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

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

COMPLAINT COUNSEL'S OPPOSITION TO INTUIT'S MOTION IN LIMINE TO EXCLUDE OR LIMIT COMPLAINT COUNSEL'S EVIDENCE OF CONSUMER COMPLAINTS¹

This case is about Respondent Intuit Inc.'s ("Intuit") deceptive marketing of TurboTax as "free" when in truth TurboTax is not free for most American taxpayers. The Consumer Sentinel Network—a repository of consumer reports maintained by the Federal Trade Commission in the ordinary course of its consumer protection mission—has received information from hundreds of consumers that have complained about their experiences with TurboTax.² *See* GX 502-03 (Sentinel Complaints received Jan. 1, 2016 to Mar. 28, 2022)); GX 504 (Sentinel Complaints received Mar. 29, 2022 to Aug. 31, 2022). Now, Intuit throws its weight behind a motion seeking to silence the individual consumers who took the time to report Intuit's deception to the FTC, the Better Business Bureau, State Attorneys General and other members of the Consumer Sentinel Network. This consumer complaint data is relevant, material, and reliable in that it offers valuