retention rates for customers in [its] paid products are actually higher than those in [its] free products."[506] [redacted][507]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

70. Intuit maintains its industry-leading customer-retention rate despite low switching costs for consumers and aggressive competition from competitors.[508] [redacted][509]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial. Complaint Counsel also objects to the asserted fact that Intuit has "low switching costs" based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

71. Intuit also maintains high Net Promotor Scores ("NPS"), a standard metric ofcustomer satisfaction.[510]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

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[506] GX 152 at 133:4-6; *see also* GX 155 at 213:19-22; RX 59 at 3; Golder Decl. ¶ 173.

[507] RX 59 at 3; Golder Decl. ¶ 173; *see also* RX 36 at INTUIT-FFA-FTC-000477258 [redacted]; RX 50 at INTUIT-FFA-FTC-000526548, -526550 ([redacted]).

[508] RX 53 at 271; RX 60 at 21; Golder Decl. ¶ 156.

[509] RX 53 at 271; Golder Decl. ¶ 156.

[510] *See* GX 156 90:19-23.

72. [redacted].[511]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

73. [redacted].[512]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

74. Intuit has received hundreds of thousands of positive reviews on its own website and on third-party websites, further evidencing consumer satisfaction with its products and services.[513]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial. Complaint Counsel also objects to the assertion that positive reviews evidence consumer satisfaction with Intuit's products and services based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

75. Between November 7, 2021 to August 18, 2022, 68,836 customer reviews of TurboTax Free Edition generated an average 4.9-star rating out of 5 stars. There were also 63,252 customer reviews of TurboTax Deluxe Edition, generating a 4.5-star average rating; 16,466 customer reviews of TurboTax Premier, generating a 4.4-star average

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[511] RX 38 at INTUIT-FFA-FTC-000435838.

[512] RX 39 at 4; *see also* RX 61 at 36 [redacted] Golder Decl. ¶ 166 (same).

[513] Golder Decl. ¶ 170.

rating; and 18,488 customer reviews of TurboTax Self Employed, generating a 4.7-star average rating.[514]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

76. On the customer review platform Influenster, TurboTax has the highest rating for any tax preparation brand with 4.5 out of 5 stars based on over 47,000 reviews, followed by TaxAct with 4.4 stars, TaxSlayer with 4.4 stars, and H&R Block with 4.1 stars.[515]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

77. Intuit's industry-leading customer satisfaction scores and retention statistics illustrate that Intuit's customers are satisfied with their decision to use TurboTax—whether they file for free or not—and that paying consumers do not feel deceived.[516]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

78. "Most customers feel that the service they receive from TurboTax's products matches or exceeds their expectations."[517]

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[514] *See* RX 9.

[515] RX 88; Golder Decl. ¶ 172.

[516] Golder Decl. ¶ 35 ("[Intuit's] high satisfaction, high retention, and a low number of complaintsindicate that most customers feel that the service they receive from TurboTax products matches orexceeds their expectations.").

[517] *Id*.

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

79. Intuit uses the phrase "simple tax returns" [redacted][518]

**Response:** Complaint Counsel admits that Intuit's reason for using the phrase "simple tax returns" is [redacted] Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

80. The phrase "simple tax returns" is a standard term in the world of tax preparation, commonly used by public and private entities alike.[519]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support.

81. The IRS categorizes tax returns based on their complexity and the "accompanying schedules or additional forms associated with specific tax credits."[520] It defines "[s]imple returns" as those "without any schedules."[521]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

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[518] GX 155 at 55:16-20.

[519] *See infra* Intuit SOF ¶¶81-84.

[520] RX 78 at 14.

[521] RX 78 at 14.

82. Since at least 2008, the IRS has defined "simple returns" as those filed using the most basic form (either Form 1040A, Form 1040EZ, or Form 1040) "without any schedules."[522]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

83. The State of California Franchise Tax Board stated that its ReadyReturn pre-filled tax forms would be available to "taxpayers who file simple returns," explaining that the program (before it was discontinued) would be extended to individuals with "[i]ncome only from wages," "[n]o more than five dependents," "[n]o credits other than the renter's credit," and taking the"[s]tandard deduction"—i.e., a tax return without any schedules.[523]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

84. Other tax preparation service providers including H&R Block and TaxSlayer likewise use the term "simple returns," and tie eligibility for free tax filing to the complexity of one's returns.[524]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

85. [redacted]. Although consumers "are skeptical that 'free' products are actually free," [redacted][525]

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[522] RX 77 at 106 n.2, 111 n.3.

[523] RX 79 at 1, 2.

[524] *See* RX 97 (stating, under the header "Free Online," that the product is available for "Simple returns"); RX 98 (proclaiming that people can "file a simple return for free," and that a simple return is "a basic 1040 tax return").

[525] GX 295 at INTUIT-FFA-FTC-000006255866.

**Response:** Complaint Counsel admits that some consumers are skeptical that free products are actually free. Complaint Counsel also admits that [redacted] Complaint counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

86. [redacted][526]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support.

87. Using the phrase "simple tax returns" is more effective at conveying Free Edition's qualifications than potential alternatives. [redacted][527]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. [redacted] Complaint Counsel also objects to the asserted fact that [redacted] because is irrelevant and immaterial.

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[526] *Id.*

[527] GX 155 58:5-11; RX 44 at INTUIT-FFA-FTC-000117680.

88. Including more detailed disclosures early in the buying process could be confusing for some consumers, generate less attention and interest, and ultimately result in fewer people filing for free.[528]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

89. [redacted]."[529] [redacted].[530]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

90. Reasonable consumers do not understand Intuit's Free Edition advertisements to convey that TurboTax is free for all consumers or that all consumers will qualify to use Free Edition.[531]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

91. To the contrary, reasonable consumers understand from Intuit's ads that Free Edition is TurboTax's free tax-preparation product, that some consumers will not

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[528] *See* Golder Decl. ¶ 73; GX 155 at 209:7-210:7.

[529] GX 155 at 209:11–16.

[530] GX 155 at 209:23-210:7.

[531] *See infra* Intuit SOF ¶¶ 91-107; Golder Decl. ¶ 56 ("[I]n my opinion, Intuit's advertisementsdid not communicate that TurboTax was free for everyone or all tax situations.").

qualify to use that product, and that Intuit has other products that consumers can pay to use.[532]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support.

92. Consumers are familiar with business models like Intuit's, where a free product is offered along with priced offerings and understand that for-profit companies do not offer all goods and service at no cost.[533]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

93. Consumers are inherently skeptical of "free" claims, appreciating that a corporation's goal is to turn a profit.[534] [redacted][535] [redacted][536]

**Response:** Complaint Counsel admits that [redacted] Complaint Counsel also admits that [redacted]. Complaint Counsel

[532] *See infra* Intuit SOF ¶¶ 92-107.

[533] *See* Golder Decl. ¶ 65.

[534] RX 33 at INTUIT-FFA-FTC-000139032; RX 34 at INTUIT-FFA-FTC-000549950; RX 56 at (only 22% of consumers were confident that Free Edition was truly free); Golder Decl. ¶ 65.

[535] RX 34 at INTUIT-FFA-FTC-000549950.

[536] RX 33 at INTUIT-FFA-FTC-000139032.

objects to the remainder of the asserted fact based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

94. Moreover, consumers understand that companies like Intuit cannot and do not provide free products to all consumers.[537] Indeed, consumers understand that for-profit companies need to make money, and thus consumers are likely to conduct research before committing to using products advertised as free.[538] And consumers are familiar with tiered pricing or "freemium" models, both in the tax preparation industry and in other industries.[539]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor Peter Golder, a purported expert, who is unqualified to opine on the fact at issue. Professor Golder's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

95. The major players in the online-tax-preparation industry employ a business modelthat mirrors Intuit's.[540]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

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[537] *See* Golder Decl. ¶¶ 64-68.

[538] Golder Decl. ¶¶ 64-65.

[539] Golder Decl. ¶ 66-69.

[540] Golder Decl. ¶ 68.

96. [redacted].[541] [redacted][542]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

97. [redacted][543]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. The asserted fact selectively quotes investigational hearing testimony of [redacted] (GX 152), in a manner that distorts the testimony. During the portion of the investigational hearing quoted in the asserted fact, [redacted]

[redacted]

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[541] RX 45 at 17; *see* RX 46 at INTUIT-FFA-FTC-000486016 (noting that Credit Karma Tax experienced "another week of declining login share," with a total login-share of less than 6% in Tax Year 2018).

[542] RX 45 at 18.

[543] *See* GX 152 at 144:11-145:1.

98. Moreover, consumers do not rely on advertisements and the Intuit website alone when selecting a tax preparation product.[544]

**Response:** Complaint Counsel admits that some consumers do not rely on advertisements and the Intuit website alone when selecting a tax preparation product. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

99. "[T]axpayers are likely to be highly motivated, highly involved, and risk averse in their Consumer Buying Process for tax preparation services. They are therefore likely to commit meaningful time and energy to the information-search and evaluation-of-alternatives stages of the Consumer Buying Process."[545] In other words, consumers conduct extensive research before filing their taxes, and evaluate their tax filing options based on a variety of factors they consider important.[546]

**Response:** Complaint Counsel admits that some taxpayers are highly motivated, highly involved, and risk averse in their Consumer Buying Process for tax preparation services. Complaint Counsel also admits that some consumers commit meaningful time and energy to the information-search and evaluation-of-alternatives stages of the Consumer Buying Process. Complaint Counsel also admits that some consumers

[544] Hauser Decl. ¶ 76.

[545] Golder Decl. ¶ 64.

[546] Golder Decl. ¶¶ 37, 64; Hauser Decl. ¶¶ 20, 71-72, 74, 76-77.

conduct extensive research before filing their taxes and evaluate their tax filing options based on a variety of factors they consider important. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professors Peter Golder and John Hauser, purported experts, who are unqualified to opine on the fact at issues. Golder and Hauser's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

100. Consumers explore tax preparation websites, read reviews or testimonials, and speak with friends and family, all as part of the process of researching tax preparation methods.[547]

**Response:** Complaint Counsel admits that some consumers explore tax preparation websites, read reviews or testimonials, and speak with friends and family, all as part of the process of researching tax preparation methods. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor John Hauser, purported expert, who is unqualified to opine on the fact at issues. Hauser's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

101. Numerous third-party websites provide comparisons of offers from Intuit and its competitors that set forth the qualifications for Free Edition.[548]

**Response:** Complaint Counsel admits the asserted fact.

102. Consumers also consider many factors when filing their taxes, including tradeoffs between quality and price, and do not strictly prefer the cheapest or free option.[549] While price is one important factor, it is by no means the only one considered

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[547] Hauser Decl. ¶ 72; RX 72 at 57:9-58:16; RX 70 at 50:22-51:2.

[548] *See* RX 90, RX 91, RX 99.

[549] Hauser Decl. ¶¶ 21, 71, 78-83.

by consumers; in fact, non-price factors such as ease of use, confidence in the accuracy and reliability of the results, and data security are also important factors in the choice of tax preparation method or provider.[550]

**Response:** Complaint Counsel admits the asserted fact.

103. In response to news articles claiming that Intuit deceived consumers by steering them away from its commercial free product, enterprising lawyers filed arbitration claims on behalf of individuals seeking money from Intuit. [redacted][551]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

104. One arbitrator found that "[redacted]"[552]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

105. Another arbitrator concluded that "[redacted]" noting that Intuit's "[redacted]"[553] The arbitrator further recognized that [redacted]" and that

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[550] *Id.*

[551] Declaration of David Gringer in Support of Intuit's Opposition to Complaint Counsel's Motionfor Summary Decision ("Gringer Decl.") ¶ 15.

[552] RX 67 at 12; *see also* RX 68 at 12.

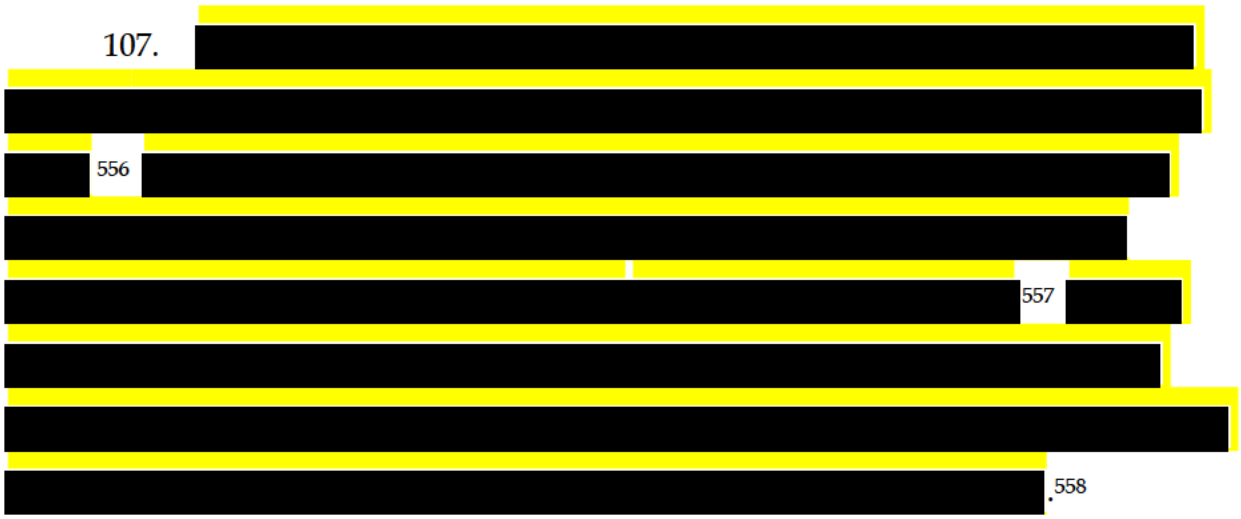
[553] RX 69 at 4.


[554]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

106. Depositions of consumer declarants from other related proceedings also indicate that consumers were not misled by Intuit's advertisements.[555]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. It is impossible to determine whether consumers were misled by Intuit's advertisement based on three deposition transcripts submitted in support of this assertion.

107. 
[556] [557] [558].

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

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[554] *Id.*

[555] *See* RX 72 at 161:20-22; RX 70 at 74:6-77:9; RX 71 at 43:8-15; 60:5-9.

[556] RX 72 at 161:20-22.

[557] RX 70 at 74:6-77:9.

[558] RX 71 at 43:8-15; 60:5-9.

108. Consumers do not feel "locked in" to a tax preparation provider after providing personal or financial information.[559] Instead, consumers change tax preparation methods or providers year to year and are comfortable conducting research even after they have started preparing their tax return online.[560]

**Response:** Complaint Counsel admits that some consumers do not feel locked in to a tax preparation provider after providing personal or financial information. Complaint Counsel also admits that some consumers change tax preparation methods or providers year to year and are comfortable conducting research even after they have started preparing their tax return online. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support. Intuit's asserted fact relies on improper opinion by Professor John Hauser, purported expert, who is unqualified to opine on the fact at issues. Hauser's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

109. [redacted].[561]

**Response:** Complaint Counsel admits the asserted fact.

110. [redacted].[562]

**Response:** Complaint Counsel admits the asserted fact.

111. Consumers routinely try out online tax preparation products without filing using those products. [redacted]

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[559] Hauser Decl. ¶¶ 22, 71, 85-89; *see also* GX 150 at 241:20-242:3; GX 152 at 129:20-130:15, 132:7-17; RX 35 at INTUIT-FFA-FTC-000166060.

[560] Hauser Decl. ¶¶ 85-86, 89.

[561] RX 52 at 4; Golder Decl. Fig. 24.

[562] RX 52 at 4; Golder Decl. ¶ 153 & Fig. 24.

[redacted].[563] Other survey data indicates that 21.6% of respondents tried out one or more onlinetax websites without using that website to file their tax returns.[564]

**Response:** Complaint Counsel admits that [redacted] Complaint Counsel also admits that other survey data indicates that 21.6% of respondents tried out one or more online tax websites without using that website to file their tax returns. Complaint Counsel objects to the remainder of the asserted fact based on an absence of evidentiary support.

112. There is no evidence that taxpayers who upgrade to one of TurboTax's paid products are misled into believing that they are required to pay using TurboTax or are otherwise misled about the cost of TurboTax's products.[565]

**Response:** Complaint Counsel objects to the asserted fact based on an absence of evidentiary support. Intuit's asserted fact partially relies on improper opinion by Professor John Hauser, purported expert, who is unqualified to opine on the fact at issues. Hauser's testimony on the facts at issue is not based on sufficient facts or data and is not based on reliable principles and methods.

113. In response to the question of what they would do next upon seeing the upgrade screen,[566] nearly 40% of respondents indicated that upon viewing an upgrade screen, they would seek out alternative filing options or conduct additional research.[567] For example, after viewingthe upgrade screen, respondents indicated they would:

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[563] RX 57 at 25; Golder Decl. ¶¶ 58, 150.

[564] Hauser Decl. ¶ 85.

[565] Hauser Decl. ¶ 95; *see also* GX 150 at 271:25-272:4.

[566] Kirk Fair Decl. ¶ 29 and Exhibit 2.B.

[567] *Id.* ¶ 29 n.32.

- "Look into other options where I wouldn't have to pay $60. Maybe H&R Block. I'd ask friends how they filed."[568]
- "As I'm no longer able to file with the free edition, I would search the internet and comparethe Turbo Tax pay for edition with other tax platforms with comparable features."[569]
- "I would then go to reviews of each of the paid for services. This would help me decide if I want to upgrade."[570]
- "I would move on to next screen and find out what I need to do differently and how much it would cost. I would then probably go to another website to see what they say about the same information provided and compare price."[571]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

114. Seventeen percent of survey respondents indicated that they would conduct additional research to inform their decision to upgrade or not, including research on which product would best fit their needs.[572] And 15% stated outright that they would look for alternative tax preparation solutions.[573]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

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[568] *Id*.

[569] *Id*.

[570] *Id*. ¶ 30.

[571] *Id*.

[572] *See id*. ¶ 30 and Exhibit 5 (17% of respondents).

[573] *Id*. ¶ 29.

115. Had Intuit provided respondents with more information about alternative free filing options, specifically the IRS Free File program, it would not have resulted in fewer respondents choosing to upgrade with TurboTax.[574]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

116. Before sale, consumers are told what the products they are purchasing will cost, if anything. Those disclosures include the price for any TurboTax product, such as Deluxe or Premium, as well as any paid add-on features.[575]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

117. At any point before completing the transaction, consumers are able to leave theTurboTax website without paying and file their taxes in another way.[576]

**Response:** Complaint Counsel admits the asserted fact.

118. The FTC initiated its investigation into Intuit's allegedly deceptive practices inMay 2019.[577]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

119. On June 28, 2019, the FTC issued a Civil Investigative Demand ("CID") to Intuit.[578] On May 18, 2020, the FTC issued a second CID to Intuit and separate CIDs for testimony to certain Intuit employees. The second set of CIDs to Intuit demanded

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[574] *Id.* ¶ 25.

[575] Ryan Decl. ¶ 50; *see also* RX 14.

[576] GX 150 at 241:20-242:3; GX 152 at 129:20-130:15, 132:7-17; RX 35 at INTUIT-FFA-FTC-000166060.

[577] Gringer Decl. ¶ 6.

[578] *Id.*

documents,written interrogatory responses, and testimony from a corporate representative of Intuit.[579]

**Response:** Complaint Counsel admits the asserted fact.

120. Each of the CIDs stated that the purpose of the FTC's investigation was "to determine whether Intuit Inc. has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products, in violation of the FTC Act, 15 U.S.C. § 45."[580]

**Response:** Complaint Counsel admits the asserted fact.

121. In response to those CIDs, Intuit produced hundreds of thousands of documents,provided dozens of written interrogatory responses, and provided testimony from corporate representatives of Intuit.[581]

**Response:** Complaint Counsel admits the asserted fact.

122. Between September 29, 2020, and October 30, 2020, the FTC conducted investigational hearings for eight Intuit employees.[582]

**Response:** Complaint Counsel admits the asserted fact.

123. The FTC also issued subpoenas for documents to third parties.[583] In response to those requests, the FTC received over a hundred documents of which Intuit is aware, and the FTC may have received substantially more documents that have not yet been identified or produced to Intuit.

**Response:** Complaint Counsel admits the asserted fact.

124. To date Intuit has been unable to take any document discovery of the FTC or nonparties, or depose any witnesses.[584]

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[579] *Id.*

[580] *Id.* ¶ 7.

[581] *Id.* ¶ 8.

[582] *Id.* ¶ 9.

[583] *Id.* ¶ 11.

[584] *Id.* ¶ 12.

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

125. On May 4, 2022, Intuit reached a settlement agreement with the State Attorneys General of all 50 states and the District of Columbia to settle potential claims related to Intuit's marketing of its online tax-preparation products.[585]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

126. This agreement, captured in an Assurance of Voluntary Compliance (the "Assurance") with New York, a proposed final judgment and permanent injunction filed in LosAngeles County Superior Court in case no. 19STCV15644,[586] and various other settlement documents filed with courts and regulators in the various states according to those states' laws, was executed on May 4, 2022.[587] Each of the settlement documents are substantively identical, and reflect the same agreement captured in the Assurance.

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

127. Intuit does not admit liability in the Assurance.[588]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

128. The Assurance provides for injunctive relief, including and not limited to, requiring Intuit's general compliance with state consumer protection laws, prohibiting Intuit from making certain representations about its online tax preparation products, requiring Intuit to make certain disclosures regarding these products, prohibiting data-

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[585] RX 76.

[586] RX 75.

[587] *Id.*

[588] RX 76 at 18.

clearing practices, prohibiting Intuit from rejoining the IRS Free File program, and requiring Intuit to make payments to settlement and administration funds.[589]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

129. Specific provisions of the Assurance are set forth below:

- Intuit must pay a total of $141,000,000 to the Settlement Fund and Administration Fund.[590]
- "Intuit must not publish, or cause to be published, in any medium … its 'free, free, free' Video Advertisements" or "Video Advertisements that are substantially similar in their repetition of the word free."[591]
- Non-Space-Constrained[592] ads for free tax preparation products "must disclose,Clearly and Conspicuously, and in Close Proximity to the representation that the product is free: (1) the existence and category of material limitations on a consumer's ability to use that free product; and (2) that not all taxpayers qualify for the free product."[593]
- Space-Constrained ads "must disclose that eligibility requirements apply," and"[i]f made online, Intuit must also (1) Clearly and Conspicuously include a hyperlink to a landing page or webpage on a TurboTax Website that Clearly and Conspicuously contains full disclosure of all material eligibility restrictionsor (2) link by clicking on the Advertisement itself to a landing page or webpageon a TurboTax Website

[589] *Id*. at 18-34.

[590] *Id*. at 22.

[591] *Id*. at 21.

[592] "Space-Constrained Advertisement" is defined as "any online Advertisement … or any VideoAdvertisement that has space, time, format, size, or technological restrictions that limit Intuit frombeing able to make the disclosures required by this [agreement]. … Space-Constrained Advertisements do not include Advertisements on a TurboTax Website." *Id*. at 5-6.

[593] *Id*. at 20.

that Clearly and Conspicuously sets forth full disclosure of all material eligibility restrictions."[594]

- The TurboTax website must "disclose (1) Clearly and Conspicuously and very near to the representation all material limitations on a consumer's ability to use that free product, including, but not limited to, eligibility criteria for that free product, or (2) through a hyperlink (i) that is very near to the representation, (ii) that indicates that there are material limitations on a consumer's ability to use that free product, and (iii) that links to a landing page or webpage that Clearly and Conspicuously sets forth all material limitations on a consumer's ability to use that free product, including, but not limited to, eligibility criteria for that free product."[595]
- Intuit must not misrepresent "[t]hat consumers must upgrade to a TurboTax Paid Product to file their taxes online if they are eligible to use the TurboTax Free Edition Product" or "[t]hat consumers can continue using and file their taxes for free with the TurboTax Free Edition Product when that is not the case."[596]
- Intuit must not misrepresent "[a]ny other fact material to consumers concerning any tax preparation product or service, such as the price; total cost; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics."[597]
- One year after the effective date of the agreement, "Intuit must submit … a compliance report, sworn under penalty of perjury, in which Intuit

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[594] *Id.*

[595] *Id.* at 21.

[596] *Id.* at 19.

[597] *Id.*

must … describe in detail whether and how Intuit is in compliance with each Section of" the agreement.[598] Moreover, for the following five years, "Intuit must submit … a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in … the structure of Intuit that may affect compliance obligations."[599]

**Response:** Complaint Counsel objects to the asserted fact because it is irrelevant and immaterial.

Respectfully submitted,

Dated: September 8, 2022

/s/ Rebecca Plett

**Roberto Anguizola**, IL Bar No. 6270874
**Rebecca Plett**, VA Bar No. 90988
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Federal Trade Commission
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**Counsel Supporting the Complaint**
**Federal Trade Commission**

[598] *Id*. at 29.

[599] *Id*.

PUBLIC

**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Lina M. Khan, Chair**
**Noah Joshua Phillips**
**Rebecca Kelly Slaughter**
**Christine S. Wilson**
**Alvaro M. Bedoya**

| | |
|---|---|
| In the matter of:<br><br>**Intuit Inc.**,<br>a corporation,<br><br>Respondent. | Docket No. 9408 |

# COMPLAINT COUNSEL'S REPLY TO RESPONDENT INTUIT INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

## EXHIBIT LIST

| GX | Description |
|---|---|
| **360** | *In re Natural Organics, Inc.*, No. 9294, 2001 WL 1478367 (F.T.C. Jan. 30, 2001) |
| **361** | *In re Homeadvisor, Inc.*, No. 9407, 2022 WL 3500430 (F.T.C. Aug. 2, 2022) |
| **362** | *First Specialty Ins. Corp. v. GRS Mgmt. Assocs.*, No. 08-cv-81356, 2009 U.S. Dist. LEXIS 72708 (S.D. Fla. Aug. 17, 2009). |
| **363** | *Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617 (D.N.J. Apr. 7, 2020) |
| **364** | *FTC v. DirecTV*, No. 15-cv-01129, 2018 WL 3911196 (N.D. Ca. Aug. 16, 2018) |
| **365** | *In re Daniel Chapter One*, 147 F.T.C. 2009 FTC LEXIS 86 (FTC April 20, 2009) |
| **366** | *NR Grp. 3 Contractors, Inc. v. Grp. 3 Contractors, LLC*, No. 17-cv-21945, 2017 WL 7792718 (S.D. Fla. Sept. 26, 2017) |

2001 WL 1478367 (F.T.C.)

FEDERAL TRADE COMMISSION (F.T.C.)

In the Matter of NATURAL ORGANICS, INC., a corporation, and GERALD A. KESSLER, individually and as an officer of the corporation.

Docket No. 9294
January 30, 2001

**ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION**

**I. HISTORY OF THE PROCEEDING**

***1** On August 9, 2000, the Commission issued a complaint charging the Respondents, one corporation and one individual, who have manufactured, advertised, labeled, offered for sale, sold and distributed products to the public, including Pedi-Active A.D.D., with violating the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. The Complaint alleges Respondents have disseminated advertisements containing representations, that Respondents lacked a reasonable basis substantiating such representations, and that the representations are false or misleading.

On October 18, 2000, Respondents were orally granted a stay in the proceeding in order to find new counsel and allow new counsel to become familiar with the matter. On December 1, 2000, Respondents' current counsel entered its appearance in this matter.

On January 3, 2001, Complaint Counsel filed its Motion for Partial Summary Decision ("Motion") pursuant to Commission Rule 3.24. Complaint Counsel seeks a summary decision on two issues: (1) whether the four documents attached to the Complaint make certain representations; and (2) whether Gerald A. Kessler, the Chief Executive Officer and owner of Natural Organics, Inc., is legally responsible for the acts of Natural Organics.

Respondents filed their Opposition on January 16, 2001. Respondents assert that summary decision is inappropriate before they have had the opportunity to take discovery. Respondents further assert that it is premature for the Administrative Law Judge to determine at this stage, without the benefit of extrinsic evidence, what representations are made by the advertisements. Respondents maintain that a determination that Kessler is individually liable before a determination of whether the company is liable is also premature.

**II. SUMMARY DECISION STANDARD**

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(2). These provisions are virtually identical to the provisions of Fed. R. Civ. P. 56 governing summary judgment in the federal courts. *Hearst Corp. et al.*, 80 F.T.C. 1011, 1014 (1972).

***2** The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (*citing celotex Corp. v. Catrett*, 477

U.S. 317, 323 (1986)). Summary decision under Rule 3.24 is improper "where the movant's affidavits are insufficient." *Hearst Corp.*, 80 F.T.C. at 1014. "The movant has the burden of establishing the nonexistence of any genuine issue of material fact, and all doubts are resolved against him." Id; *Matsushita Elec. Hindus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Further, summary decision is improper where "various inferences can be drawn." *Hearst Corp.*, 80 F.T.C. at 1014.

**III. CLAIMS FOR WHICH SUMMARY JUDGMENT IS SOUGHT**

**A. Representations Made in Advertisements**

Complaint Counsel asserts that the four advertisements, attached to the Complaint as Exhibits A, B, C, and D, represent that the Respondents' product will: treat or mitigate attention deficit/hyperactivity disorder ("ADJXD") or its symptoms; will improve the attention span and the scholastic performance of children who suffer from ADHD; and will improve the attention span and the scholastic performance of children who have difficulty focusing on school work. Complaint Counsel asserts that "[t]hese advertisements contain language that is expressly made or clear enough on its face to demonstrate that respondents made the alleged claims." Complaint Counsel's Motion for Partial Summary Decision at 7.

Respondents argue that the advertisements do not expressly make the representations alleged by Complaint Counsel. Rather, Respondents assert that Complaint Counsel seeks a determination that the advertisements can be reasonably interpreted as making these representations. Declaration of John R. Fleder Opposing Complaint Counsel's Motion for Partial Summary Decision at 6-7.

Complaint Counsel presents no extrinsic evidence to support its assertion that Respondents made the alleged claims. Instead, Complaint Counsel asks the Administrative Law Judge to conclude, from reading the advertisements, that Respondents have made certain representations. "In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence." *Kraft, Inc. v. Federal Trade Commission*, 970 F.2d 311, 318 (7th Cir. 1992) (*citing Thompson Medical*, 104 F.T.C. 786, 788-89 (1984); *Cliffdale Assocs. Inc., et al.*, 103 F.T.C. 110, 165-66 (1984); FTC Policy Statement, 103 F.T.C. 174, 176 (1983).

The advertisements do not expressly state that Pedi-Active A.D.D. will: treat or mitigate ADHD or its symptoms; will improve the attention span and the scholastic performance of children who suffer from ADHD; or will improve the attention span and the scholastic performance of children who have difficulty focusing on school work. Whether the ads may be reasonably interpreted as making such statements is a genuine dispute. "The general rule is that when the meaning or effect of words or acts is fairly disputed, the question is for the trier of the facts, to be decided after hearing all material evidence." *United States v. J. B. Williams Co., Inc.*, 498 F.2d 414, 431 (2nd Cir. 1974) (citations omitted). In the absence of clear language in the exhibits expressly stating what Complaint Counsel asserts the exhibits state, a summary decision before Respondents have had adequate time for discovery is not warranted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment may be appropriate "after adequate time for discovery.") Accordingly, Complaint Counsel's motion for partial summary judgment is DENIED.

***3 B. Individual Liability**

Complaint Counsel also seeks a determination on summary decision that Respondent Gerald A. Kessler is individually liable because he participated directly in the acts or practices at issue, because he is the sole shareholder of Natural Organics, a closely held corporation, and because Kessler held active managerial and policy making responsibilities relating to the corporation's advertising during the period of time in question. Until a determination is made on whether Natural Organics violated the FTC Act, a determination that Kessler is individually liable is premature. Accordingly, Complaint Counsel's Motion for Partial Summary Decision is DENIED.

**V. CONCLUSION**

For the above stated reasons, Complaint Counsel's Motion for Partial Summary Decision is DENIED in full.

James P. Timony
Administrative Law Judge

FTC
2001 WL 1478367 (F.T.C.)

**End of Document**

2022 WL 3500430 (F.T.C.)

Federal Trade Commission (F.T.C.)

# In the Matter of HomeAdvisor, Inc., a corporation, d/b/a Angi Leads, d/b/a HomeAdvisor Powered by Angi.

Docket No. 9407
August 2, 2022

***1 COMMISSIONERS:**

**Lina M. Khan, Chair**

**Noah Joshua Phillips**

**Rebecca Kelly Slaughter**

**Christine S. Wilson**

**Alvaro M. Bedoya**

**ORDER DENYING SUMMARY DECISION**

On March 11, 2022, the Commission issued a Complaint against HomeAdvisor, Inc., d/b/a Angi Leads, d/b/a HomeAdvisor Powered by Angi ("Respondent"), alleging that Respondent engaged in unfair or deceptive practices in violation of Section 5(a) of the Federal Trade Commission Act, 5 U.S.C. § 45(a). On April 7, 2022, Complaint Counsel moved for summary decision on all counts. On April 18, 2022, Respondent asked the Commission to extend until May 27, 2022, the deadline to respond to Complaint Counsel's motion, in order to allow Respondent to serve subpoenas on and take depositions of the individuals who submitted declarations in support of the motion. The Commission granted this request. Respondent subsequently sought an additional 10-day extension due to certain issues with the timing of discovery, and the Commission granted that extension as well. On June 6, 2022, Respondent submitted its opposition to summary decision, along with a request for oral argument. Complaint Counsel submitted their reply on June 14, 2022. The Commission scheduled oral argument for July 14 but moved the argument to July 21 on Respondent's request.

Having reviewed the parties' submissions and arguments, the Commission has determined to deny the motion for summary decision because it has concluded that there exist genuine disputes as to material facts, and therefore a decision on the merits of Complaint Counsel's claims should await full factual development at trial. Mindful of the parties' need to prepare for the upcoming evidentiary hearing, scheduled to begin on November 9, 2022, the Commission is issuing this Order now and will issue a separate Opinion explaining its reasoning and addressing certain of Respondent's affirmative defenses at a later date. Because there were substantial delays requested by Respondent in the briefing of this summary decision motion as well as the timing of the oral argument on it, the Commission invites the parties to consider making a motion to reset deadlines in the underlying litigation.

Accordingly,

**IT IS HEREBY ORDERED THAT** Complaint Counsel's Motion for Summary Decision, filed April 7, 2022, is **DENIED.**

By the Commission.

April J. Tabor
Secretary

Seal:

Issued: August 2, 2022

FTC
2022 WL 3500430 (F.T.C.)

**End of Document**

# First Specialty Ins. Corp. v. GRS Mgmt. Assocs.

United States District Court for the Southern District of Florida

August 17, 2009, Decided; August 17, 2009, Entered

CASE NO. 08-81356-CIV-MARRA


**Reporter**
2009 U.S. Dist. LEXIS 72708 *; 39 ELR 20195; 2009 WL 2524613

FIRST SPECIALTY INSURANCE CORPORATION, Plaintiff, vs. GRS MANAGEMENT ASSOCIATES, INC., NAUTICA ISLES WEST HOMEOWNERS ASSOCIATION, INC., and JEANNINE LE and THYNG LE, individually and as parents natural and legal guardians of THAILOR LE, a minor, Defendants. PHILADELPHIA INDEMNITY INSURANCE COMPANY, a Pennsylvania corporation, Plaintiff, vs. NAUTICA ISLES WEST CONDOMINIUM ASSOCIATION, INC., GRS MANAGEMENT ASSOCIATES, INC. and JEANNINE LE and THYNG LE, individually and as parents natural and legal guardians of THAILOR LE, a minor, Defendants.

**Prior History:** *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., 2009 U.S. Dist. LEXIS 68617 (S.D. Fla., July 20, 2009)*

## Core Terms

pollutant, contaminant, swimming pool, coverage, summary judgment, bodily injury, state court, material fact, non-moving, discovery, genuine, insured, pollution exclusion, property damage, settlement, injuries, irritant, microbes, acids, compl, viral

## Case Summary

**Procedural Posture**
Plaintiffs, an insurer and an indemnity company, moved for partial summary judgment, and sought a ruling that they had no duty to indemnify defendants, insureds, in connection with the insureds' claims in an underlying state court action.

**Overview**
The state court complaint alleged that one of the insured, a child, was injured as a result of exposure to dangerous, hazardous, and unsafe sanitary conditions in the community swimming pool. An expert toxicologist's report stated that the child contracted a virus as a result of ingesting swimming pool water in a community swimming pool. The court began by looking to the language of the insurance contract. As defined under the plain language of the policy, the meaning of the term "pollutant" included contaminant. Cases from the instant jurisdiction had ruled that similar pollutant clauses encompassed "contaminants" and microbes. Clearly then, the record evidence demonstrated that the substance in the swimming pool was a viral contaminant and a harmful microbe. Thus, the pollutant exclusion applied to the instant case. The court found that the pollution exclusion of both the insurer's and the indemnity company's policies unambiguously applied to the contaminant allegedly present in the swimming pool. Thus, the court concluded that the insurer showed that it had no duty to defend or indemnify and the indemnity showed that it had no duty to indemnify in the underlying litigation.

**Outcome**
The motions for partial summary judgment brought by the insurer and the indemnity company were granted.

## LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

*HN1*[] **Summary Judgment, Entitlement as Matter of Law**

A court may grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law. Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. The court should not grant summary judgment unless it is clear that a trial is unnecessary, and any doubts in this regard should be resolved against the moving party.

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Movant Persuasion & Proof

**HN2[] Burdens of Proof, Movant Persuasion & Proof**

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. To discharge this burden, the movant must point out to the court that there is an absence of evidence to support the nonmoving party's case.

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > Need for Trial

**HN3[] Entitlement as Matter of Law, Genuine Disputes**

After the movant has met its burden under Fed. R. Civ. P. 56(c), the burden of production shifts and the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. According to the plain language of Fed. R. Civ. P. 56(e), the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but instead must come forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Scintilla Rule

**HN4[] Burdens of Proof, Nonmovant Persuasion & Proof**

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its summary judgment claim. A mere scintilla of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party. If the evidence advanced by the non-moving party is merely colorable, or is not significantly probative, then summary judgment may be granted.

Evidence > Admissibility > Statements as Evidence > Compromise & Settlement Negotiations

**HN5[] Statements as Evidence, Compromise & Settlement Negotiations**

Evidence presented during settlement negotiations does not prevent its discovery and use as long as that evidence is otherwise discoverable.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Unambiguous Terms

**HN6[] Ambiguous Terms, Unambiguous Terms**

Under Florida law, the interpretation of an insurance contract is a matter of law to be decided by the court. When an insurance contract is not ambiguous, it must be given effect as it is written. An operative term is not ambiguous by virtue of the fact that it is not defined. Simply put, where the language in a policy is plain and unambiguous, there is no special construction or interpretation required, and the plain language of the policy will be given the meaning it clearly expresses.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

**HN7[ ] Summary Judgment, Evidentiary Considerations**

The rule that granting summary judgment is improper before a party has had an adequate opportunity to take discovery applies in cases where the evidence necessary to respond to the summary judgment motion is not within the non-moving party's possession, custody or control. Fed. R. Civ. P. 56(f).

**Counsel:** **[*1]** For First Specialty Insurance Corporation, Plaintiff: John R. Catizone, LEAD ATTORNEY, Litchfield Cavo LLP, Tampa, FL.

For Philadelphia Indemnity Insurance Company, a Pennsylvania Corporation, Plaintiff: Gary I. Khutorsky, Yelena Shneyderman, LEAD ATTORNEYS, Stephens Lynn Klein & McNicholas, Miami, FL.

For GRS Management Associates,Inc., Defendant: Mary Park Morris, LEAD ATTORNEY, Morris & Morris PA, West Palm Beach, FL.

For Nautica Isles West Homeowners Association,Inc., Defendant: Christopher Anthony Sajdera, Jonathan Seth Morris, LEAD ATTORNEYS, Jay Steven Levine PA, Boca Raton, FL.

For Jeannine Le, Individually and as Parents, Natural and Legal Guardians of Thailor Le, a Minor, Thyng Le, Individually and as Parents, Natural and Legal Guardians of Thailor Le, a Minor, Defendants: Diana Leigh Martin, LEAD ATTORNEY, Ricci Leopold, Palm Beach Gardens, FL; William John McFarlane, III, LEAD ATTORNEY, McFarlane & Dolan, Coral Springs, FL.

**Judges:** KENNETH A. MARRA, United States District Judge.

**Opinion by:** KENNETH A. MARRA

## Opinion

**OPINION AND ORDER**

This cause is before the Court upon First Speciality Insurance Corporation's ("FSIC") Motion for Partial Summary Judgment (DE 10) and Philadelphia Indemnity Insurance Company's **[*2]** ("PIIC") Amended Motion for Summary Final Judgment (DE 89). The motions are fully briefed and ripe for review. The Court held oral argument on the motions on July 24, 2009. The Court has carefully considered the motions and is otherwise fully advised in the premises.

I. Background

The facts, as culled from the exhibits provided and reasonably inferred therefrom in a light most favorable to Defendants, for the purpose of this motion, are as follows:

On or about May 20, 2008, the Nautica Isles West Homeowners Association, Inc. ("the Association") and GRS Management Associates, Inc. ("GRS") were named as defendants in an action styled *Jeannine Le and Thailor Le, et al. v. Nautica Isles West Homeowners Association, Inc. et al.,* Case No. 2008 CA 014580XXXMB brought before the Circuit Court for the 15th Judicial Circuit in and for Palm Beach County, Florida. (State court complaint, Ex. A to DE 96.) The Association is a homeowners association for the residential community known as Nautica Isles West located in Greenacres, Florida. (State court compl. P 4.) GRS is the property management company which at all relevant times managed the Association's property, including its swimming pool. (State **[*3]** court compl. P P 15-17.) With respect to the Association and GRS, the Le complaint alleges, among other things, the following:

> Defendant knew or should have known that said swimming pool was improperly maintained and posed a substantial health risk to the health, safety and welfare of those individuals swimming in the defendant's swimming pool. (State court compl. P P 8, 20.)
>
> On or about June 1, 2004 . . . Thailor Le was swimming in the Defendant's swimming pool when Thailor Le was exposed to the dangerous, hazardous, and unsafe sanitary conditions of the Defendant's swimming pool. (State court compl. P P 10, 22.)

In pre-suit correspondence, Le's counsel advised GRS that Thailor Le was injured "after he contracted a viral infection from contaminants within the water of the Nautica Isles West community pool." [1] (Mar. 4, 2008 letter, Ex. B-1, attached to DE 96.) An expert toxicologist's report submitted by the Les stated that Thailor Le contracted the Coxsackie virus as a result of ingesting swimming pool water in the Nautica Isles West

[1] The letter also requested insurance information pursuant to Florida Statute § 627.4137 and information regarding third-parties who might be liable for Thailor Le's injuries.

community swimming pool. In addition, the expert report stated that chlorination of swimming pool water is "an effective way to kill harmful microbes, including **[*4]** Coxsackie viruses." (Harold I. Zeliger Letter, Ex. B-3, attached to DE 96.)

PIIC issued a primary general liability policy number PHPK053395 to the Association as the Named Insured; GRS also qualified as an insured under this policy. (PIIC Policy, DE 73.) PIIC's primary policy covered the period of June 30, 2003 to June 30, 2004 and provided coverage for "bodily injury" in the amount of $ 1,000,000.00 per occurrence. The primary policy contained the following Total Pollution Exclusion Endorsement (form CG 21 49 09 99) (NI-0094, Exhibit C, DE 96.):

2. Exclusions

This insurance does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

The term "pollutant" is defined in the policy as follows:

SECTION V - DEFINITIONS

"Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, **[*5]** acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. (Exhibit C, p. NI-0086)

PIIC also issued to the Association an excess liability policy number PHUB020208, which covered the same period of time and which provided an additional $ 2,000,000 in coverage. (DE 73.) The excess policy contains a similar pollution exclusion which provides as follows:

3. Exclusions

This insurance does not apply to:

(p) "Bodily injury", "personal injury" or "property damage" arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants.

We shall have no obligation under this policy:

(1) To investigate, settle or defend any claim or suit against any insured alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the "pollution hazard", or,

(2) To pay any damages, judgments, settlements, loss, costs or expenses that may be awarded or incurred by reason of any such claim or suit of any such injury or damage, or in complying with any action **[*6]** authorized by law and relating to such injury or damage.

As used in this exclusion:

"Pollution hazard" means an actual exposure or threat of exposure to the corrosive, toxic or other harmful properties to any solid, liquid, gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acids or alkalis, and waste materials consisting of or containing any of the foregoing.

(NI-0124, Ex. D, DE 96.)

With respect to FSIC, under policy number FCP211000647200, effective December 5, 2003 to December 5, 2004, FSIC provided commercial general liability coverage to GRS pursuant to a Commercial General Liability Coverage Form, form no. CG 00 01 10 01. The named insured on the policy is G.R.S. Management Associates. (Policy, Ex. C, DE 11.)

The Commercial General Liability Coverage Form provides in relevant part:

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies . . . .

The First Specialty policy contains a Total Pollution Exclusion Endorsement, **[*7]** form no. CG 21 49 09 99, which provides in pertinent part as follows:

This insurance does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge,

dispersal, seepage, migration, release or escape of "pollutants" at any time.

The First Specialty policy contains the following definitions:

SECTION V - DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

14. "Personal and advertising injury" means injury, including consequential "bodily injury"…

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(Policy, Ex. C, DE 11.)

II. Summary Judgment Standard

HN1[] The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment **[*8]** as a matter of law." Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and any doubts in this regard should be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

HN2[] The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

HN3[] After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). According **[*9]** to the plain language of Fed. R. Civ. P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

HN4[] Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." Anderson, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202.

III. Discussion

FSIC moves for partial summary judgment, seeking a ruling that it has no duty to indemnify any insured in connection with the Le's claims in the underlying state court action. PIIC moves for summary judgment on both its duty to defend and to indemnify for the claims asserted **[*10]** in the underlying state court action. Before interpreting the insurance policies, however, the Court must first address the facts presented regarding the underlying state case.

The state court complaint alleged that Thailor Le was injured as a result of exposure to "dangerous, hazardous, and unsafe sanitary conditions" in the community swimming pool. (State court compl. P P 10, 22.) Specifically, Thailor Le "contracted a viral infection from contaminants within the water of the Nautica Isles West community pool." (Mar. 4, 2008 letter.) This viral infection was identified as the Coxsackie virus, which was contracted from "ingesting swimming pool water in the Nautica Isles West community swimming pool." Significantly, chlorination of swimming pool water is an "an effective way to kill harmful microbes, [such as the] Coxsackie viruses." (Harold I. Zeliger Letter.)

Despite Defendants' protestations, it is proper for the Court to consider this evidence. Neither the pre-suit letter nor the letter from the expert, Mr. Zeliger, is barred under Rule 408 of the Federal Rules of Evidence. To begin, the pre-suit letter made no offer to compromise or settle the Le's claim. Instead, the letter merely

**[*11]** requested that GRS provide the Le's attorney with insurance information pursuant to *Florida Statute § 627.4137* and information regarding the existence of any third-parties who may be liable for Thailor Le's injuries. Next, despite Defendants' complaint that Mr. Zeliger's letter was attached to the settlement demand letter, [2] that fact, if true, would not require the exclusion of this letter under *Rule 408 of the Federal Rules of Evidence*. Indeed, ***HN5***[] evidence presented during settlement negotiations does not prevent its discovery and use as long as that evidence is otherwise discoverable. See *NAACP Legal Defense Fund and Education Fund, Inc. v. United States Dept. of Justice, 612 F. Supp. 1143 (D.D.C. 1985)* ("Although the intent of *Fed. R. Evid. 408* is to foster settlement negotiations, the sole means used to effectuate that end is a limitation on the admission of evidence produced during settlement negotiations for the purpose of proving liability at trial. It was never intended to be a broad discovery privilege."); 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence, § 408.07* (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2005). Thus, in determining insurance coverage, **[*12]** the Court will consider the admissions by the Les that Thailor Le's injuries were caused by a viral contaminant and/or microbe.

Turning now to the coverage issue, the Court begins, as it must, by looking to the language of the insurance contract. ***HN6***[] Under Florida law, the interpretation of an insurance contract is a matter of law to be decided by the Court. *Gas Kwick, Inc. v. United Pac. Inc. Co., 58 F.3d 1536, 1539 (11th Cir.1995)*. "When an insurance contract is not ambiguous, it must be given effect as it is written." *Siegle v. Progressive Consumers Ins. Co., 819 So.2d 732, 735 (Fla. 2002)*. An operative term is not ambiguous by virtue of the fact that it is not defined. *Swire Pacific Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 166 (Fla. 2003)*; **[*13]** see *Jefferson Ins. Co. v. Sea World, 586 So.2d 95, 97 (Fla. Dist. Ct. App. 1991)* ("The mere failure to provide a definition for a term involving coverage does not necessarily render the term ambiguous"). Simply put, "where the language in a policy is plain and unambiguous, there is no special construction or interpretation required, and the plain language of the policy will be given the meaning it clearly expresses." *Fla. Farm Bureau Ins. v. Birge, 659 So.2d 310, 312 (Fla. Dist. Ct. App.1994)*.

As defined under the plain language of the policy, the meaning of the term pollutant includes contaminant. Furthermore, cases from this jurisdiction have ruled that similar pollutant clauses encompass "contaminants" and microbes. See, e.g., *Phila. Indem. Ins. Co. v. Yachtsman's Inn Condo Ass'n, 595 F. Supp. 2d 1319 (S.D. Fla. 2009)* (concluding that feces, raw sewage and battery acid fall within the policy pollutant definition of irritant or contaminant); *Nova Casualty Co v. Waserstein, 424 F. Supp. 2d 1325, 1333-34 (S.D. Fla. 2006)* (finding "living organisms," "*microbial* populations," "airborne and *microbial contaminants,*" and "indoor allergens" fit the definition of "contaminant" **[*14]** and are excluded from coverage under the pollution exclusion clause); *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998)* (rejecting the argument that the pollutant exclusion is ambiguous because the word "contaminant" is not defined). [3] (emphasis added) Clearly, the record evidence demonstrates that the substance in the swimming pool was a viral contaminant and a harmful microbe. Thus, the pollutant exclusion applies here. [4]

It is important to note that Defendants have not presented any evidence which would raise a genuine issue of material fact as to the cause of Thailor Le's injuries. The procedural posture they have chosen to take is merely to assert that Plaintiffs have not proven the cause of the injuries. Plaintiffs, however, have relied upon admissions from the **[*15]** Les, the parties claiming the injury and the parties in the best position to know the cause. There is no reason why Plaintiffs should not be entitled to rely upon admissions from the parties claiming the injury to prove causation in this case. No Defendant has even suggested that the injury had a different cause. Nor can Defendants rely upon a

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[2] The Court is not considering the demand letter submitted by FSIC and PIIC (Demand Letter, Ex. B, DE 11; Demand Letter, Ex. B-2, DE 96). There is, however, a factual dispute as to whether Mr. Zeliger's letter was attached to the demand letter. Of course, on a motion for summary judgment, the Court must take the facts in the light most favorable to the non-moving party. Thus, the Court will assume, for the purpose of these motions, that Mr. Zeliger's letter was attached to the demand letter.

[3] The Court chooses not to follow *Keggi v. Northbrook Prop. & Cas. Ins. Co., 199 Ariz. 43, 13 P.3d 785, 789 (Ariz. App. Div. 2000)* (finding water-borne bacteria did not fit within definition set forth in pollutant exclusion) as suggested by the Le Defendants.

[4] The Court need not address FSIC's argument that the fungi or bacteria exclusion endorsement applies to the facts of this case.

lack of discovery taken in this proceeding. HN7[↑] The rule that granting summary judgment is improper before a party has had an adequate opportunity to take discovery applies in cases where the evidence necessary to respond to the summary judgment motion is not within the non-moving party's possession, custody or control. Fed. R. Civ. P. 56(f); see Walters v. City of Ocean Springs, 626 F.2d 1317, 1321 (5th Cir. 1980) [5] (a Rule 56(f) motion is more likely to be granted when relevant facts are in exclusive control of the opposing party). Here, the information relating to the cause of Thailor Le's injuries is within the control of the Le Defendants and it is the evidence that they have produced which is being used to support Plaintiff's motion. For example, the Le Defendants have used Dr. Zeliger's report in the state court action to support their theory **[*16]** of causation. [6] The other Defendants, who have litigated against the Les in the underlying state court proceeding and had the opportunity to conduct discovery there to determine another cause, have presented nothing to suggest a record could be developed in this case which might create a genuine issue of material fact regarding causation.

Based on the foregoing, the Court finds that the pollution exclusion of both FSIC and PIIC's policies unambiguously apply to contaminant allegedly present in the swimming pool. Thus, the Court concludes that PIIC has shown that it has no duty to defend or indemnify and FSIC has shown that it**[*17]** has no duty to indemnify in the underlying litigation.

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1) FSIC's Motion for Partial Summary Judgment (DE 10) is **GRANTED.** FSIC shall inform the Court **within 10 days from the date of entry of this Order** as to how this case should proceed.

2) PIIC's Amended Motion for Summary Final Judgment (DE 89) is **GRANTED.** The Court will separately issue judgment for PIIC.

**DONE AND ORDERED** in Chambers at West Palm Beach, Palm Beach County, Florida, this 17th day of August, 2009.

/s/ Kenneth A. Marra

KENNETH A. MARRA

United States District Judge

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[5] The decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit. Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[6] At the oral argument, the parties informed the Court that this evidence was stricken in the state case, however, that fact does not change the Court's analysis in this case.

2020 WL 1685617
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Nelson ESTRELLA-ROSALES and Joann Estrella, individually and as husband/wife, Plaintiffs,

v.

TACO BELL CORPORATION; Yum! Brands Inc.; ABC Corporation (1-10), and John Does 1-10, Defendants.

Civ. No. 2:19-18192 (WJM)
|
Filed 04/07/2020

**Attorneys and Law Firms**

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Allen W. Burton, O'Melveny & Myers LLP, New York, NY, for Defendant Taco Bell Corporation.

**OPINION**

WILLIAM J. MARTINI, U.S.D.J.

***1** In this action, Plaintiffs seek damages stemming from their purchase of two Chalupa Cravings Boxes for a rate of $5.99 from Defendant Taco Bell Corp. ("Taco Bell") after viewing a television ad promoting the items for $5.00. Before the Court is Defendant's Motion for Judgment on the Pleadings, ECF No. 14. For the reasons set forth below, Defendant's motion is **GRANTED**.

## I. BACKGROUND AND PROCEDURAL HISTORY

In May 2018, Taco Bell ran a nationwide promotion for the Chalupa Cravings Box—a value box that included five items: a Beefy 5-Layer Burrito, a Chalupa Supreme, a Crunchy Taco, Cinnamon Twists, and a Medium Fountain Drink. ECF No. 1, Compl. ¶ 8. The television ad for the Chalupa Cravings Box at issue in this case, called the "Librarian," featured a librarian who secludes herself away from a group of children to enjoy a moment of respite along with a Chalupa Cravings Box. *Id.* The ad concluded with a full-screen view of the Chalupa Cravings Box and its contents, along with the text "$5 Chalupa Cravings Box." In the same frame as the "$5" message, the advertisement included the following qualifying disclosure about the $5 promotional price: "At participating locations for a limited time. Prices may vary. Tax extra." *Id.* ¶ 16.

Plaintiffs allege that they viewed "The Librarian" advertisement in May 2018, *id.* ¶ 16, and that they "were induced to travel" to the Taco Bell branded restaurant located at 225–227 US Highway 22, Green Brook, New Jersey ("Green Brook Restaurant" or "Restaurant") around 8:00 p.m. on an unknown date "to specifically purchase two Chalupa Cravings Boxes." *Id.* ¶ 10. The Green Brook Restaurant displayed "point of purchase" advertising for the Chalupa Cravings Box on a menu board that indicated that the restaurant charged $5.99 for the item. Ex. A, Gebhardt Decl. ¶ 5. Plaintiffs allege that, after ordering two "Chalupa Cravings Boxes," they were provided with a receipt charging them $12.18 before tax. *Id.* ¶ 11. That receipt indicated that the Green Brook Restaurant charged $5.99 for the Chalupa Cravings Box. Def.'s Mot. Ex. C. The receipt also indicated that Plaintiffs chose to pay $0.20 extra for a soft taco substitution ($0.10 for each box). *Id.* Plaintiffs were charged a total of $12.99, inclusive of $0.81 of New Jersey sales taxes. *Id.* ¶ 12. Plaintiffs allege that, after they were handed the receipt, they "questioned the restaurant's management why they were charged $12.18 for two $5.00 Cravings Boxes." *Id.* They allege the manager informed them that individual Taco Bell restaurants, such as the Green Brook Restaurant, operate as franchises that can set their own prices. Compl. ¶ 13.

On August 15, 2019, Plaintiffs Nelson Estrella-Rosales and Joann Estrella sued Taco Bell in the Superior Court of New Jersey, Middlesex County, bringing this individual action for compensatory damages (based on an alleged $1.98 overcharge), punitive damages, and attorneys' fees. Compl. ¶ 65. Plaintiffs purport to state two claims for relief: (1) violation of the New Jersey Consumer Fraud Act ("CFA"), and (2) common law fraud. *Id.* Invoking this Court's diversity jurisdiction, Taco Bell removed the action on September 20, 2019. ECF No. 1.

## II. STANDARD OF REVIEW

***2** Rule 12(c) of the Federal Rules of Civil Procedure provides that "a party may move for judgment on the pleadings" after the pleadings are closed. Fed. R. Civ. P. 12(c).

"A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion [to dismiss]." *Revell v. Port Auth. of N.Y., N.J.*, 598 F.3d 128, 134 (3d Cir. 2010). That is, the court must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant, *id.*, but "may [also] consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). For claims sounding in fraud, a plaintiff fails to state a claim unless the circumstances of fraud are pleaded with particularity in compliance with Rule 9(b). *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1417 (3d Cir. 1997).

A Rule 12(c) motion should be granted "if the movant establishes that 'there are not material issues of fact, and he is entitled to judgment as a matter of law.' " *Zimmerman v. Corbett*, 873 F.3d 414, 417 (3d Cir. 2017) (quoting *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005)). It is "well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) (per curiam).

## III. DISCUSSION

The New Jersey Consumer Fraud Act ("CFA") prohibits, in relevant part, "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise." N.J. Stat. Ann. § 56–8:2. Under the CFA, "[t]o constitute consumer fraud ... the business practice in question must be 'misleading' and stand outside the norm of reasonable business practice in that it will victimize the average consumer." *New Jersey Citizen Action v. Schering–Plough Corp.,* 367 N.J.Super. 8, 13, 842 A.2d 174 (App.Div.2003) (quoting *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.,* 139 N.J. 392, 416, 655 A.2d 417 (1995)). Often, the determination of whether business conduct "stand[s] outside the norm of reasonable business practice" presents a jury question. *Id.* Nonetheless, in recognition of the fact that the "capacity to mislead ... is the prime ingredient of all types of consumer fraud [under the CFA]," *Turf,* 139 N.J. at 416, 655 A.2d 417, and that "[m]ere customer dissatisfaction does not constitute consumer fraud," *Van Holt v. Liberty Mut. Fire Ins. Co.,* 163 F.3d 161, 168 (3d Cir. 1998), courts have dismissed CFA complaints for failure to state a claim where plaintiffs have failed to allege that the defendant engaged conduct that could be considered misleading within the meaning of the Act. *See, e.g., Adamson,* 463 F.Supp.2d at 501; *Schering–Plough,* 367 N.J.Super. at 13, 842 A.2d 174; *see also Wendling v. Pfizer, Inc.,* 2008 WL 833549, at *4 (App.Div. Mar. 31, 2008); *Delaney v. American Express Co.,* No. 06–5134, 2007 WL 1420766, at *7 (D.N.J. May 11, 2007). Because the alleged misleading conduct at issue here does not stand outside the norm of reasonable business practice in that it will victimize the average consumer, the Court concludes that there are no material issues of fact, and Defendant is entitled to judgment as a matter of law.

It is a violation of the CFA to use "any type, size, location, lighting, illustration, graphic depiction or color resulting in the obscuring of any material fact." N.J.A.C. 13:45 A –9.2(a)(5). "Disclaimers permitted or required under this section, such as 'terms and conditions apply' and 'quantities limited,' shall be set forth in a type size and style that is clear and conspicuous relative to the other type sizes and styles used in the advertisement." *Id.* Plaintiff argues that Defendant violated N.J.A.C. 13:45 A-9.2(a)(5) by including disclaimer language that is smaller than other language in the shot, such as the five dollar price designation. ECF No. 22, Pls.' Resp. 6-7. Relying on its own screenshot of the final shot of the Librarian ad showing both the price designation and the disclaimer, Plaintiff states that the disclaimer is "portrayed in white against a light grey background, making it difficult to see and not conspicuous." *Id.* at 7. Defendant responds that the screenshot in Plaintiff's response brief shows the disclaimer on a "white or light gray" background, when in fact the ad includes white text against a dark gray background, and surmises that this image "appears to have been doctored." ECF No. 23, Def.'s Reply, 12. Both Plaintiffs' and Defendant's sourced version of the Librarian ad—respectively, a video file provided to the Court, and a screenshot purportedly taken from a website, iSpot.tv, which "captures commercials as they are actually displayed on television" via streaming video—show white text against a background that is a considerably darker gray than the image in Plaintiff's opposition brief. *See* Def.'s Mot, Ex. A; ECF No. 24, Pls.' Letter; Pls.' Resp. 7. The Court finds that the disclaimer in the Librarian ad stating in part, "At participating locations for a limited time" and "Prices may vary," is clear and conspicuous, and no material fact is obscured.

It is commonplace for television advertisements to contain some kind of qualifying disclaimers in the closing seconds of the commercial. Just as "anyone familiar with fast-food restaurants ... surely knows that prices are typically displayed on menus located near the registers," *Killeen v. McDonald's Corp.*, 317 F. Supp. 3d 1012, 1013 (N.D. Ill. 2018), anyone familiar with television ads for consumer products knows that these disclaimers are often presented at the end of the ad toward the bottom of the screen. While the disclaimer at issue here is smaller than font displaying the five dollar purchase price of the Chalupa Cravings Box, it is nevertheless clear and conspicuous, and consistent with "the norm of reasonable business practice."

***3** Point-of-purchase advertising at the Green Brook Restaurant plainly disclosed the price at that location.[1] Plaintiffs fail to state a claim for consumer fraud where they affirmatively chose to buy a menu item—and even paid extra for substitutions—after being put on notice that the Chalupa Cravings Box was not being offered for $5 at the restaurant they chose to visit. Here, "anyone familiar with fast-food restaurants ... surely knows that prices are typically displayed on menus located near the registers." *Killeen*, 317 F. Supp. 3d at 1013. Just as in *Killeen*, "a straightforward, price-to-price comparison based on information available at the point of purchase would unequivocally dispel any misleading inference that could be drawn from" Taco Bell's advertising. *Id.*

In sum, Plaintiffs were on notice of the $5.99 price of a Chalupa Cravings Box at the Green Brook Restaurant, yet decided to make the purchase anyway, including the $0.20 substitution for two soft-shell tacos. Plaintiffs did not reasonably rely on any misleading inference they claim could be drawn from the "Librarian" ad, and they could not have been injured by any of the accurate information conveyed in that ad, which did not contradict any information Plaintiffs received at the Green Brook Restaurant.

## IV. CONCLUSION

Because Plaintiffs' claims fail as a matter of law, they fail to state a claim upon which relief can be granted under Rule 12(c). Defendants' Motion for Judgment on the Pleadings is **GRANTED**. Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

### All Citations

Not Reported in Fed. Supp., 2020 WL 1685617

Footnotes

1 Plaintiffs argue that Defendant cannot rely on point of purchasing advertising because it is "extraneous to the Complaint and claims asserted because none are 'integral to or expressly relied upon' by the Plaintiffs." Pls.' Resp. 7 (citing *In re Burlington Coat Factory Sec. Litig.*, 113 F.3d 1410, 1426 (3d Cir. 1997). A court may consider a document if it is "integral to" the complaint or "if the plaintiff's claims are based on the document," regardless of whether the plaintiff explicitly mentions the document or claims to have subjectively relied on it in making his purchase. *Burlington Coat Factory*, 114 F.3d at 1425 (citing *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n.9 (3d Cir. 1993)). "[W]hat is critical is whether the claims in the complaint are 'based' on an extrinsic document and not merely whether the extrinsic document was explicitly cited." *Id.* Because Plaintiffs' visit to the Green Brook Restaurant, where they were exposed to in-store advertising, is central to their claims, the Court will consider point of purchasing advertising.

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2018 WL 3911196
United States District Court, N.D. California.

FEDERAL TRADE COMMISSION, Plaintiff,

v.

DIRECTV, INC., et al., Defendants.

Case No. 15-cv-01129-HSG
|
Signed 08/16/2018

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**ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON PARTIAL FINDINGS; FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Re: Dkt. No. 396

HAYWOOD S. GILLIAM, JR., United States District Judge

***1** On March 11, 2015, the Federal Trade Commission ("FTC") brought this action alleging that Defendants DIRECTV and DIRECTV, LLC (collectively, "DIRECTV" or "Defendant") violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), as well as the Restore Online Shoppers Confidence Act ("ROSCA"), 15 U.S.C. §§ 8401 *et seq.* *See* Dkt. No. 1 ("Compl."). A court trial was held in August 2017. At the close of the FTC's presentation of its case-in-chief, DIRECTV moved for judgment on partial findings pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, on the ground that the FTC failed to prove essential elements of its claims. Dkt. No. 396. Based on the evidence presented at trial, the arguments of the parties and the applicable law, the Court **GRANTS IN PART** DIRECTV's motion. This memorandum opinion will constitute the Court's Findings of Fact and Conclusions of Law pursuant to Rules 52(a) and (c).

## I. BACKGROUND

### A. Allegations

In this action the FTC challenges DIRECTV's advertisement campaign for and sale of its subscription satellite television services. The FTC commenced its investigation in April 2010 when it served DIRECTV with a civil investigative demand. The FTC then filed the complaint in this action in March 2015. *See* Compl. In the complaint, the FTC sought equitable relief, including a permanent injunction and equitable monetary relief. *Id.* at 11 ("Prayer for Relief").

The FTC contends that from 2007 to the time of trial, DIRECTV failed to adequately disclose in its advertising certain terms of purchase for its satellite television services, in violation of § 5 of the FTC Act. In particular, the FTC alleges that DIRECTV failed to adequately disclose that: (1) the introductory discounted price only lasts 12 months, after which the subscriber is charged the then-prevailing rate; (2) the subscriber is subject to a 24-month commitment period; (3) a subscriber who cancels before the end of the commitment period is assessed an early cancellation fee of $20 per month for the remaining months in the commitment period; and (4) subscribers receive a free premium channel package (*e.g.*, HBO, Starz, Cinemax, and Showtime) for three months, but must affirmatively cancel these premium channels before the end of the three-month period to avoid monthly charges (the "premium channel negative option"). *See id.* ¶¶ 12–14. The FTC further contends that DIRECTV failed to clearly and conspicuously disclose the premium channel negative option on its website, and that it also failed to obtain express informed consent before charging consumers, in violation of ROSCA. *See id.* ¶¶ 35–42.

Based on these claims, the FTC seeks restitution in the amount of $3.95 billion. Dkt. No. 362 ("Tr. Vol. 1") at 33:5–16 (transcript of FTC's opening statement).

B. **Procedural Posture**

This matter was tried to the Court, sitting without a jury, from August 14, 2017, to August 25, 2017. After the close of the FTC's case-in-chief, DIRECTV moved orally for Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c). The Court suspended the trial before DIRECTV presented its defense to allow DIRECTV to file its motion, as well as the parties' respective proposed findings of fact and conclusions of law. *See* Dkt. No. 390 ("Tr. Vol. 10") at 1708:25–1713:6.

## II. LEGAL STANDARD

***2** Under Rule 52(c):

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Fed. R. Civ. P. 52(c). Thus, the Rule "authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1031 (9th Cir. 1996). In doing so, the Court draws its own conclusions as factfinder and need not draw any inferences in favor of the non-moving party. *See Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006). As the plaintiff, the FTC bears the burden of proof and must prove each element of its case by a preponderance of the evidence. *United States v. F/V Repulse*, 688 F.2d 1283, 1284 (9th Cir. 1982). The Court should grant the motion if it becomes apparent that plaintiff has failed to carry an essential burden of proof. *Cf. EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 272 (3d Cir. 2010) ("The rule's objective is to 'conserve[ ] time and resources by making it unnecessary for the court to hear evidence on additional facts when the result would not be different even if those additional facts were established.' ").

## III. JURISDICTION AND VENUE

The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b). Venue is proper in this district under 28 U.S.C. §§ 1391(b), (c)(2), and (d), and 15 U.S.C. § 53(b).

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. **The Parties**

The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41–58. The FTC enforces Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces ROSCA, which prohibits certain methods of negative option marketing on the Internet. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, and to seek injunctive relief for violations of the FTC Act and ROSCA. 15 U.S.C. § 53(b).

DIRECTV is a provider of subscription satellite television services.[1] Each of DIRECTV's subscription packages offers a varying selection of channels, equipment, and video quality. *See, e.g.*, Ex. 172 (letter describing several available subscription packages). Over time, the terms of DIRECTV's subscription packages, including the price for each package, have changed periodically. *See* Ex. 76 (summary of subscription offers between 2008 and 2015, citing trial exhibits describing the terms of each package), Ex. 617 (2014 "New Customer Offer Timeline" graphic showing offer terms between 2008 and 2013).

***3** DIRECTV's subscription television services are a "considered purchase," such that consumers generally "go through anywhere between [a] 45- to 90-day process" when deciding whether or not to purchase. Dkt. No. 367 ("Tr. Vol. 2") at 308:16–309:4 (Bentley). The complexities of the product stem from the "sheer number of different tradeoffs and decisions that need to be made" regarding the packages, "advanced receiver, size of the hard drive, movies to save," number of rooms, and whether advanced receivers were required in each room. Tr. Vol. 2 at 294:19–295:1 (Bentley); Dkt. No. 371 ("Tr. Vol. 4") at 643:10–11 (Guyardo) (DIRECTV is a "high involvement" and "complex" purchase). Consumers who wish to subscribe to DIRECTV must proceed through a lengthy and detailed subscription process, either on the phone with a DIRECTV representative or on the web. *See* Tr. Vol. 2 at 302:1–310:14 (Bentley); Tr. Vol. 4 at 661:20–662:19 (Guyardo); Dkt. No. 372 ("Tr. Vol. 5") at 792:18–21 (Chen).

DIRECTV acquires subscribers using multiple sales channels that are broadly categorized as either "Direct Sales" or "Indirect Sales." Tr. Vol. 4 at 667:3–668:9 (Guyardo); Ex. 9 at 44. Direct Sales involves customers who subscribe either by phone through one of DIRECTV's toll free numbers or on the DIRECTV website, directv.com. Tr. Vol. 2 at 298:19–25 (Bentley). The majority of Direct Sales subscribers complete their sign up over the phone, and only a small percentage subscribe on the web. Dkt. No. 389 ("Tr. Vol. 9") at 1441:23–1442:15 (Leever).

Indirect Sales are made through a number of third-party channels. Ex. 9 at 44. These include Consumer Electronics (consumer electronics and other big box stores like Walmart or Best Buy that sell DIRECTV in their stores, Tr. Vol. 2 at 299:10–23 (Bentley) ); Telco (partnerships with telephone companies that sell DIRECTV services on their networks in addition to phone and internet services, Tr. Vol. 2 at 299:2–5 (Bentley) ); National Strategic Partners (national third-party dealers, Tr. Vol. 2 at 300:3–7 (Bentley) ); Local Strategic Partners (local third-party dealers, Tr. Vol. 2 at 300:9–14 (Bentley) ); and Multi-Dwelling Units (multi-unit buildings that contract with DIRECTV to make the service available to residences). Ex. 9 at 44.

Many third-party providers, including Telco partners, used their own advertising tactics. *See* Tr. Vol. 2 at 225:21–226:20, 300:15–301:1 (Bentley); Dkt. No. 388 ("Tr. Vol. 8") at 1328:20–23 (Pratkanis) (referring to Costco tactic). Third-party providers also had offers that were different from Direct Sales offers. Tr. Vol. 2 at 299:6–9 (Bentley). For example, Telco partners offered bundles with their telephone and Internet services and DIRECTV's television services, and the Telco partners would offer such services, including DIRECTV's, using their own sales network and cross-selling to their existing customers. Tr. Vol. 2 at 300:15–301:1 (Bentley). Likewise, there were over two thousand National Strategic Partners that would create and place their own advertising for DIRECTV. Tr. Vol. 2 at 225:21–226:20 (Bentley).

B. **The Challenged Advertisements**

Between 2007 and the time of the trial, DIRECTV advertised its subscription television service through several different media. DIRECTV aired television commercials, *see*, *e.g.*, Exs. 472–478; disseminated tens of thousands of different print advertisements through newspapers and direct mailings, Dkt. 386 ("Tr. Vol. 6") at 933:20–21 (Erdem) (over 40,000 ads); published over 150 different Internet banner ads, Ex. 1161; and used its website (directv.com), which was revised several times during this period, Tr. Vol. 9 at 1448:12–20 (describing website redesigns).

i. **Television Commercials**

DIRECTV advertised on television in nationally-broadcast 30-second and one-to-two-minute ads about DIRECTV called "direct response television." Tr. Vol. 2 at 220:8–11 (Bentley). All television ads prompted consumers to call 1-800-DIRECTV and/or visit directv.com. *Id.*

ii. **Print Advertising**

***4** DIRECTV's print advertising has generally included three broad categories: freestanding inserts disseminated with Sunday newspapers (also known as Sunday Circulars), Alternative Media, and Solo Mail.

a. Sunday Circulars

Sunday Circulars are multi-page advertisements inserted into the Sunday newspaper. Tr. Vol. 2 at 312:7–9 (Bentley); Ex. 9 at 60. DIRECTV has circulated approximately 200–300 different types of freestanding newspaper inserts per month. Tr. Vol. 2 at 231:7–10 (Bentley).

The number of consumers who called DIRECTV in response to a Sunday Circular is "extremely small." Tr. Vol. 5 at 883:6–17 (Gieselman). By way of example, in response to a Sunday Circular distributed to 7 million consumers in or around August 2013, only three one hundredths of a percent (.03%) of the people who received the Sunday Circular called DIRECTV, and only 32% of the people who called ultimately subscribed to DIRECTV during the call. Tr. Vol. 5 at 879:21–883:18 (Gieselman); Ex. 384 at 7.

b. Alternative Media

Alternative Media includes "hundreds of different tactics" that generally are provided to consumers with material or advertisements from other (and often many other) companies. Tr. Vol. 2 at 223:22–224:2, 224:9–13, 313:22–314:10, 315:17–316:17 (Bentley); Ex. 9 at p. 59. Alternative Media

advertisements are comprised of newspaper-delivered inserts, shared mail or co-op mailings, mail inserts, or directories. Tr. Vol. 2 at 223:22–224:13 (Bentley); Ex. 9 at p. 59.

DIRECTV sent out "anywhere from 2[00] to 300 [Alternative Media] tactics every month" in multiple channels of distribution. Tr. Vol. 2 at 312:5–6, 321:6–10 (Bentley) ("there may be 300 different creative versions of [Alternative Media] in a single month ..."); Ex. 9 at 59. Alternative Media is high-volume, low-return marketing that targets the same households week after week. Tr. Vol. 2 at 320:21–321:10, 322:18-323:16 (Bentley) (one alternative media advertisement disseminated 10 million pieces to generate approximately 300 subscriptions).

c. Solo Mail

Solo Mail is a multipage letter sent in a standard envelope to targeted, credit pre-approved households. Tr. Vol. 2 at 311:23–312:9, 315:9–16, 321:2–10 (Bentley); Ex. 9 at 58. DIRECTV would use predictive models to determine which households to target. Tr. Vol. 2 at 321:11–19 (Bentley). DIRECTV generally sent 15 to 18 million Solo Mail letters per month. Tr. Vol. 2 at 320:12–16 (Bentley).

iii. **Banner Ads**

Banner ads are animated images that appear on third-party websites. Tr. Vol. 5 at 801:3–6 (Chen). When a consumer clicks on the banner ad, she is routed to directv.com. *Id.*

iv. **directv.com**

Consumers may subscribe to DIRECTV's satellite television services through directv.com. Few consumers who enter DIRECTV's web flow complete the purchase on the website. *See, e.g.*, Tr. Vol. 5 at 794:13–18 (Chen) (rate of subscription for prospects who entered the website and placed a package in their cart ranged between 6.5 and 8.9%.); Ex. 1146 at 1.

Based on unique toll-free numbers on the website and available data regarding visits to directv.com, out of all subscriptions arising from a customer who visited directv.com, approximately 70% of those consumers called a toll-free number and completed their subscription with a telephone customer service representative. Tr. Vol. 2 at 305:14–25 (Bentley).

C. **The FTC Failed to Prove a Violation of Section 5(a) of the FTC Act as to Any of Defendant's Print, Television or Electronic Banner Advertisements**

***5** Section 5(a) of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). A practice is deceptive in violation of § 5(a) if: (1) "there is a representation, omission, or practice"; (2) that "is likely to mislead consumers acting reasonably under the circumstances"; and (3) "the representation, omission, or practice is material." *F.T.C. v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). Even if it contains some truthful disclosures, a representation still "may be likely to mislead by virtue of the net impression it creates." *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *see also Gill*, 265 F.3d at 956 (evaluating the "overall 'net impression' " of the representations). And failure to disclose material information may cause an advertisement to be false or deceptive within the meaning of the Act even where the advertisement does not state false facts. *Simeon Management Corp. v. F.T.C.*, 579 F.2d 1137, 1145 (9th Cir. 1978). Actual deception is not required for a Section 5 violation. *Trans World Accounts, Inc. v. F.T.C.*, 594 F.2d 212, 214 (9th Cir. 1979).

Here, the FTC does not contend that any of the over 40,000 advertisements it purports to challenge contained affirmatively false representations. *See* Dkt. No. 337 (FTC's section of joint pretrial statement) at 34 ("Because, in a failure to disclose case, the deception does not turn on literal falsity, the FTC need not demonstrate that reasonable consumers are likely to take away some false message about [the] advertised offer."); Dkt. No. 412 (transcript of argument on motion for partial findings) at 23 ("This is an omission case, not a falsity case."). Nor does the FTC contend in any systematic or detailed way that the advertisements *entirely* omitted the information it claims was necessary to ensure that the statements in the advertisements were not misleading. *See* Tr. Vol. 1 at 8:3–7 (FTC's opening statement) ("When you look at the advertisements, you will see disclosures, *if they exist at all*, flashing briefly on the screen, hidden behind hyperlinks, buried in fine print, or obscured by dense paragraphs of legal text.") (emphasis added). Instead, the FTC's theory is that Defendant's advertisements were likely to mislead reasonable consumers because, in its view, critical details of Defendant's offer were not disclosed prominently enough. Tr. Vol. 1 at 15:10–13 ("In this case we are talking about

omissions; omissions by inadequately disclosing material terms after the advertised price has been prominently featured in DIRECTV's advertisements.")

The FTC fails to meet its burden as to Defendant's print, television and electronic advertisements for at least two reasons. First, as to the very small number of advertisements actually analyzed by its expert witnesses, the FTC failed to establish that there was any misleading "net impression," or even to identify clearly what it claims the net impression was. Neither a facial review of these advertisements nor the FTC's extrinsic evidence established that these materials are likely to mislead a reasonable consumer. Second, the FTC also failed to articulate what common net impression is conveyed by the over 40,000 challenged advertisements (which spanned several different formats), or to explain how and why that impression would be likely to mislead a reasonable consumer.

i. **The FTC's Theory**

In the complaint, the FTC framed its allegation with regard to the two-year requirement as follows:

> In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, and sale of Defendants' subscription service, Defendants have represented, directly or indirectly, expressly or by implication, that their programming packages can be purchased by paying the advertised monthly prices, typically for a twelve-month period.
>
> ***6** In numerous instances in which Defendants have made the representation set forth in Paragraph 28 of this Complaint, Defendants have failed to disclose, or to disclose adequately, to consumers certain material terms and conditions of the offer, including but not limited to:
>
> A. The mandatory two-year agreement period, which carries an early cancellation fee, for the subscription service; and
>
> B. The significantly higher price for programming packages, typically $25 to $45 per month higher, during the mandatory second year of the consumer's agreement.
>
> This additional information would be material to consumers in deciding to purchase Defendants' subscription services.

Compl. ¶¶ 28–29.

As to the premium channel offer terms, the FTC alleged that:

> In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, and sale of Defendants' subscription service, Defendant have represented, directly or indirectly, expressly or by implication, that consumers could obtain certain premium channels for free for a certain period of time, typically three months.
>
> In numerous instances in which Defendants have made the representation set forth in Paragraph 31 of this Complaint, Defendants have failed to disclose, or disclose adequately, to consumers the material terms and conditions related to the costs of the offer, including:
>
> A. That Defendants automatically enroll consumers in a negative option continuity plan with significant charges;
>
> B. That consumers must affirmatively cancel the negative option continuity plan before the end of the trial period to avoid charges;
>
> C. That Defendants use consumers' credit or debit card information to charge consumers for the negative option continuity plan; and
>
> D. The costs associated with the negative option continuity plan.

Compl. ¶¶ 31–32.

In its pretrial statement, the FTC articulated its theory this way: "DIRECTV's advertisements consistently create an overall 'net impression' that the company's service may be obtained for substantially less than consumers ultimately must pay over the course of their mandatory 24-month contract." Dkt. No. 337 at 3. Now, in its opposition to the motion for judgment on partial findings, the FTC frames its theory as being based on the principle that "prominently advertising a half-truth while omitting or hiding qualifying material information renders the *net impression* of the advertisements misleading." Dkt. No. 401 at 2 and n.2 (emphasis in original) (citing *F.T.C. v. AMG Svc's, Inc.*, 29 F.Supp.3d 1338, 1351 (D. Nev. 2014) and *Cyberspace.com*, 453 F.3d at 1201).

ii. **Net Impression Analysis**

In assessing whether the FTC has met its burden of establishing liability under § 5(a), the Court must first determine what "net impression" the advertisements at issue create, so that it can then decide whether this net impression was likely to mislead reasonable consumers. *See AMG Svc's, Inc.*, 29 F.Supp.3d at 1368 n.9 (explaining that "the FTC Act requires the court to determine what 'net impression' the [allegedly misleading] loan note creates"); *F.T.C. v. Commerce Planet, Inc.*, 878 F.Supp.2d 1048, 1063 (C.D. Cal. 2012), *aff'd* 642 Fed. Appx. 680 (9th Cir. 2016) ("District courts consider the overall, common sense 'net impression' of the representation or act as a whole to determine whether it is misleading."). In determining what net impression an advertisement creates, the Court considers the face of the advertisement, and may also consider extrinsic evidence. *See Commerce Planet*, 876 F.Supp.2d at 1062–78 (considering face of advertisements as well as extrinsic evidence in assessing whether net impression was misleading; "[a]lthough a facial examination of the sign-up pages sufficiently demonstrates that the website marketing of [company] was misleading to a reasonable consumer, the Court may consider extrinsic evidence as corroborating evidence").[2]

***7** Generally, the FTC can succinctly describe its position as to what the net impression is and explain why that net impression is likely to mislead in its view. *See F.T.C. v. Johnson*, 96 F.Supp.3d 1110, 1139–1140 (D. Nev. 2015) (describing FTC's position that "a consumer proceeding through the website pages would have a net impression that they were getting a free CD for a minimal shipping and handling or download fee," while in truth "the sites collected preliminary information without informing the consumer that they would be enrolled in a core membership with a negative option and additional upsell memberships with negative options").

In attempting to determine the net impression of the advertisements at issue, the Court is confronted with an immediate challenge: the FTC's evidence spans at least four tiers, which together encompass tens of thousands of discrete advertisements used by DIRECTV over an eight-year period.

First, the FTC's expert witness, Dr. Tülin Erdem, conducted an online survey based on a print advertisement from 2013. Exs. 2374, 2375 (survey URL); Ex. 244 (underlying advertisement); Tr. Vol. 6 at 928:3–934:6.

Second, Dr. Erdem testified that she chose this print advertisement for her survey based on a review of 116 advertisements used by DIRECTV between 2007 and 2015, and said she found the chosen ad to be "sufficiently representative." Tr. Vol. 6 at 934:7–21, 956:3–977:20, 996:17–997:10; Dkt. No. 393.[3] Dr. Erdem claimed that the results of her survey could be generalized to draw conclusions about other print advertisements beyond the one she tested. Tr. Vol. 6 at 956:8–957:10, 986:1–995:21. Another of the FTC's expert witnesses, Dr. Anthony Pratkanis, testified similarly that the characteristics of two print advertisements, Exhibits 238 and 273, were generalizable to "hundreds" of other advertisements he reviewed. Tr. Vol. 8 at 1251:21–1266:3.

Third, the FTC introduced a total of approximately 228 print advertisements, 17 television commercials, and 33 electronic banner ads into evidence. Dkt. No. 401-1 (FTC's proposed findings of fact and conclusions of law) at ¶¶ 41, 46, 50, 54, 56, 59, 62–63 (listing exhibit numbers of admitted exhibits in each category). Witnesses testified regarding approximately 47 of these exhibits. A large number—approximately 231—were introduced by stipulation without live witness testimony. Dkt. No. 391.

Fourth, and finally, a much larger number of advertisements that were disseminated during the period for which the FTC claims DIRECTV customers are entitled to restitution—over 39,000—were never introduced into evidence at all. Tr. Vol. 6 at 933:20–21; *cf.* Dkt. Nos. 360-1, 363-1, 364-1, 368-1, 369-1, 376-1, 381-1, 382-1, 383-1, 392-1, 391, 395, 415 (lists of exhibits admitted at trial and by stipulation).

All told, the FTC's theory of the case thus requires the Court to attempt to determine the "net impression" of more than 40,000 advertisements, across print, television, and electronic formats. Simply to state this fact is to highlight the extraordinary ambition—and daunting challenges—inherent in the FTC's theory. The district court in *Johnson* noted similar challenges in that case, where the FTC "ask[ed] the Court to draw conclusions as to all of Defendants' sites, presented to the Court or not, based on the exhibits presented and [its expert's report]":

> ***8** Immediately the Court is confronted with a problem. As previously mentioned, the FTC has provided over one-hundred exhibits of grant websites and the expert report from [expert]. However, for the purposes of summary judgment, the Court cannot rely solely on the representations of the FTC and their expert as

> to what the websites represent.... In its briefing, the FTC picks examples of claims from across its grant website exhibits to suit their arguments. It is not clear to the Court, however, whether the FTC's examples are representative of the grant website experience as a whole.... The Court cannot adopt the FTC's approach of using selected examples of claims picked from across the entire universe of the FTC exhibits, seemingly without a clear methodology, and draw conclusions as to every one of Defendants' sites.

*Johnson*, 96 F.Supp.3d at 1118, 1121.

The challenges described by the *Johnson* court are substantially multiplied here, given the enormous number of advertisements at issue, the diversity of format of those advertisements, and the varying nature of the representations made in the advertisements over time.

Accordingly, the Court will proceed here in two stages. First, the Court will examine the single print advertisement analyzed by Dr. Erdem to determine whether the net impression created by that advertisement would be likely to mislead consumers acting reasonably under the circumstances. Second, the Court will consider whether, even if the net impression of this advertisement was misleading, that impression can be generalized (1) to any of the other advertisements in evidence or (2) to tens of thousands of other advertisements, the vast majority of which were never admitted in evidence, spanning an eight-year period across different media.

iii. **Print Advertisements**

a. Analysis of print advertisement tested by Dr. Erdem (Ex. 244)[4]

1. Facial review

Exhibit 244, which Dr. Erdem used as the basis for her web-based survey, is a one-page advertisement with the heading "Best Offer Ever" in gold, silver and yellow letters against a blue background:


Ex. 244.[5]

As would be expected for a complex multi-option product like a satellite television subscription, the advertisement contains a large amount of information about various programming packages, pricing and equipment options, product quality and installation logistics. Roughly the middle third of the advertisement describes three tiers of programming packages: the Entertainment Package, the Choice Package and the Xtra Package. Each package includes a different number of channels and a different number of on demand titles. Each package also includes HBO, Starz, Showtime and Cinemax "free for three months."

The text box for each package includes a price "for 12 months" "after instant savings." In each instance, that price is crossed out by a red line, and a lower price appears in white text against a red circle with the phrase "Act Now!" at the top. So, for example, the crossed-out price for the Entertainment Package is $29.99/month, and the "Act Now!" price is $24.99/month. The price in the red bubble has a caret next to it, which directs the viewer to the following bolded text in the first line of a section of disclosures in black text against a white background at the bottom of the page: "**BILL CREDIT/PROGRAMMING OFFER: IF BY THE END OF PROMOTIONAL PRICE PERIOD(S) CUSTOMER DOES NOT CONTACT DIRECTV TO**

**CHANGE SERVICE THEN ALL SERVICES WILL AUTOMATICALLY CONTINUE AT THE THEN-PREVAILING RATES."**[6] Because most of the text in the disclosure box is not bolded, not in all capital letters, and not partially underlined, this information stands out visually. *See* Ex. 1119 (FTC ".com Disclosures" guidance) at 17 ("A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable."). The text in the disclosure box is smaller than most of the text in the advertisement, though type in different sizes, fonts and colors is used throughout the ad. The next line in the disclosure box lists the current non-promotional package price for each option (for example, the non-promotional price at the time for the Entertainment Package was $54.99 per month).

***9** Bolded text in black print against a white background immediately below the three boxes describing the packages explains that **"ALL DIRECTV OFFERS REQUIRE 24-MONTH AGREEMENT.* *"** This same bolded language appears again in smaller text (again black against a white background) in the bottom third of the advertisement, below three smaller boxes describing installation details, HD DVR features and options for bundling TV, internet and phone service. The two asterisks direct the viewer to the following bolded text in the disclosure box at the bottom of the page: **"24-MONTH AGREEMENT: EARLY CANCELLATION WILL RESULT IN A FEE OF $20/MONTH FOR EACH REMAINING MONTH."** Again, this information is one of the few pieces of text in the disclosure section that is bolded, in all capital letters and partially underlined, making the information stand out visually.

Near the bottom of the page, above the disclosure section, large text says "Upgrade to DIRECTV! Call 1-866-951-9617 or visit directv.com."

Based on its facial review of Exhibit 244, the Court finds that the net impression a reasonable consumer would take away from this advertisement is that a promotional price applies for 12 months, that a 24-month agreement is required, that an early cancellation fee of $20 per month will apply if the customer cancels before the end of the 24-month period, that services will continue at the end of any promotional period at the then-applicable regular rate unless the customer contacts DIRECTV to change the services, and that the customer needs to call a toll-free number or go to DIRECTV's website to subscribe. These provisions are adequately disclosed throughout the advertisement, and while the ad contains a substantial amount of information, a reasonable consumer would understand that this is because subscription satellite television service is a complex product with a number of options for price, level of service, package features and other components. *See* Tr. Vol. 2 at 308:16–309:7 (subscribing to satellite television services involves a large "number of different tradeoffs and decisions that need to be made," making subscribing a "considered purchase") (Bentley); Tr. Vol. 9 at 1439:14–24 (testimony of former DIRECTV executive Karen Leever that satellite television services are "a complex product" requiring customers to make a number of decisions to customize their package). Because the advertisement adequately discloses the details that the FTC claims were omitted due to a lack of prominent disclosure, the net impression of the advertisement on its face would not be likely to mislead a reasonable consumer.[7]

2. Extrinsic evidence

The Court further finds that none of the extrinsic evidence introduced by the FTC meets its burden of showing that Exhibit 244, or any of the other print, electronic or television advertisements analyzed by the FTC's experts, would be likely to mislead a reasonable consumer.

a. Expert Testimony

*1. Dr. Erdem*

***10** The primary extrinsic evidence upon which the FTC relies in support of its claim is a web-based survey conducted by Dr. Tülin Erdem, a professor of business administration and marketing at New York University. Tr. Vol. 6 at 902:19–21. Dr. Erdem described her assignment as "evaluating whether DIRECTV's website and print advertisements clearly and conspicuously disclosed certain items about the contract, price terms, et cetera." *Id.* at 910:17–20. Dr. Erdem testified that "in order to evaluate this hypothesis whether they are indeed clear and conspicuous or not, I had to look at the baseline understanding as well as whether it can be improved with some targeted modifications." *Id.* at 910:22–25.

Dr. Erdem created a web-based survey to test this hypothesis, using the actual print ad as a control stimulus and creating a modified test version of the ad as a comparative stimulus. *Id.*

at 927:1–929:25, 936:23–937:22.[8] In the modified version, Dr. Erdem changed the manner in which certain information regarding price and subscription terms appeared in the ad. *Id.* at 936:23–937:22. She then asked survey respondents a number of questions, and concluded that her modified version of the ad increased "consumer understanding" of these terms. *Id.* at 912:8–913:20.

Dr. Erdem's survey suffers from several flaws that essentially negate its probative value as to the central issue in the case: whether DIRECTV advertisements' are likely to mislead reasonable consumers based on the net impression they create.

First, Dr. Erdem's survey was designed to test consumers' comprehension of certain terms and to determine whether their understanding could be enhanced with minor modifications to DIRECTV's disclosures. *See id.* at 926:20–927:24, 963:2–24, 1010:1–15. But saying that changing the presentation of certain information may result in better recollection of that information simply does not support the conclusion that the information was likely to mislead as presented in its original form. Dr. Erdem acknowledged that she did not perform a deception study, or do any copy testing to determine "what is the overall impression of the consumer from the ad." *See id.* at 965:2–19, 990:1–22. While the FTC suggests that deception studies are only relevant in Lanham Act cases, *see id.* at 1013:14–14:10, it never explains why. Dr. Erdem's generic testimony about principles of "shrouding" also failed to establish that the ad was likely to mislead a reasonable consumer. *See id.* at 924:10–13 ("[F]ine print is a classic example of that kind of shrouding or a practice that makes cognitive load of consumers high, and a majority of consumers don't read the fine print."). Accordingly, the questions asked and answered by Dr. Erdem's survey provide little, if any, support for the FTC's claim that the tested advertisement (Ex. 244) would be likely to mislead a reasonable consumer. *Compare Commerce Planet*, 878 F. Supp. 2d at 1068 (expert's testimony focused on whether most customers would understand negative option and continuity program subscription aspects of website; analysis "focuse[d] on what the user can perceive and what the user should do").

***11** Moreover, Dr. Erdem acknowledged that as part of her survey results, she grouped participants who responded that they didn't "know" about specific terms together with those who responded that they didn't "recall" or "remember" the terms. Tr. Vol. 6 at 966:6–968:11. The FTC argues that this approach "is the right one for a deceptive-omission case, where consumers are misled in part *as a result* of their lack of knowledge." Dkt. No. 401 at 14 (emphasis in original). But the FTC's argument fails to recognize that Dr. Erdem's survey did not test, and therefore cannot establish, *why* a consumer responded that he or she did not know or recall the terms. Because Dr. Erdem did not ask follow-up questions or have subcategories for responses, she acknowledged that she did not know whether these survey participants saw the key terms but just could not recall what they had seen in the print advertisement earlier, or whether they had the wrong impression about these terms based on the advertisements. Tr. Vol. 6 at 966:22–968:19, 970:2–16 (Erdem). Accordingly, this characteristic of Dr. Erdem's survey further supports the Court's conclusion that the results lack substantial probative value on the question of whether Exhibit 244 was likely to mislead a reasonable consumer.

Finally, the Court finds that given the centrality of the disclosures in the text at the bottom of the ad to the issues in this case, Dr. Erdem's web study did not adequately replicate the experience of a prospective customer viewing the ad in paper form, as it was actually distributed. Defendant introduced a hard copy of the advertisement in its original paper form. Ex. 2026A. With the paper version in hand, a prospective customer could review those disclosures simply by looking at the bottom of the page. By contrast, in Dr. Erdem's survey, the survey taker had to scroll down the screen to see those disclosures (in other words, the disclosures were not visible unless the survey taker scrolled down). Tr. Vol. 6 at 973:7–15 (Erdem). Further, the Court's personal comparison at trial of the paper and electronic survey versions of the ad reflected that the disclosure text in the survey version was substantially less clear and legible than the paper copy. *Compare* Ex. 2026A *with* Ex. 2371 (URL link for survey).[9] The fact that respondents could "zoom [in] on any part," Tr. Vol. 6 at 975:2–4 (Erdem), does not remedy this problem, nor does it matter that none of the participants in Dr. Erdem's pretest said that the text was not legible, Tr. Vol. 6 at 1013:1–3. Survey participants were not asked if they could read the disclosure block, Tr. Vol. 6 at 1015:6–11, and the Court finds that it would not be apparent to a participant that the specific content of the disclosure block could be relevant (in fact, crucial) to the survey exercise.

For all of these reasons, the Court finds that Dr. Erdem's survey has little to no probative value on the question of whether the 2013 advertisement admitted as Exhibit 244 was likely to mislead a consumer acting reasonably under the circumstances.

*2. Dr. Pratkanis*

The Court finds Dr. Pratkanis' "social influence analysis" to be similarly unpersuasive on the question of whether a reasonable consumer likely would be misled by Defendant's advertisements. Dr. Pratkanis acknowledged that he did no copy testing or other empirical testing of how consumers perceive Defendant's advertisements. Tr. Vol. 8 at 1291:13–1293:12. He also did not analyze Defendant's advertisements to determine their net impression, or do any content analysis that would support the conclusion that his conclusions were generalizable to all of the ads at issue over the eight-year period at issue. Tr. Vol. 8 at 1304:6–1306:24, 1311:6–1315:24.

Instead, Dr. Pratkanis testified that general principles of social influence such as "throwing the lowball" and "free gift" can increase the "likelihood" that someone would make a purchase. Dr. Pratkanis' "fundamental finding" was that DIRECTV employed a "lowball" initial offer to get consumers to later agree to a less desirable offer. *Id.* at 1249:12–1250:8. During his testimony, Dr. Pratkanis discussed two print ads: another variant of the one-page "Best Offer Ever" flyer from 2013 (Ex. 238) and a 2014 two-page advertisement headed "Get 2 YEARS OF SAVINGS" (Ex. 273).

***12** Exhibit 238 describes the Entertainment Package, and has a slashed-out price of $29.99 "FOR 12 MONTHS," next to the notation "With 24-mo. agreement.* *" A red bubble just above the slashed-out price contains large white text reading "ACT NOW! $24.99/MO." with a caret. As with Exhibit 244, the print ad Dr. Erdem tested, the caret and asterisks refer the viewer to a disclosure section of black text against a white background that occupies approximately the bottom one-third of the advertisement. The text in the disclosure section that corresponds to the caret begins in the first line of that section, and contains the following bolding, underlining and capitalization: **"BILL CREDIT/PROGRAMMING OFFER: IF BY THE END OF PROMOTIONAL PRICE PERIOD(S) CUSTOMER DOES NOT CONTACT DIRECTV TO CHANGE SERVICE THEN ALL SERVICES WILL AUTOMATICALLY CONTINUEAT THE THEN-PREVAILING RATES."** Later text in that line lists the "current prices" of each package. The text in the disclosure section that corresponds to the asterisks is bolded and in all capital letters, and says **"24-MONTH AGREEMENT: EARLY CANCELLATION WILL RESULT IN A FEE OF $20/MONTH FOR EACH REMAINING MONTH."**

Exhibit 273, like Exhibit 244, describes three different packages. It contains the same red bubble price format, slashed-out prices, and references to the disclosure section via carets and asterisks. The formatting and content of the disclosures described above with regard to Exhibit 244 (including underlining, bolding and capitalization) is identical in Exhibit 273, except that the Court assumes that this was a two-sided advertisement, such that the second page of text and the disclosure section would appear on the back of the piece.[10]

For the reasons described in its analysis of Exhibit 244 above, the Court finds based on a facial review that neither Exhibit 238 nor Exhibit 273 creates a net impression that would be likely to mislead a reasonable consumer.

Moreover, the Court accords minimal weight to Dr. Pratkanis' opinions in light of this determination that the advertisements at issue were not facially deceptive. Dr. Pratkanis' general testimony regarding the "likelihood of the impressions that [a consumer] would take," Tr. Vol. 8 at 1347:1–1348:8, is unpersuasive for several reasons. First, while Dr. Pratkanis testified, for example, that a consumer would "have a tendency and a likelihood" to perceive the slashed-out price as the "real price or the regular price," he acknowledged doing no study or survey to determine whether customers in fact held that belief. *Id.* at 1314:8–1315:15. Nor did Dr. Pratkanis do any empirical testing of any advertisement, *id.* at 1301:4–8, survey customers to ask what messages they took away from ads, *id.* at 1303:16–1304:24, or do a content analysis of any advertisements, *id.* at 1305:11–1306:4. Dr. Pratkanis has performed this kind of testing in other instances, but did not do so here because the FTC did not ask him to. *Id.* at 1303:16–1304:24.

Similarly, Dr. Pratkanis conceded that he could not measure how purported "lowball" representations would affect consumers' understanding:

> Q: But likelihood is what? Is it more likely than not? Does that mean more than 50 percent who sign up don't know?
>
> A: It would be an increase over base rate.
>
> Q: Do you know what the base rate is?

A: No.
Tr. Vol. 8 at 1312:2–6.

Third, as Defendant points out, the "lowball theory" also does not map well to FTC's theory in this case, because that theory presumes that consumers *do* understand the price that they will pay before the time of purchase. *Id.* at 1320:12–1321:12; *see id.* at 1348:4–8 (agreeing with the Court's statement that "if they are exposed to the true terms up front there can't be a lowball by definition"). Here, the Court has found that the true terms are adequately and accurately disclosed in the advertisements Dr. Pratkanis testified about. For at least these reasons, the Court finds that nothing in Dr. Pratkanis' testimony persuasively supports the FTC's contention that the print advertisements at issue in this case created a misleading net impression in violation of the FTC Act.

3. The Cases Upon Which the FTC Relies Reinforce the Conclusion That the Agency Failed to Meet Its Burden of Proof

***13** The cases the FTC relies upon in support of its argument that these advertisements (and, by extension, the thousands of others at issue in this case) were misleading by omission are readily distinguishable. In those cases, the courts found that advertisements created a misleading impression, even when the relevant information was technically disclosed in some form, because the overall presentation would lead a reasonable consumer to conclude that the terms were materially different than the true terms.

For example, in *Cyberspace*, the defendants mailed millions of solicitations offering internet access to individuals and small businesses. 453 F.3d at 1198. The solicitations included a check, usually for $3.50, addressed to the recipient and referencing the recipient's phone number on the "re" line. *Id.* The check was "attached to a form resembling an invoice designed to be detached from the check by tearing at the perforated line." *Id.* "The back of the check and invoice contained small-print disclosures revealing that cashing or depositing the check would constitute agreement to pay a monthly fee for internet access, but the front of the check and the invoice contained no such disclosures." *Id.* Under those circumstances, the Ninth Circuit readily rejected defendants' argument that "the fine print notices they placed on the reverse side of the check, invoice, and marketing insert preclude liability" under the FTC Act. *Id.* at 1200. This was because the "mailing created the deceptive impression that the $3.50 check was simply a refund or rebate rather than an offer for services," and gave the "overall impression that the check resolves some small, outstanding debt." *Id.* at 1200–1201.

Similarly, in *AMG Services*, defendants' loan note contained two sets of representations: a Truth In Lending Act ("TILA") box, and additional fine print disclosures. 29 F.Supp.3d at 1366. The TILA box "represent[ed] that borrowers [were] obligated to repay a *fixed* sum equal to the principal plus a single finance charge." *Id.* (emphasis added). But terms in the fine print "contradict[ed] the terms disclosed in the TILA box," in that the repayment amount was *not* fixed, the borrower was automatically enrolled in a ten pay-period "loan renewal" plan that imposed multiple finance charges, and the "renewal plan" increased the borrower's cost of credit from $90 to $675. *Id.* at 1367. Given these contradictions, the court had no trouble concluding that "[i]t requires no citation of authority to demonstrate that the 'net impression' of a boldfaced representation, which states that the borrower is responsible to repay a fixed sum, is misleading when the fine print indicates that the boldfaced sum is not fixed." *Id.* at 1368; *see also id.* at 1351 (finding that "the net impression of the Loan Note Disclosure is likely to mislead borrowers acting reasonably under the circumstances because the large prominent print in the TILA Box implies that borrowers will incur one finance charge while the fine print creates a process under which multiple finance charges will be automatically incurred unless borrowers take affirmative action"); 1373 (recommending that summary judgment be granted because "the representation [was] clearly misleading and the defendant relie[d] exclusively on the fine print to correct the misrepresentation").

*Johnson* also illustrates the usual type of representation found to create a misleading net impression. In that case, the FTC argued that a consumer reviewing defendant's website "would have the net impression that they were getting a free CD for a minimal shipping and handling or download fee," but failed to inform the consumer "that they would be enrolled in a core membership with a negative option and additional upsell memberships with negative options." 96 F.Supp.3d at 1139–1140. Essentially, the FTC argued that "the disclosures were presented in a way that made consumers unlikely to expect them (because the claims 'free' and 'risk free' were so prominent) and were unlikely to see them (because the disclosures were inadequate or non-existent)." *Id.* at 1140. The court agreed, finding it clear that the sites did not advertise a membership program, and concluding that

customers would be likely "to believe that they are ordering a CD for a one-time fee and would not have reason to believe they were enrolling in membership programs with monthly charges." *Id.* at 1145. The Court noted that "[i]nformation about the trial memberships, and their associated costs, [was] hidden in disclosures that consumers would be justified in believing they did not have to examine closely." *Id.* at 1146.

***14** Significantly, however, the *Johnson* court noted that the circumstances before it were different than a squarely-presented offer regarding subscription services like the one at issue in this case:

> [T]here is a significant distinction between sites that clearly offer subscription-based or membership-based services to a consumer with a trial period and negative option, on one hand, and sites that offer to ship a product for a one-time payment with a bundled membership trial period and negative option on the other. In the first situation, the consumer is made aware of an ongoing obligation for use of the seller's service. Generally speaking, Defendants are correct that a consumer's failure to cancel their membership in that situation would be the fault of the consumer. The Court's concern in this case is that the sites do not clearly offer a membership program.... That is a significantly different situation from one in which a consumer willingly receives the benefit of a subscription or membership program and forgets to cancel.

*Id.* at 1141-42.

*Cyberspace* and *AMG Services* also do not support the FTC's argument as to the probative weight of Dr. Erdem's analysis, Dkt. No. 401 at 14, and the critically different facts of those cases highlight the weakness of the government's evidence in this case. The Ninth Circuit's comment in *Cyberspace* that the defendant's proffered survey "did not probe whether the notices were sufficiently conspicuous to draw the survey subjects' attention in the first place," 453 F.3d at 1201, addressed a circumstance in which (1) the supposed disclosure was on the back of what appeared to be a check; and (2) the misleading impression was that a reasonable consumer would not understand that by cashing the check she would be enrolling in a subscription service. *Id.* at 1200–1201. Similarly, as explained above, the deception in *AMG Services* was that the net impression made by the advertisements at issue fundamentally and comprehensively contradicted the true terms of the offered loan. In contrast, here Dr. Erdem's survey treated respondents who did not recall the terms being studied the same as those respondents who said they did not know what the terms were, without providing any persuasive basis for concluding that either answer reflected a misleading net impression. *See* Tr. Vol. 6 at 966:22–970:16.

In sum, the facts in this case are plainly different from those in cases in which the FTC has successfully established that a misleading net impression existed. Nothing in one part of Exhibit 244 (or Exhibits 238 or 273) contradicts any other part of the advertisement. The advertisement makes plain that it essentially describes an "offer for services," *Cyberspace* at 1200, accurately describes (within the limitations of a one- or two-page flyer) the terms of the offer, and invites an interested consumer to follow up to select a specific package and subscribe through a phone- or website-based process. The Court finds it self-evident that this case bears no resemblance to cases in which a defendant represents in an advertisement that the consumer will receive a benefit (like the check in *Cyberspace*, the fixed interest rate in *AMG Services*, or the free CD in *Johnson* ), only to turn around and impose a concealed and unwanted burden (like the hidden subscriptions and requirements in each of those cases). *Compare* Ex. 1119 (FTC ".com Disclosures" guidance) at 18 ("Consumers who are trying to complete a task and obtain a specific product or service may not pay adequate attention to a disclosure that does not relate to the task at hand. This can be problematic if, for example, an advertiser is selling a product or service together with a negative option trial *for a different product or service.*") (emphasis added).

***15** Nor has the FTC shown that this advertisement was a "deceptive door opener," in which DIRECTV "induce[d] first contact through deception, even if the buyer later becomes fully informed before entering the contract." Dkt. No. 401-1 at 146 (*citing Resort Car Rental Sys., Inc. v. F.T.C.*, 518 F.2d 962, 964 (9th Cir. 1975) ). In *Resort Car Rental*, defendant used the slogan "Dollar-A-Day" for its car rental business, but apparently charged more than that. *Id.* Under those circumstances, the Ninth Circuit agreed with the FTC that "the trade name, 'dollar-a-day' by its nature has a decisive connotation for which any qualifying language would result in a contradiction in terms." *Id.* That principle is inapplicable here, because (1) the Court has found that nothing in Exhibit 244 (or Exhibits 238 or 273) contradicts the true terms of DIRECTV's provision of services; and (2) for a complex product like subscription satellite television services, a reasonable consumer would understand the limitations of how information is presented in a one- or two-page flyer. *See* Tr. Vol. 2 at 243:2–23, 311:11–317:11 (testimony of Brad Bentley that the amount of "real estate" in a particular form of advertisement affects the layout

of information included, but that "we made sure all the offer details were available on each piece").

Consistent with these observations, the Court finds that the FTC has failed to establish that Exhibit 244, or Exhibits 238 or 273, would be likely to mislead a reasonable consumer.

b. Even had the FTC shown that these examples created a misleading net impression, it failed to show how that impression is generalizable to hundreds or thousands of additional advertisements.

1. Expert Testimony

Dr. Erdem and Dr. Pratkanis' testified about the detailed content of only three advertisements. Dr. Erdem's survey concerned a single 2013 print advertisement, which she chose as the basis for her test after reviewing a set of nearly 120 DIRECTV ads culled by her staff. Tr. Vol. 6 at 989:12–25. She did not conduct any copy or content analysis, *id.* at 989:18–22, but rather reviewed this small set of advertisements "across different denominations like the content, the language, the fine print, whether it was a circular, etc." and "decided [the 2013 advertisement] was sufficiently representative." *Id.* at 956:3–957:10. According to Dr. Erdem, the advertisements "typically" had fine print, a promotional price, and package choices. *Id.* at 996:6–13. She further testified that "the single page format was easier to adopt for an online survey." *Id.* at 957:6–7. In this way, the advertisement was chosen, at least in part, because of the limitations of the survey methodology and not because the advertisement itself was the most representative.

Even if the Court had found, contrary to the analysis above, that Exhibit 244 was likely to mislead a consumer acting reasonably under the circumstances, Dr. Erdem presented no persuasive explanation in support of her assertion that this single 2013 print advertisement was somehow representative of even the advertisements she reviewed, let alone the universe of 40,000 or more advertisements at issue in this case.[11]

The Court finds that the several years' worth of advertisements accused by the FTC in this case took different forms and depended on the specific offer in place at the time. *See* Ex. 617 (timeline of offers). The ads contain everyday low pricing or promote introductory pricing for 12 months; require no commitment or state that a 24-month agreement is required; have no premium channel offer or offer premium channels free for 3 months; explain rebate credits (when rebates were in effect) or, later, the instant rebate prices; and disclose additional terms about equipment pricing, packages, and cancellation in other areas and the disclosure block. *See, e.g.*, Exs. 78, 84, 85 (2007); Exs. 92, 95 (2008); Ex. 113 (2009); Exs. 124, 139 (2010); Exs. 172, 2014 (2011); Exs. 175, 178/2707, 185 (2012); Exs. 203, 209, 212, 217 (2013); Ex. 281 (2014).[12] Indisputably, there is substantial variation in DIRECTV's print advertising with respect to, among other things, tactics, page count, content, and the frequency, placement, and manner of disclosures in the ads Dr. Erdem reviewed. *Compare*, *e.g.*, Ex. 2026A (paper copy of single page ad used in Erdem study, described above), *with* Ex. 2707 (original four-page Sunday Circular of Ex. 178 with no slashed out pricing; disclosing "FOR 12 MONTHS" and "2-year" agreement immediately under each price point; and disclosing first and second-year savings in large font on inside left page and again, in red, on back cover), *with* Ex. 124 (advertising "50% OFF FOR ONE YEAR!" at top and side; disclosing promotional price is "FOR 12 MONTHS" in red bubble), *with* Ex. 92 (two-sided advertisement disclosing promotional price is "FOR 12 MONTHS" with the "Reg." package price in red bubbles on front and back), *with* Ex. 172 (four-page direct mail letter disclosing "FOR 12 MONTHS" and "2-yr agreement" immediately under each price point; disclosing first and second-year savings in second paragraph of first page, and under each promotional price on later pages; disclosing value of premium channels next to premium channel copy), *with* Ex. 209 (four-page ad disclosing promotional price is "FOR 12 MONTHS" 12 times on front and back covers; disclosing first and second-year savings under each package on back cover; disclosing value of free premium channels next to premium channel copy on inside right page), *with* Ex. 113/2011A (slashing out regular package price rather than prior promotional price), *with* Ex. 139/2013A (advertising "PACKAGES START AT $29.99 Everyday Low Price" without promoting any specific package or premium channels). This variation among DIRECTV's ads precludes generalizing Dr. Erdem's survey results to the relative handful of print ads she reviewed, let alone to the some 40,000 she did not.[13]

***16** Contrary to the FTC's claim, neither DIRECTV nor the Court is suggesting that the FTC had to introduce all of the more than 40,000 advertisements into evidence. *See* Dkt. No. 401 at 15. But the FTC *does* have to explain why conclusions about a handful of advertisements can be applied

to derive a uniform net impression for an extremely large number of others that vary significantly in format, content and emphasis. The FTC simply cannot meet this burden by characterizing the advertisements at a high level of generality and asserting that conclusions regarding one advertisement apply uniformly to tens of thousands of others. *See* Dkt. No. 401-1 (FTC's proposed findings of fact and conclusions of law) at ¶¶ 82-91 (referencing inclusion of "some type of 'call to action' " in advertisements, as well as general thematic and formatting consistency); Tr. Vol. 6 at 956:16–20 (Erdem) ("[T]he common denominations were some kind of promotional package—I mean, premium channels package and promotional price, some kind of call to action, we call these kind of ads call to action ads, and the templates were similar."). The Court does not find Dr. Erdem's opinion that she would "expect no differences" in the empirical test results across all of the dramatically different types of advertisements at issue in this case, Tr. Vol. 6 at 996:21-997:10, to be persuasive or adequately supported. The Court similarly finds unpersuasive and inadequately supported Dr. Pratkanis' assertion that his conclusions about Exhibits 238 and 273 can be generalized to a broader universe of Defendant's advertisements.

2. Other Extrinsic Evidence

The Court also finds that none of the other extrinsic evidence relied upon by the FTC meets its burden of establishing that any of Defendant's advertisements was likely to mislead a reasonable consumer.

a. Eye Tracking Studies

The FTC introduced evidence that in 2010, DIRECTV contracted with Realeyes North America, a market research firm, to perform eye tracking studies on four DIRECTV advertising circulars. Hellstrom Depo. 9:19–23; Ex. 705 at 1–2.[14] DIRECTV engaged Realeyes to help its team understand how consumers read circulars. Ex. 378 at 31; Ex. 408. During this study, participants were shown a DIRECTV print advertisement on a large computer screen. Tr. Vol. 7 at 1221:8 (Hellstrom Depo. at 25:25–26:07); Ex. 718 at 16. Realeyes then tracked participants' "eye gaze data" for 30 to 90 seconds, aggregated that data, and created a "heat map" to show where participants focused their "visual attention" on DIRECTV's advertisement. Tr. Vol. 7 at 1221:8 (Hellstrom Depo. at 62:16-63:12); Ex. 718 at 16; Ex. 720 at 3.

The four DIRECTV ads tested by Realeyes were each four-page circular ads. Each of the circular ads was comprised of three components—a front cover, a two-page inside spread, and a back cover. Hellstrom Depo. 51:12–16. Realeyes conducted individual tests of all three components of each circular ad (twelve tests in all), and generated a report for each test. Hellstrom Depo. 50:24–51:16; Exs. 708, 709, 710, 713, 714, 715, 718, 719, 720, 723, 724, 725. Each report contained a bar graph called "Attention Allocation," as well as heat maps. *See, e.g.*, Ex. 708. DIRECTV prepared an internal document called "Heat Mapping Research: Learnings & Recommendations" which presented the results of the Realeyes eye tracking studies. Ex. 408.

These eye tracking studies are not persuasive on the relevant issue: whether the studied advertisements, or any of Defendant's advertisements, were likely to leave a reasonable consumer with a misleading net impression. These types of studies do not measure consumer sentiment, persuasion, or understanding of an advertisement. Tr. Vol. 8 at 1339:24–1340:5 (Leever); *see also id.* at 1339:15–23 (Pratkanis) (answer to question "And you can't measure any miscomprehension or any wrong impression from an ad based on an eye tracking study?" was "Generally, that's correct. It might give you some input into understanding that, but in general that's correct."). The fact that study participants' eyes may be more drawn to bright colors and pictures than to written details during a simulation test conducted on a computer simply does not provide persuasive support for the FTC's claim that advertisements describing a multifaceted offer for a plainly complex product like subscription satellite television services were misleading.[15]

b. RIO – Subscriber Call Data

***17** DIRECTV's RIO customer service database includes a note field where the agent writes down information about a customer's telephone call. Tr. Vol. 8 at 1280:14–1281:9 (Pratkanis). DIRECTV developed proprietary text-mining software that goes through the note field and assigns a primary tag to the call, corresponding to the primary reason for the phone call. (*Id.*). There are about 1,120 different primary tags. Tr. Vol. 8 at 1281:10–12 (Pratkanis).

Dr. Pratkanis analyzed the RIO data by selecting 17 primary tags he characterized as encompassing claims by customers, at the fourth and thirteenth months of service, expressing

surprise, confusion, or dislike over bill increases. Tr. Vol. 8 at 1281:17–1282:10 (Pratkanis). The 17 tags fall into four categories: billing, 24-month commitment, early cancellation fee, and possible remedies for a price increase. *Id.* Dr. Pratkanis's RIO analysis was based on a random sample drawn from the RIO database. Tr. Vol. 8 at 1285:12–23 (Pratkanis).

Dr. Pratkanis opined that spikes in the RIO data at months 4 and 13 "would confirm the kind of things you would expect if the free gift as a negative option is not fully disclosed." Tr. Vol. 8 at 1282:19–1283:3. But as Dr. Pratkanis recognized, month 4 is when subscribers wishing to cancel their premium packages because the free period ended would naturally call to do so. *Id.* at 1336:5–7. And in month 13, "one possibility" is that subscribers call to explore other package options once their introductory pricing ends. *Id.* at 1336:8–15. Critically, Dr. Pratkanis did no content analysis to identify callers at these stages who called because they claimed to have been misled about the conditions of their subscriptions. *Id.* at 1336:17–24. While Dr. Pratkanis said he excluded tags like "cancel premiums" or "cancel HBO" from his analysis, *id.* at 1348:18–1349:6, the Court finds the RIO analysis to be unpersuasive evidence of consumer deception given Dr. Pratkanis' understandable inability to determine anything about why subscribers were *actually* calling in the months characterized as "spikes."

c. Customer Experience Steering Committee Documents

The Court also heard evidence regarding findings made by DIRECTV's "Customer Experience Steering Committee" ("CX Committee"). The CX Committee was a cross-functional group of DIRECTV executives led by Rasesh Patel. Tr. Vol. 2 at 274:16–20 (Bentley), Tr. Vol. 6 at 1020:4–6 (Patel). The evidence showed that the CX Committee was created in 2012 as part of a "company-wide focus" to "improve the customer experience." Tr. Vol. 6 at 1025:4–7 (Patel). The initiative focused on both current and prospective DIRECTV customers. Tr. Vol. 6 at 1027:16–18 (Patel). The CX Committee reviewed customer research and satisfaction data and operational data. Tr. Vol. 6 at 1029:19–1030:2 (Patel). The CX Committee's goal was to "identify customer pain points ... and then really prioritize the ones that were most meaningful in terms of impact." Tr. Vol. 6 at 1030:7–9 (Patel). The CX Initiative was "very self-critical" and "discerning" in identifying "every opportunity ... to improve the customer experience." Tr. Vol. 6 at 1052:18–24 (Patel). By 2013, the CX Committee had identified numerous customer "pain points," which it categorized and prioritized in a "Customer Pain Points—Review and Prioritization" discussion document dated May 7, 2013. Tr. Vol. 6 at 1031:8–22 (Patel); Ex. 589. The CX Committee identified a number of these as "top recommended pain points" based on the "degree of impact" a particular pain point might have on metrics such as customer satisfaction, call volume, and numerous other dimensions. Tr. Vol. 6 at 1043:10–18 (Patel); Ex. 589 at 7. The CX Committee initiative lasted three years, until 2015. Tr. Vol. 6 at 1029:3–7 (Patel).

***18** Nothing about the CX Committee materials introduced at trial persuasively supports the FTC's claim that Defendant's advertisements misled millions of customers between 2007 and 2015 (or were likely to do so). Instead, Mr. Patel credibly testified that the CX Committee engaged in a good-faith and comprehensive effort to evaluate DIRECTV's operations, identify potential problem areas and recommend improvements. The evidence at trial established that a number of such improvements were implemented. For example, in October 2012, DIRECTV moved from an offer requiring customers to redeem a rebate via mail or online to an "instant" rebate. Ex. 617 at 5. This policy ensured that every customer would receive the discounted price starting with the first month's bill, and addressed an issue noted by the CX Committee. Tr. Vol. 2 at 293:11–21 (Bentley). This change resulted in an $80 million reduction in revenue each year. *Id.* at 294:3–11 (Bentley). As another example, around the same time, DIRECTV adopted a "Simplified Bill" that incorporated a number of changes with the goal of making the bill easier to understand. Ex. 569. And third, another pain point that the CX Committee identified was that customers were unable to refuse the premium channel promotional offer at the point of sale or request a future cancellation date for premium channels. Ex. 589 at 4–9. In response to this pain point, DIRECTV implemented changes to its premium offer policies and processes so that customers could decline the premium channel offer at the point of sale, or at any specified future date without having to remember to call to cancel on the last day of the trial period. Tr. Vol. 7 at 1053:1–11 (Patel).

Mr. Patel also credibly explained that if consumers believed that the terms in DIRECTV's advertisements did not match the terms disclosed when they sought to subscribe, that feeling of deception would have been reflected in the findings of the CX Committee and in DIRECTV's data collected on pain points, consumer research, sales calls, closing rates, activation rates, and churn. Tr. Vol. 8 at 1047:3–10451:9 (Patel). The

evidence did not support the FTC's theory in this regard. DIRECTV's "churn rate" (the rate at which customers leave DIRECTV's platform) stayed constant at approximately 1.5% from 2007 to 2013. Tr. Vol. 4 at 650:20–651:7 (Guyardo); Ex. 991 at 5. DIRECTV improved its market share from 2008 to 2013, when "the DIRECTV subscriber base grew by 3.5 million subscribers ... while all of [DIRECTV's] other competitors combined only grew by 400,000." Tr. Vol. 4 at 651:22–652:5 (Guyardo); Ex. 991 at 6. A subscriber's average time on the platform has also steadily increased over time. The average customer now stays with DIRECTV for "close[ ] to seven years"—years after the initial 24-month commitment period. Tr. Vol. 2 at 347:8–18 (Bentley).[16] Finally, DIRECTV's Net Promoter Score increased over time from 16 to 34 and from "second best in the industry to best in class in the industry." Tr. Vol. 7 at 1077:16–20 (Patel).[17]

DIRECTV's investment of substantial resources in analyzing its operations, candidly identifying areas for improvement, and following through on a number of improvements does not support a finding that the company violated the FTC Act. If anything, this evidence further underscores how this case is very unlike the straightforward deception cases upon which the FTC purports to rely.

d. Other Evidence

Finally, none of the FTC's other evidence persuasively met its burden of proof of showing that DIRECTV's print advertisements were likely to deceive a reasonable consumer. The FTC's attempt to rely almost entirely on pretrial deposition testimony regarding a large number of exhibits never even discussed at trial is telling, and does not account for the detailed and credible trial testimony that substantially undercut its position. *See* Dkt. No. 401-1 at ¶¶ 411–453 (citing virtually no trial testimony). Moreover, the FTC's approach appears to have been to seize on language superficially helpful to its case in documents, while consistently ignoring pivotal context showing the actual meaning of the evidence.

***19** For example, the FTC called DIRECTV executive Brad Bentley in its case-in-chief, and asked him a number of questions about a study prepared by McKinsey consultants as part of the CX Committee project. Tr. Vol. 2 at 279:17–282:5 (Bentley); Ex. 573 (July 10, 2012 "discussion document" slide deck). FTC counsel focused on a slide called "NPS drops early—opportunity to improve selling and on-boarding." Tr. Vol. 2 at 279:17–282:5 (Bentley); Ex. 573 at 18. Government counsel suggested that the slide showed that "33 percent of DIRECTV customers felt misled during the sign-up process." Tr. Vol. 2 at 281:4–9. But on redirect, Mr. Bentley made clear that because this exercise surveyed customers in the first 90 days of their subscriptions, this figure had nothing to do with the issues that are the basis of the FTC's complaint: second-year pricing, 24-month commitment or early cancellation fees. *Id.* at 288:15–289:14. Moreover, Mr. Bentley persuasively explained that the biggest complaint among onboarding customers at this time was the first month's bill not aligning with the customer's expectations, an issue DIRECTV addressed by replacing its mail-in rebate model with an automatic instant rebate model. *Id.* at 291:13–294:14 (customers reported feeling misled in survey because, although they "had to redeem [their] rebate" in order to obtain the introductory price, "oftentimes consumers wouldn't redeem [the rebate] quick[ly] enough for it to be reflected on the first month bill.").

iv. **Conclusion**

The evidence at trial conclusively established that the FTC failed in its case-in-chief to meet its burden of proving a Section 5 claim based on any of DIRECTV's non-website advertisements. The FTC's ambition in attempting to show that over 40,000 advertisements were likely to deceive substantially exceeded the strength of its evidence: this case did not involve the type of strong proof the Court would expect to see in a case seeking nearly $4 billion in restitution, based on a claim that all of DIRECTV's 33 million customers between 2007 and 2015 were necessarily deceived. Tr. Vol. 1 at 34:3–16 (FTC's opening statement). Because the FTC definitively failed to prove its case as to Defendant's non-website advertisements, the motion for judgment on partial findings is **GRANTED** as to the FTC's Section 5 claims to the extent they are based on those advertisements.

D. **The Court Will Defer Judgment With Regard to the Claims Based on the Website**

For now, the Court reaches a different conclusion with regard to the Section 5 and ROSCA claims based on the various iterations of Defendant's website. While the FTC's case as to the websites was far from overwhelming, the Court finds it appropriate to defer a determination on these claims until after the close of the evidence.

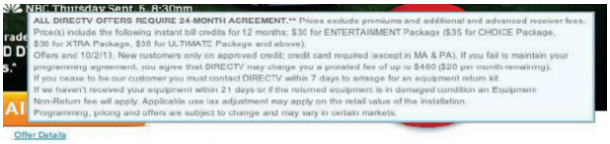
i. **Website version tested by Dr. Erdem (Exs. 1052, 2033 and 2371)**

Dr. Erdem conducted an online survey based on a modified mockup version of the August 2013 version of DIRECTV's website (known as the "Old Flow"). Ex. 2371; Tr. Vol. 6 at 929:1–11, 937:23–938:8; Tr. Vol. 4 at 683:17–684:4; Tr. Vol. 9 at 1448:1–20 (Poling-Hiraldo and Leever). Dr. Erdem testified that she used the August 2013 Old Flow version of the website because she understood that this was the only interactive live version the FTC was able to recover. Tr. Vol. 6 at 938:2–5. FTC expert witness Dr. Nathan Good prepared the "UX" (or user experience) version of the August 2013 Old Flow that Dr. Erdem used as the basis for the treatment stimulus. Tr. Vol. 1 at 114:8–20, 121:8–25 (Good). A number of the links that were live on the actual website were not live in Dr. Good's UX version (meaning that nothing would happen when those links were clicked). *Id.* at 114:16–20, 121:8–126:14; *see also generally* Ex. 1052.

Dr. Erdem claimed that the results of her survey could be generalized to draw conclusions about other versions of the website beyond the one she tested. Tr. Vol. 6 at 956:3–957:15, 986:1–995:25. She testified that she would "expect" the results to be the same for other versions of the website, but she did not test any other versions. Tr. Vol. 6 at 1003:16–23.

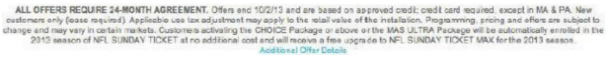
In the Old Flow, to complete a purchase, consumers would navigate through a landing page, programming package selection page, receiver selection page, a shopping cart page, and several checkout pages. *See* Ex. 1045; *see also* Ex. 2033 at .pdf p. 2 (Landing Page), 5–8 (Programming Package Selection Page), 28 (Receiver Selection Page), 47–49 (Shopping Cart Page), 107 (Checkout Page: Installation Address), 111 (Checkout Page: Account Info), 112 (Checkout Page: Billing Address), and 121–123 (Confirmation Page).

***20** Based on a facial review of the Old Flow, the Court cannot say conclusively at this stage that the FTC has failed to prove that this version of the website could create a net impression that was likely to deceive a consumer acting reasonably under the circumstances. In the Old Flow, on the landing page of the website, near the introductory discounted price, DIRECTV disclosed that the discounted price was for 12 months and required a 24-month agreement, *see* Ex. 2033 at 1; Dkt. No. 370 ("Tr. Vol. 3") at 510:7–10 (Poling-Hiraldo). However, other significant details only became visible if the prospective customer moused over a small info hover, labeled only "Offer Details," at the bottom of the landing page under the "View All Packages" button. *See* Ex. 2033 at 2 (disclosures that all offers require a 24-month agreement, the amount of the discount for the first 12 months, and the $20/month early cancellation fee appeared only behind info hover).

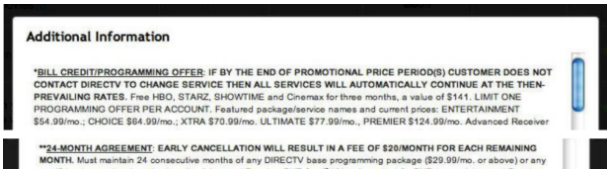



When a prospective customer clicked the "View All Packages" button and provided her zip code, she would move to the package selection page. *Id.* at 3–4. On that page, near the introductory discounted price, DIRECTV disclosed that the discounted price was for 12 months with a 24-month agreement, and disclosed the regular package price, *see* Ex. 2033 at 4.


On the bottom of each of the package selection page, receiver selection page, and cart page, DIRECTV disclosed that all offers require a 24-Month Agreement, next to a blue "Additional Offer Details" hyperlink, *see* Ex. 2033 at 7, 48, 92; Tr. Vol. 3 at 511:17–512:11 (Poling-Hiraldo).



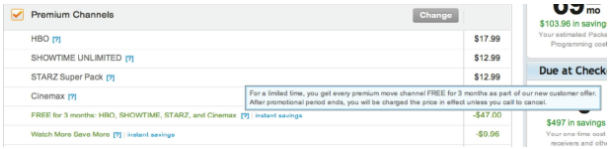

Again, however, significant details appeared only if a prospective customer clicked the blue "Additional Offer Details" link on the package selection page, receiver selection page, and cart page. Clicking this link led users to a light box (i.e., a textbox overlay that appeared on the same page and dimmed the background, Tr. Vol. 1 at 84:10–14 (Stahl); Tr. Vol. 3 at 451:10–15 (Mandel) ) containing a long list of details about the offer, including that the customer had to call to change or cancel the premium channels after three months or be charged the then-prevailing rate; the regular cost of the premium channels for three months; the regular package prices; the 24-month agreement; and the $20/month early cancellation fee, *see* Ex. 2033 at 23-26; Tr. Vol. 3 at 512:12–513:25 (Poling-Hiraldo). While this box is titled "Additional Information," much of this information is actually central to a potential customer's ability to evaluate and understand the terms of the subscription.




At the top of the shopping cart page, DIRECTV disclosed the regular package price in black, and the first year discount immediately underneath it, in green, as a bill credit labeled for "Months 1-12," *see* Ex. 2033 at 50. On the cart page, immediately next to the package, the website included blue language reading "What is my agreement?" *Id.* at 49. A prospective customer who clicked on this language would see a box reading "You agree to maintain DIRECTV service with any base package of $29.99/mo. or above for 24 consecutive months." *Id.*; Tr. Vol. 3 at 514:23–515:12, 516:15–21 (Poling-Hiraldo).[18]


***21** At the top of the Cart, next to the "Package & Programming" header, DIRECTV provided a "View Monthly Cost" tab that opened a chart showing all costs for each of the 24 months in six month blocks, including that the regular price of the premium channels would be billed starting in month four, and that the regular package price would be billed starting in month 13, *see* 2033 at 78–79; Tr. Vol. 3 at 514:1–22, 518:17–519:4 (Poling-Hiraldo).

In the Cart, under a "Premium Channels" header, DIRECTV disclosed the regular price of the premium channels in black, and immediately underneath them, in green, a bill credit labeled: "FREE for 3 months: HBO, SHOWTIME, STARZ, and Cinemax", *see* Ex. 2033 at 59. Again, the disclosure that the customer must call to cancel the premium channels after three free months or be charged the then-prevailing rate only appeared if the prospective customer moused over an info hover next to the premium channel bill credit in the shopping cart on the cart page. *See* Ex. 2033 at 58; Tr. Vol. 3 at 517:10–20 (Poling-Hiraldo).




Finally, on the checkout page of the Old Flow, before the consumer could place an order and transmit financial information to DIRECTV, the consumer was required to affirmatively click the orange button affirming: "I Accept. Submit My Order." Ex. 2033 at 111. Next to the orange button was a blue hyperlink labeled "By clicking 'Submit Order' I agree to these Terms & Conditions." *Id.* Clicking on this link brought up a light box that detailed the 24-month agreement and the $20/month early cancellation fee. *See* Ex. 1021 at 124-25; Tr. Vol. 3 at 519:5–15 (Poling-Hiraldo).


It was technically possible for a consumer to proceed through the entire purchase process without ever clicking or hovering over any of the hyperlinks or symbols described above. *See* Ex. 1060 at 0:01–5:20, Ex. 1069 at 0:01–5:21; Tr. Vol. 9 at 1482:22–1483:3, 1513:11–1514:15 (Leever).

ii. **Section 5**

Based on a facial review of the Old Flow website, as well as the evidence introduced at trial, the Court will defer a finding as to what net impression that website would leave with a consumer acting reasonably. The manner in which some key terms were presented behind hyperlinks, info hovers and tool tips leaves the Court unable to conclude at this stage that judgment on partial findings is appropriate. The Court likewise defers this analysis as to the other versions of the website placed in evidence by the FTC.[19]

iii. **ROSCA**

***22** ROSCA prohibits certain methods of negative option marketing on the Internet. A "negative option feature" is "an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w). ROSCA prohibits charging consumers for goods or services in Internet transactions through a negative option feature, unless the seller "provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information." 15 U.S.C. § 8403(1). Additionally, ROSCA requires sellers to obtain a "consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for products or services through such transaction." *Id.* § 8403(2).

Consistent with the above discussion of the Old Flow, the Court will defer ruling on this claim until the close of the evidence. The Court is not in a position to conclude on the record presented thus far that the FTC cannot meet its burden, given the manner in which information about the negative option feature appeared on the website behind hyperlinks, info hovers or tool tips. This decision to defer ruling until the close of the evidence applies to all versions of the website in existence in 2011 or later that were introduced in evidence by the FTC.[20]

E. **Remedy**

Because the Court has granted Defendant's motion for partial findings to the extent the FTC's case is based on anything other than Defendant's website, the scope of the maximum potential recovery in this case has been substantially curtailed.[21] Even in the event the FTC might eventually be able to prevail on what remains of the case (a question the Court need not answer at this stage), the Court believes that there are a number of problems with the FTC's equitable relief theories that suggest it will have difficulty meeting its burden of providing an adequate basis for the relief it seeks.

The Ninth Circuit has held that § 13(b) of the FTC Act empowers the Court to award "any ancillary relief necessary to accomplish complete justice, including restitution" and injunctive relief. *Commerce Planet*, 815 F.3d at 598 (*citing F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) ). This holding was premised on the principle that "[t]he equitable jurisdiction to enjoin future violations of § 5(a) carries with it the inherent power to deprive defendants of their unjust gains from past violations...." *Commerce Planet*, 815 F.3d at 599. The Ninth Circuit has adopted a two-step approach to determining the amount of unjust gains. Under the first step, "the FTC bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains." *Commerce Planet*, 815 F.3d at 603. In *Commerce Planet*, the Ninth Circuit held that unjust gains in a case like that one are "measured by the defendant's net revenues (typically the amount consumers paid for the product or service minus refunds and chargebacks), not by the defendant's net profits." *Id.* If the FTC makes this showing, at the second step "the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains." *Id.* at 604. "[T]he purpose of such an award is to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction." *Id.* at 603 (quotation omitted).

Here, the Court has significant questions about the FTC's ability to prove that the amount it seeks in restitution reasonably approximates the Defendant's unjust gains, even if it prevails to some extent with regard to its Section 5 claim based on the website. Expert witness Dr. Daniel Rascher testified in support of the FTC's claim that $3.95 billion represents "a reasonable estimate (under *Commerce Planet* ) of the unjust gains DIRECTV collected from consumers." Dkt. 337 at 11. To calculate this amount, Dr. Rascher examined customer billing data for certain types of programming packages identified by the FTC. Tr. Vol. 10 at 1552:5–10, 1554:11–17. He then calculated an estimate of unjust gains related to second year pricing, Tr. Vol. 10 at 1599:09–1600:07 ($3.68 billion); Ex. 1321, and the premium channel offer, Tr. Vol. 10 at 1605:12–16 ($268 million); Ex. 1322.[22]

***23** Dr. Rascher testified that he calculated DIRECTV's "unjust gains" based on the assumption that "*all* DIRECTV subscribers ... thought they would pay the same amount in the second year as they paid in the first," Tr. Vol. 10 at 1630:15–20 (emphasis added), and that he applied "that same kind of presumption" with respect to unjust gains for the premium channel offer, *id.* at 1681:11–25. He thus presumed that all DIRECTV subscribers in his approximation of unjust gains were misled, and that they were all misled in the same way. Dr. Rascher testified that he was instructed that the

FTC would prove what DIRECTV customers "thought" or "believed" their deal with DIRECTV to be and thus supply the core predicate for his analysis. Tr. Vol. 10 at 1616:13–18, 1618:08–25 (Rascher). Dr. Rascher testified that the FTC advised him that he could "presume reliance," which he said he then "operationalized" as a presumption that all subscribers purchased DIRECTV service with the "expectation" that the second-year price would be the same as the first year price (and he adopted similar presumptions as to the other terms at issue). Tr. Vol. 10 at 1554:5–1556:6.

The Court acknowledges the Ninth Circuit's holding that once the FTC proves a defendant made widely-disseminated material misrepresentations, it is "entitled to a presumption that all consumers who purchased [defendant's product] did so in reliance on the misrepresentations." *Commerce Planet*, 815 F.3d at 604 (*citing F.T.C. v. Figgie Int'l*, 994 F.2d 595, 605-06 (9th Cir. 1993) ).[23] But here, the Court believes the FTC has an uphill climb to prove its "expectation" theory, because it will be difficult to establish based on the presentation of various terms in several different iterations of Defendant's website that a reasonable consumer uniformly would expect to pay the same price in year two that she paid in year one, as Dr. Rascher assumed. *See* Tr. Vol. 10 at 1555:08–16 (to determine the price that a customer would pay in the but-for world, Dr. Rascher simply used the price the customer had paid in the first year based on the billing data). In other words, Dr. Rascher simply presumed that customers had an expectation that they would pay the same introductory price for two years, based only on an instruction from the FTC. *Id.* at 1618:08–25, 1667:02–09 (Rascher). The Court believes that this issue, and the breadth of the FTC's interpretation of the "presumption of reliance," creates a significant possibility that at the close of the evidence the FTC will be unable to establish a reasonable approximation of damages, or that its approximation will be substantially or even entirely rebutted by the Defendant. In any event, the Court will confront this concern if the FTC is able to prove liability as to what remains of its case.[24]

## V. CONCLUSION

Accordingly, the Court **GRANTS IN PART** Defendant's motion for judgment on partial findings. To the extent the motion is not granted, the Court declines to enter judgment until the close of the evidence.

The Court **SETS** a case management conference for September 4, 2018 at 2:00 p.m. to discuss (1) a schedule and plan for completing what remains of the trial; and (2) whether the parties believe that renewed settlement discussions would be productive in light of the Court's findings and conclusions.

**IT IS SO ORDERED.**

### All Citations

Not Reported in Fed. Supp., 2018 WL 3911196, 2018-2 Trade Cases P 80,489

Footnotes

1 DIRECTV was acquired by AT&T Inc. on July 24, 2015. *See* Dkt. No. 337 at 17.

2 Defendant contends, citing two out-of-circuit district court cases, that "courts have consistently held that, where it is not reasonably clear from the face of the advertisement that reasonable consumers take away the alleged implied false message, extrinsic evidence is required to prove deception." Dkt. No. 396 at 6 (*citing United States v. Bayer Corp.*, 2015 WL 5822595 at *11 and *13 (D.N.J. Sept. 24, 2015) and *F.T.C. v. Nat'l Urological Grp., Inc.*, 645 F.Supp.2d 1167, 1193 (N.D. Ga. 2008) (internal quotation marks omitted) ). Neither the Ninth Circuit nor any district court in this circuit has construed the requirements of the FTC Act in the manner Defendant urges, and the Court does not find these cases persuasive on this issue.

3 Dr. Erdem testified that she reviewed "exactly 116 print ads" in detail. Tr. Vol. 6 at 934:22–935:2. At the Court's request, the parties submitted a stipulation listing the trial exhibit number for each of the items reviewed by Dr. Erdem, which included 119 print advertisements. Dkt. No. 393.

4 This exhibit was admitted by stipulation. Dkt. No. 391. The parties' joint exhibit list describes it as "2013 print ad, offer ends 10/02/2013, 'Best Offer Ever.' " Dkt. No. 353-1 at 34.

5 The Court notes for clarity of the record that the reproduction of Exhibit 244 in this order is substantially smaller than the actual size of the advertisement as it was distributed to potential consumers in paper form. *See* Exhibit 2026A (paper version of the advertisement measuring approximately 8.5# by 11#). The resolution of the original Exhibits 244 and 2026A is also substantially clearer than the resolution of the reproduction in this order. The Court has inserted a reproduction of Exhibit 244 simply to provide context for this order's narrative description of the advertisement's content.

6 Brad Bentley, who has served as a sales and marketing executive at DIRECTV and then at its parent company AT&T for 17 years, referred to the section at the bottom of the advertisement as the "offer details" section. Tr. Vol. 2 at 217:9–230:25, 238:23–239:3, 265:22–266:3.

7 As noted above, Exhibit 244 disclosed the then-current promotional price for each package. The FTC argues that "no DIRECTV print ad in evidence stated the actual price a consumer would pay during the second year of the 24-month contract because the regular price is subject to change." Dkt. No. 401 at 6. The uncontradicted evidence at trial explained why: DIRECTV could not know in advance what the second-year price would be, because it had to take into account consistent increases in its own cost structure before it could set that figure. *See* Tr. Vol. 3 at 406:20–407:6 (Bentley). DIRECTV's costs to obtain content rose from 8 to 10 percent annually over a three year period, but the company could only pass on a 3 to 5 percent increase to its customers for business reasons. *Id.* at 331:1–333:5 (Bentley). The evidence at trial also established that annual price increases occur across the pay television industry. *Id.* at 333:12–20.

8 FTC counsel used a slide deck as a demonstrative visual aid during Dr. Erdem's testimony. *See, e.g.*, Tr. Vol. 6 at 938:22–24 (referring to "slide 47"). The FTC submitted the slide deck as "Attachment A" to its proposed findings of fact, and Dr. Erdem's control and test versions of the Exhibit 244 print advertisement as "Attachment B" to that filing. Dkt. Nos. 401-2 and 401-3. However, the FTC never actually introduced the control and test stimuli in evidence, which it appears to recognize by attempting to submit this material as an "attachment" to its proposed findings. *See* Dkt. No. 401-2 at 44 (depicting "Modifications to Original DIRECTV Print Ad" by showing original and treatment versions side by side, and referencing "Trial Exhibit 913"). Exhibit 913 was not offered for admission at trial, nor was it included in any of the parties' stipulations. Accordingly, the Court bases its analysis on the testimony Dr. Erdem offered at trial and the Court's recollection of the demonstrative slides, and rejects the FTC's apparent (and unacknowledged) attempt to supplement the record after the close of the evidence.

9 Because all that was entered in evidence was the URL links, rather than an actual electronic copy of the survey, it is unclear how the FTC intends to preserve the evidence presented at trial for the record.

10 No witness testified to how this exhibit, which was admitted by stipulation, *see* Dkt. No. 391, was laid out in the document potential DIRECTV customers actually saw.

11 The evidence at trial established that this single 2013 advertisement would have resulted in only about 300 subscriptions, and even fewer activations. Tr. Vol. 2 at 323:13–16 (Bentley).

12 As one example of the FTC's tendency to gloss over pertinent details, counsel in opening statement highlighted an advertisement from 2007 and asked "Where does it say what the higher second year price will be?" Tr. Vol. 1 at 11:12–13 (referencing and displaying Ex. 84). But the evidence ultimately established, without contradiction, that this offer did not require a two-year commitment, and that it contained standard rather than promotional pricing. Tr. Vol. 2 at 345:3–25 (comparing Ex. 84 to Ex. 617 (timeline of offers) ) (Bentley).

13 This conclusion applies with even more force to the television commercials. Those commercials plainly differ in content, purpose, approach and format from print ads, and often relied primarily on overt humor to attract viewers' attention and interest them enough to call a toll-free number or visit the website to learn more. *See* Tr. Vol. 5 at 872:7–875:7 (testimony of former DIRECTV executive Jon Gieselman explaining that commercials focused on different main messages, with the main "proof points" being "technology superiority, programming superiority [and] customer service superiority"); Ex. 443 (television commercial featuring a talking horse discussing benefits of DIRECTV); Tr. Vol. 2 at 260:13–18, 266:4–16 (the purpose of DIRECTV's advertisements was to "create some interest and start a dialogue by motivating the consumers to pick up the phone and call DIRECTV or to go on the DIRECTV website," which is colloquially known as the "call to action" in DIRECTV's advertising) (Bentley).

14 The FTC played excerpts of Mr. Hellstrom's deposition at trial. Dkt. No. 387 ("Tr. Vol. 7") at 1221:5–8.

15 This conclusion applies equally to the "click-tracking studies" introduced by the FTC. *See, e.g.,* Ex. 347; Tr. Vol. 8 at 1340:6–9 (Pratkanis). A survey participant's response to an invitation to "click on the three parts of the [advertisement] that are most compelling to you," Ex. 347 at slide 30, simply is not probative of whether the advertisement was likely to leave a reasonable consumer with a misleading net impression.

16 DIRECTV witnesses testified that, due to upfront "subscriber acquisition costs" approaching $1,000 per subscriber, the company does not break even until, on average, a customer remains on the platform for 28 to 30 months. Tr. Vol. 2 at 330:3–6 (Bentley); Tr. Vol. 8 at 881:25-882:2 (Gieselman). This means that it is "absolutely paramount" to DIRECTV's business model to retain the average customer for longer than the break-even point. Tr. Vol. 2 at 347:24–348:14 (Bentley).

17 "Net Promoter Score," or "NPS," is a calculation of promoters (consumers who are satisfied or would recommend a service) minus detractors (consumers who are dissatisfied or would not recommend a service), the sum of which measures customer satisfaction. Tr. Vol. 3 at 363:12–364:11 (Bentley); Ex. 571 at 2. NPS is not a metric unique to DIRECTV; rather, it is a "self-critical" standardized metric that can be compared within and across industries. Tr. Vol. 3 at 364:6–11 (Bentley).

18 DIRECTV referred to this mechanism as a "tool tip." A tool tip is a method DIRECTV used to disclose additional information on the same webpage when the consumer clicked on a prompt or icon signaling there was additional information (e.g., a blue "i" enclosed in a circle). Tr. Vol. 3 at 515:24–25, 516:7–11 (Poling-Hiraldo). Unlike a hyperlink, a tool tip does not redirect a user to another webpage. *Id.* at 516:7–11.

19 DIRECTV's web flow underwent two major redesigns during the relevant time period. The design that existed until late 2009 was referred to as the "Wizard Flow." In late 2009, the Old Flow replaced the Wizard Flow, and the "New Flow" completely replaced the Old Flow in 2014. Tr. Vol. 4 at 683:17–684:4 (Poling-Hiraldo); Tr. Vol. 9 at 1448:12–20 (Leever). The New Flow was publically split-tested with the Old Flow from January to July of 2014. During that period, some consumers were directed to the Old Flow, and some were directed to the New Flow. Tr. Vol. 9 at 1493:7–1494:2 (Leever). After more than a year of development, the New Flow took over 100% of prospect traffic in July 2014. Tr. Vol. 9 at 1486:21–1487:5 (Leever). The Wizard Flow, Old Flow, and New Flow differed significantly with respect to, among other things: the design and layout of information (e.g., whether the packages were presented vertically or horizontally); the number and placement of hyperlinks, tool tips, or info hovers that DIRECTV used to disclose information about its offers and product; and the icons and prompts signaling those hyperlinks, tool tips, or info hovers. *Compare* Ex. 1000 (9/4/09 Wizard Flow), *with* Ex. 2033 (8/13 Old Flow), *with* Ex. 1065 (9/17/15 New Flow); *see also* Tr. Vol. 9 at 1448:22–1451:21 (Leever). DIRECTV's web flow designs also differed with respect to the flow of webpages. For example, in the New Flow, between the package selection step and the receiver selection step, the consumer was directed to a "Choose add-on packages" step that was not in the Old Flow. At the top of this step, DIRECTV provided information and disclosures regarding the free premium channels offer. *See* Ex. 1065 at 10:58–11:14 (9/17/15 capture).

20 ROSCA was enacted on December 29, 2010.

21 *See* Tr. Vol. 9 at 1441:23–1442:15 (only approximately 20% of direct sales subscribers either subscribed via DIRECTV.com or subscribed via a phone number that indicated they started the subscription process on the website) (Leever).

22 Dr. Rascher had never previously testified in a false advertising case before this trial. Tr. Vol. 10 at 1608:9–11.

23 Defendants cite the Second Circuit's decision in *F.T.C. v. Verity Int'l*, 443 F.3d 48, 69 (2d Cir. 2006), in support of its argument that no presumption of reliance applies here. Dkt. No. 396 at 23. The Ninth Circuit has never adopted the reasoning of *Verity*, and in fact distinguished that case in an unpublished memorandum disposition. *See F.T.C. v. Publishers Bus. Svcs.*, 540 Fed. Appx. 555, 556–557 (9th Cir. 2013) (reversing as inconsistent with Ninth Circuit law district court's holding, relying in part on *Verity*, that defendants' gain rather than consumers' loss was proper measure of equitable damages).

24 The Court will also have to consider whether injunctive relief is warranted, and assess the appropriate measure of recovery under ROSCA if the FTC proves that claim.

**End of Document**


***2009 FTC LEXIS 86***

Federal Trade Commission

April 20, 2009

DOCKET NO. 9329

**Reporter**
2009 FTC LEXIS 86 *

# In the Matter of DANIEL CHAPTER ONE, a corporation, and JAMES FEIJO, Respondents

**Subsequent History:**

Motion denied by *In re Daniel Chapter One, 2009 FTC LEXIS 87 (F.T.C., Apr. 20, 2009)*

**Prior History:**

*In re Daniel Chapter One, 2009 FTC LEXIS 85 (F.T.C., Apr. 20, 2009)*

## Action

**[*1]**

ORDER ON COMPLAINT COUNSEL'S MOTION IN LIMINE TO PRECLUDE RESPONDENTS FROM INTRODUCING AT TRIAL EVIDENCE OF PURPORTED CONSUMER SATISFACTION AS A DEFENSE TO LIABILITY

## Administrative Law Judge-Decision

D. Michael Chappell, Administrative Law Judge

## Order

**ORDER ON COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE RESPONDENTS FROM INTRODUCING AT TRIAL EVIDENCE OF PURPORTED CONSUMER SATISFACTION AS A DEFENSE TO LIABILITY**

**I.**

On March 16, 2009, pursuant to the Scheduling Order in this case, Complaint Counsel submitted a Motion *In Limine* and Memorandum to Preclude Respondents from Introducing at Trial Evidence of Purported Consumer Satisfaction as a Defense to Liability ("Motion"). Respondents submitted their Opposition to the Motion on March 26, 2009 ("Opposition").

Having fully considered all arguments in the Motion and Opposition, and as further discussed below, the Motion is GRANTED in part and DENIED in part.

**II.**

**A. Generally Applicable Standards**

The admission of relevant evidence is governed by Commission Rule 3.43, which 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)(1). **[*2]** 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 by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 16 C.F.R. §3.43(b)(1). *See also* In Re Telebrands Corp., Docket No. 9313, 2004 FTC LEXIS 270, at *2 (April 26, 2004).

"Motion *in limine"* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." Luce v. United States, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *see also* In re Motor Up Corp., Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. Luce, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g.,* In re Telebrands Corp., Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); In re Dura Lube Corp., Docket 9292, 1999 FTC LEXIS 252 ***[*3]*** (Oct. 22, 1999).

Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. Bouchard v. American Home Products Corp., 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); Intermatic Inc. v. Toeppen, No. 96 C 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. Hawthorne Partners v. AT&T Technologies, Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also* Sec. Exch. Comm'n v. U.S. Environmental, Inc., No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. U.S. Environmental, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g.,* Veloso v. Western Bedding Supply Co., Inc., 281 F. Supp. 2d 743, 750 (D.N.J. 2003). *In limine* rulings are not binding on the trial judge, and the judge may change **[*4]** his mind during the course of a trial. Ohler v. United States, 529 U.S. 753, 758 n.3, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000); Luce, 469 U.S. at 41 (stating that a motion *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer"). "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." Noble v. Sheahan, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000); Knotts v. Black & Decker, Inc., 204 F. Supp. 2d 1029, 1034 n.4 (N.D. Ohio 2002).

**B. Arguments of the Parties**

Complaint Counsel states that Respondents' exhibit list includes a section on "testimonials," and includes 34 such documents. *See* Respondents' Final Proposed Exhibit List, pp. 1-2, Exhibits R8-a through R8-ah. Complaint Counsel also points to Respondents' witness list, which includes a category of witnesses expected to testify: "With regard to their belief about their experience **[*5]** with DCO [Daniel Chapter One] products..." *See* Respondents' Final Proposed Witness List, pp. 4-5. Complaint Counsel also challenges certain of Respondents' proposed witnesses who are expected to testify "with regard to the operation of the Daniel Chapter One Ministry, including the collection and dissemination of information and the management of ministry programs." Respondents' Final Proposed Witness List, pp. 2-4. Complaint Counsel contends that despite the general language used to describe the testimony, the specific descriptions of certain witnesses' testimony include "testimonial" evidence about how the products have affected their lives, or the lives of others of which the witness is aware. Motion, pp. 2-3 and n.3.

Complaint Counsel contends that evidence of consumer satisfaction is irrelevant to whether a violation of the FTC Act occurred. Complaint Counsel further argues that consumer satisfaction evidence is not necessary as "extrinsic evidence" to prove the meaning of Respondents' advertisements at issue, because the meaning is sufficiently clear on the face of the ads. Finally, Complaint Counsel asserts that the evidence should be excluded prior to trial because consumer **[*6]** testimonials do not constitute adequate substantiation for health-related efficacy claims, which require competent and reliable scientific evidence.

Respondents state that none of the exhibits or witnesses to which Complaint Counsel objects is offered for the purpose of showing consumer satisfaction or substantiation, but for other matters. Opposition, pp. 2-3. Respondents contend that at least some of the challenged testimony is being offered to show that DCO is a ministry and that those who listen to their programs, access the website, and use the products are "members of a unique religious constituency," Opposition, p. 2, with a common religious orientation and view of health and healing, based in the Bible. Opposition, p. 4. According to Respondents, Complaint Counsel's proposed *in limine* order is overbroad, because it would preclude broad categories of evidence that may be relevant to other issues, such as: (1) whether DCO is an non-profit entity that is exempt from the FTC Act; (2) what impression Respondents' messages about their products conveyed to members of their community, at whom Respondents assert their messages were directed; and (3) as to at least one witness, **[*7]** whether Respondents authored certain representations on the DCO website.

**III.**

Evidence of customer satisfaction is not relevant to determining whether the claims made are deceptive. *Fed. Trade Comm'n v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989)* ("the existence of [satisfied] customers is not relevant to determining whether consumers were deceived and the magistrate was correct to exclude [such evidence]"); *In re Horizon Corp., 97 F.T.C. 464, 1981 FTC LEXIS 47, at *37 (May 15, 1981)* (stating: "It is not a defense to a charge of deception under *Section 5* that some customers were satisfied with the product."). *See also Independent Directory Corp. v. Fed. Trade Comm'n, 188 F.2d 468, 471, 47 F.T.C. 1821 (2d Cir. 1951)* (holding that evidence of consumer satisfaction was properly excluded because "[t]he fact that petitioners had satisfied customers was entirely irrelevant").

Moreover, non-scientific, consumer testimonials of product effectiveness are generally considered inadequate substantiation. *Fed. Trade Comm'n v. QT, Inc., 512 F.3d 858, 862 (7th Cir. 2008)*; *Fed. Trade Comm'n v. Natural Solution, Inc. **[*8]** , Case No. CV 06-6112-JFW (JTLx), 2007 U.S. Dist. LEXIS 60783, at *15 (C.D. Cal. Aug. 7, 2007)*; *In re Warner-Lambert Co., 86 F.T.C. 1398, 1496 (1975)*, *aff'd, 183 U.S. App. D.C. 230, 562 F.2d 749 (D.C. Cir. 1977)* (stating: "Since there may be a divergence between what the user thinks the product will do for him and what the product actually does (or does not do), evidence of consumer beliefs has little probative value for determining whether" a product works in the manner claimed).

Respondents state "none of the written testimonials or witnesses to which Complaint Counsel objects is offered for the purpose of 'introducing evidence of satisfied consumers to show the claims were not deceptive and evidence of consumer testimonials to show the claims were not unsubstantiated.'" Respondents' Opposition, p. 2. Accordingly, such evidence may not be offered for those purposes. However, it cannot be presumed, without the context of trial and a specific proffer of evidence, that all the proposed evidence referred to in Complaint Counsel's Motion and Respondents' Opposition is inadmissible on all potential grounds.

Having fully considered all arguments in the Motion and **[*9]** Opposition, Complaint Counsel's Motion is GRANTED to the extent that Respondents seek to introduce evidence of satisfied consumers to show the claims were not deceptive and evidence of consumer testimonials to show the claims were not unsubstantiated. In all other respects, the Motion is DENIED. Other than the evidence which is being precluded herein, this Order shall not be construed as a ruling on the admissibility of evidence that may be proffered at trial.

ORDERED:

D. Michael Chappell

Administrative Law Judge

Date: April 20, 2009

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2017 WL 7792718
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

NR GROUP 3 CONTRACTORS, INC., Plaintiff,

v.

GROUP 3 CONTRACTORS, LLC, Gianni Corradi, and Gaston Corradi, Defendants.

Case No. 17-21945-Civ-SCOLA/TORRES
|
Signed 09/26/2017

**Attorneys and Law Firms**

Brian W. Toth, Lauren Vanessa Lopez, Scott Daniel Ponce, Holland & Knight, Miami, FL, for Plaintiff.

Jennifer Nicole Hernandez, Avila Rodriguez Hernandez Mena & Ferri LLP, Coral Gables, FL, for Defendants.

**REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES**

EDWIN G. TORRES, United States Magistrate Judge

***1** This matter is before the Court on NR Group 3 Contractors, Inc.'s ("Plaintiff") Motion to Strike ("Motion") several affirmative defenses and to treat others as denials against Group 3 Contractors, LLC, Gianni Corradi, and Gaston Corradi (collectively, "Defendants"). Defendants responded on August 22, 2017 [D.E. 17] and Plaintiff replied on August 29, 2017. [D.E. 18]. Therefore, Plaintiff's Motion is now ripe for disposition. After careful consideration of the Motion, response, reply, and relevant authority, and for the reasons discussed below, Plaintiff's Motion should be **GRANTED in part** and **DENIED in part**.

## *I. BACKGROUND*

On May 25, 2017, Plaintiff filed a five-count complaint asserting various claims against Defendants. [D.E. 1]. Counts I through III relate to trademark infringement whereas Counts IV and V relate to breaches of contract. More specifically, Count I is for violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Count II is a claim for trademark infringement under Florida's common law. Count III is for violations of Florida's Deceptive and Unfair Trade Practices Act, §§ 501.201 *et seq.*, Florida Statutes. Count IV is based on Defendants' breached o the parties' agreement regarding the payment of office expenses. And Count V is based on the Defendants' breach of the parties' agreement regarding payment for construction projects.

## *II. APPLICABLE PRINCIPLES AND LAW*

A party may move to strike pursuant to Rule 12(f) of the Federal Rules "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "An affirmative defense is one that admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification or other negating matter." *Royal Palm Sav. Ass'n v. Pine Trace Corp.,* 716 F. Supp. 1416, 1420 (M.D. Fla. 1989) (citing *Fla. East Coast Railway Co. v. Peters,* 72 Fla. 311 (Fla. 1916) ). Thus, affirmative defenses are pleadings, and as a result, must comply with all the same pleading requirements applicable to complaints. *See Home Management Solutions, Inc. v. Prescient, Inc.,* 2007 WL 2412834, at *1 (S.D. Fla. Aug. 27, 2007). Affirmative defenses must also follow the general pleading standard of Fed R. Civ. P. 8(a), which requires a "short and plain statement" of the asserted defense. *See Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005). A defendant must admit the essential facts of the complaint and bring forth other facts in justification or avoidance to establish an affirmative defense. *See id.*

"The striking of an affirmative defense is a 'drastic remedy' generally disfavored by courts." *Katz v. Chevaldina*, 2013 WL 2147156, at *2 (S.D. Fla. May 15, 2013) (citations omitted); *see also Blount v. Blue Cross & Blue Shield of Florida, Inc.*, 2011 WL 672450, at *1 (M.D. Fla. Feb. 17, 2011) ("Striking a defense ... is disfavored by the courts."); *Pandora Jewelers 1995, Inc. v. Pandora Jewelry, LLC*, 2010 WL 5393265, at *1 (S.D. Fla. Dec. 21, 2010) ("Motions to strike are generally disfavored and are usually denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties") (internal quotations omitted) (quoting another source).

***2** But, a "defendant must allege some additional facts supporting the affirmative defense." *Cano v. South Florida*

*Donuts, Inc.*, 2010 WL 326052, at *1 (S.D. Fla. Jan. 21, 2010). Affirmative defenses will be stricken if they fail to recite more than bare-bones conclusory allegations. *See Merrill Lynch Bus. Fin. Serv. v. Performance Mach. Sys.*, 2005 WL 975773, at *11 (S.D. Fla. March 4, 2005) (citing *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 684 (M.D. Fla. 2002) ). "An affirmative defense may also be stricken as insufficient if: '(1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law." ' *Katz*, 2013 WL 2147156, at *1 (citing *Blount v. Blue Cross and Blue Shield of Fla., Inc.*, 2011 WL 672450 (M.D. Fla. Feb. 17, 2011) ).

"Furthermore, a court must not tolerate shotgun pleading of affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint." *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005). An affirmative defense should only be stricken with prejudice when it is insufficient as a matter of law. *See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982) (citing *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976) ). Otherwise, district courts may strike the technically deficient affirmative defense without prejudice and grant the defendant leave to amend the defense. *See Microsoft Corp.*, 211 F.R.D. at 684.

## *III. ANALYSIS*

Plaintiff's Motion seeks to strike Defendants' second, seventh, eleventh, fourteenth, and seventeenth affirmative defenses.[1] " 'Affirmative defenses are 'established only when a defendant *admits the essential facts* of the complaint and sets up other facts in justification or avoidance.' ' " *Helman v. Nationstar Mortg., LLC*, 2015 WL 11199691, at *1 (S.D. Fla. May 29, 2015) (quoting *Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544, 547 (S.D. Ga. 1986) (emphasis in the original) ). "A defense which only points to a defect in a plaintiff's case is not an affirmative defense." *Helman*, 2015 WL 11199691, at *1 (citing *In re Rawson Food Serv. Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ).

Plaintiff contends that Defendants' second affirmative defense should be stricken because it does not allege the elements to establish mootness. As for Defendants' seventh and eleventh affirmative defenses, Plaintiff suggests that they should be deemed mere denials. And finally, Plaintiff believes that Defendants' fourteenth and seventh affirmative defenses should either be stricken or deemed as mere denials.

### *A. The Second Affirmative Defense*

Defendants' second affirmative defense relates to the trademark claims in Counts I and III of Plaintiff's complaint. Defendants argue that both Counts are moot because Defendants have ceased use of the name "Group 3 Contractors" and that Plaintiff's allegations fail as a matter of law:

> Defendants Are Ceasing Use of the Name 'Group 3 Contractors'. The LLC is ceasing its use of the subject name and diminutive, i.e., 'Group 3 Contractors' and 'G3C,' *without waiver of any kind and with a full reservation of rights*. Accordingly, there is no need to further litigate the purported infringement or the requested injunction alleged in Counts I through III of the Complaint, as this issue is now moot.

***3** [D.E. 12]. Plaintiff takes issue with the second affirmative defense because "[t]he doctrine of voluntary cessation provides an important exception to the general rule that a case is mooted by the end of the offending behavior." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[T]o say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement."). As such, Plaintiff argues that Defendants' qualifying language falls short of the type of representation necessary to satisfy the doctrine of voluntary cessation and that Defendants' second affirmative must be stricken.

However, Plaintiff is mistaken on the difference between simply raising an affirmative defense and an attempt to dismiss allegations in a complaint. A case is moot when it no longer presents a case or controversy and where the court can no longer give meaningful relief. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir. 2007). On the other hand, the doctrine of voluntary cessation operates as an exception to the mootness rule in that "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotations omitted); *accord*, *FTC v. Sage Seminars, Inc.*, 1995 WL 798938, at *6 (N.D. Cal. Nov. 2, 1995).

At this stage of the litigation, Defendants are not attempting to dismiss the allegations presented in Counts I and III. They are merely raising the affirmative defense of mootness because the facts are in dispute about whether Defendants have ceased the offending behavior. If Defendants can later establish that it is absolutely clear that the alleged wrongful behavior cannot reoccur then there is the possibility that the second affirmative defense may ultimately prevail.[2] Stated differently, it is possible that the Court could find no likelihood of recurrence and therefore deny Plaintiff's requested injunctive relief. The second affirmative defense is also not conclusory and is stated with sufficient clarity to provide Plaintiff with fair notice of the defense. As such, "[n]o further factual enhancement is necessary at the pleading stage," because "[b]oth parties will be afforded an opportunity to test each other's allegations and defenses," with respect to the trademark infringement claims through discovery. *See Hilson v. D'more Help, Inc.*, 2015 WL 5308713, at *3 (S.D. Fla. Sept. 11, 2015). Because we are merely at the pleading stage and the second affirmative defense meets all of the required elements under Rule 8, Plaintiff's motion to strike the second affirmative defense should be **DENIED**. *See, e.g.*, *F.T.C. v. Hang-Ups Art Enterprises, Inc.*, 1995 WL 914179, at *6 (C.D. Cal. Sept. 27, 1995) ("If defendants can establish that they were unaware of the artworks' counterfeit nature, and that once they became aware they ceased selling the artworks, it is possible that the court finds no likelihood of recurrence and denies injunctive relief. This factual issue *mandates denial* of plaintiff's request to strike the twelfth affirmative defense.") (emphasis added).

***B. The Seventh Affirmative Defense***

***4** Defendants' seventh affirmative defense states that Plaintiff has impermissibly split her contractual claims in the complaint and that the allegations constitute a mischaracterization of the parties' business relationship:

> Impermissible Splitting of Contractual Claims. In the Complaint, NR has impermissibly split its contract claims, including by asserting multiple claims for breaches of allegedly separate contracts, which amounts to a mischaracterization. There was one business venture between the parties, which had multiple aspects.

[DE. 12]. Plaintiff argues that the aforementioned is not an affirmative defense and that it must be treated as a mere denial. Plaintiff suggests it is also unaware of any cases that recognize the splitting of contractual claims as a valid defense to liability and that the seventh affirmative defense is merely disguised as a defect in how Plaintiff presented its allegations.

We agree with Plaintiff that the splitting of contractual claims is not an affirmative defense. We have not found any case where a court has found that the mischaracterization of a contractual breach arises to an affirmative defense. An affirmative defense (1) admits the essential acts of the complaint and then (2) sets up other facts in justification or avoidance. The seventh affirmative defense is noticeably missing both requirements. Instead, it merely points out a mischaracterization of a contractual breach and points to a defect in plaintiff's case. *See Helman*, 2015 WL 11199691, at *1 ("A defense which only points to a defect in a plaintiff's case is not an affirmative defense.") (citing *In re Rawson Food Serv. Inc.*, 846 F.2d at 1349). As such, Plaintiff's motion should be **GRANTED** and the seventh affirmative defense should be treated as a denial because "[t]he proper remedy when a party mistakenly labels a denial as an affirmative defense is not to strike the claim but instead to treat it as a specific denial." *Ramnarine v. CP RE Holdco 2009-1, LLC*, 2013 WL 1788503, at *4 (S.D. Fla. Apr. 26, 2013).

***C. The Eleventh Affirmative Defense***

Defendants' eleventh affirmative defense states that Plaintiff's damages are speculative. Plaintiff argues that this is not an affirmative defense because Defendants are neither admitting any allegations of the complaint nor pleading new facts to explain why Defendants are not liable. Instead, Plaintiff contends that Defendants are merely alleging that Plaintiff's evidence on damages will be speculative and therefore incapable of proving the damages element of Plaintiff's claims.

As most courts have found, allegations that a plaintiff's damages are speculative do not constitute affirmative defenses because those statements are merely allegations that Plaintiff has not met its burden of proof. *See Taylor v. Chase*, 2016 WL 6575072, at *3 (N.D. Ind. Nov. 7, 2016) ("[A]sserting that a plaintiff's claimed damages are speculative, vague, or even non-existent does not constitute an affirmative defense.") (citing *Manley v. Boat/U.S. Inc.*, 2016 WL 1213731, at *5 (N.D. Ill. Mar. 29, 2016) ("[S]imply accusing [a plaintiff] of pleading vague and speculative damages does not state an affirmative defense"); *Varrasso v. Barksdale*, 2016 WL 1375594, at *2 (S.D. Cal. Apr. 5, 2016) (affirmative defense that plaintiffs' damages are "speculative or nonexistent ... are simply allegations that Plaintiffs did not meet their burden of proof ... [so] they are not affirmative defenses"); *Joe Hand Promotions, Inc. v. Kurti*, 2015 WL 5276691, at * (C.D. Cal. Sept. 8, 2015)

("[S]peculative damages, is a defense to damages, not an affirmative defense") ).

***5** In other words, alleging that Plaintiff's damages are speculative is not an affirmative defense because "[a]ffirmative defenses plead matters extraneous to the plaintiff's prima facie case, which deny plaintiff's right to recover, even if the allegations of the complaint are true." *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987); *see also Hernandez v. Dutch Goose, Inc.*, 2013 WL 5781476,*3 (N.D. Cal. 2013) (an "affirmative defense is a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven."). Because Defendants' eleventh affirmative defense states that Plaintiff's damages are speculative, we agree that this does not constitute a proper affirmative defense. Accordingly, Plaintiff's motion should be **GRANTED** and the eleventh affirmative defense should be treated as a denial.

***D. The Fourteenth Affirmative Defense***

Next, Plaintiff argues that Defendants' fourteenth affirmative defense should be stricken, or deemed a denial, because it alleges that Plaintiff failed to register the trademark at issue:

> Failure to Register Trademark. At all material times, NR did not have a registered trademark. The Complaint mischaracterizes the subject name and diminutive as purported 'trademarks.' NR submitted an application to register the subject name in late 2016, after the parties' relationship began to deteriorate. In addition, NR filed this application without informing Defendants and in surreptitious manner inconsistent with the duties owed by NR under the subject business venture.

[D.E. 12]. Plaintiff contends that the fourteenth affirmative defense fails because it is an irrelevant allegation premised upon the legally incorrect position that the claims alleged in the complaint require that the marks be registered.

Plaintiff suggests that neither federal nor Florida law require that trademarks be registered to bring forth an unfair trade practices violation. *See, e.g., Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1193 (11th Cir. 2001) ("Section 43(a) of the Lanham Act [Count I] forbids unfair trade practices involving infringement of trade dress, service marks, or trademarks, *even in the absence of federal trademark registration.*") (emphasis added); *Rain Bird Corp. v. Taylor*, 665 F. Supp. 2d 1258, 1267 (N.D. Fla. 2009) (holding that the "legal standards" governing federal claims of trademark infringement and unfair competition are the same standards applicable to claims for Florida common law infringement (Count II) and violations of FDUTPA (Count III) ); *Tally-Ho, Inc. v. Coast Community College District*, 889 F.2d 1133, 1022-23 (11th Cir. 1989) (addressing acquisition of common law rights in a trademark). Plaintiff asserts that the fourteenth affirmative defense must be stricken or deemed a denial because it only attempts to negate the element of ownership that Plaintiff must establish in connection with the infringement claims asserted in Counts I through III. Stated differently, Plaintiff contends that the fourteenth affirmative defense does nothing to negate liability in this case, but only points out a defect in the allegations presented.

We agree with Plaintiff that the failure to register a trademark does not constitute a proper affirmative defense in this action because it does not assist Defendants with avoiding liability with "new allegations of excuse, justification, or other negating matter." *Royal Palm Sav. Ass'n,* 716 F. Supp. at 1420 (citing *Fla. East Coast Railway Co.,* 72 Fla. at 311). Instead, the fourteenth affirmative defense is a denial of the ownership element that plaintiffs must establish in every trademark case. *See CJ Prod. LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 147 (E.D.N.Y. 2011) ("[I]n a trademark case, plaintiffs must establish their ownership of the mark in question.") (citing *Pan Am. World Airways, Inc. v. Flight 001, Inc.,* 2007 WL 2040588, at *3–4 (S.D.N.Y. July 13, 2007) ). Accordingly, Plaintiff's motion should be **GRANTED** and the fourteenth affirmative defense should be deemed a denial of Plaintiff's ownership of the trademarks in question.

***E. The Seventeenth Affirmative Defense***

***6** The final issue presented is whether the seventeenth affirmative defense should be stricken or deemed a denial:

> Ownership of Web Pages, Social Media and Pictures. One or more of the Defendants developed and established web pages and social media sites and own same. Defendants originally did this as part of the venture with NR and Rojas. As previously noted, Defendants are ceasing using the name and logo on these sites. NR does not own these sites or domains and has no claim or right to them. In addition, the pictures used by Defendants of past projects were paid for using Defendants' monies, in whole or in part, and Defendants have the express right to use the pictures from the owners of the projects. NR has no claim to these items.

[D.E. 12]. Plaintiff argues that the seventeenth affirmative defense fails for two reasons. First, Plaintiff contends that

it is premised, in part, on mootness and that Defendants' qualified statement on voluntary cessation is inadequate. Second, Plaintiff suggests that the defense alleges that some or all of the content on Defendants' internet website does not infringe on Plaintiff's trademarks. This is supposedly not an affirmative defense because Defendants are neither admitting any allegations of the complaint nor pleading new facts to avoid liability. Instead, Plaintiff accuses Defendants of merely denying the element of Plaintiff's infringement-related claims that requires Plaintiff to establish that the "defendant made unauthorized use [of the] trademarks 'such that consumers were likely to confuse the two.' " *Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 647–48 (11th Cir. 2007) (quoting *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.,* 106 F.3d 355, 358 (11th Cir. 1997) ); *see also SunAmerica Corp. v. Sun Life Assurance Co. of Canada,* 77 F.3d 1325, 1334 (11th Cir. 1996).

Plaintiff's arguments are well taken. The seventeen affirmative defense merely asserts that Defendants have not violated any purported trademark and that Defendants have the express right to display some of the content in dispute. This is not an affirmative defense because it merely denies that Plaintiff has any ownership or rights to Defendants' web pages, social media, and pictures. There is nothing in the seventeen affirmative defense that admits the allegations in the complaint and articulates a basis for avoiding liability. Because "[a]ffirmative defenses which simply deny the complaint's allegations are ... not affirmative defenses," Plaintiff's motion should be **GRANTED** and the seventeenth affirmative defense should be deemed a denial. *Home Design Serv. Inc. v. Park Square Enter., Inc.,* 2005 WL 1027370, *7 (M.D. Fla. 2005) (citing *Losada v. Norwegian (Bahamas) Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013) ).

## *IV. CONCLUSION*

For the foregoing reasons, the Court **RECOMMENDS** that Plaintiff's Motion to Strike [D.E. 13] be **GRANTED in part** and **DENIED in part**. With respect to the second affirmative defense, Plaintiff's Motion should be **DENIED**. As for the remaining affirmative defenses, Plaintiff's Motion should be **GRANTED**.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

***7 DONE AND SUBMITTED** in Chambers at Miami, Florida, this 26th day of September, 2017.

**All Citations**

Not Reported in Fed. Supp., 2017 WL 7792718

Footnotes

1 Defendants' answer asserts a total of seventeen affirmative defenses.

2 We note that "[e]ven if the allegedly improper conduct has ceased, an injunction may be appropriate if there is a 'cognizable danger of recurrent violation." ' *Hang-Ups Art Enterprises, Inc.*, 1995 WL 914179, at *6 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ).

End of Document

## CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2022, I electronically filed the foregoing Complaint Counsel's Reply in Response to Complaint Counsel's Motion for Summary Decision, Complaint Counsel's Responses and Objections to Intuit Inc.'s Statement of Material Facts as to Which There Exists a Genuine Issue for Trial, and Exhibits in Support of Complaint Counsel's Reply in Response to Complaint Counsel's Motion for Summary Decision electronically using the FTC's E-Filing system, which will send notification of such filing to:

April Tabor
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Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580
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*Secretary of the Commission*
*Clerk of the Court*

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
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*Administrative Law Judge*

I further certify that on September 8, 2022, I caused the foregoing document to be served via email on:

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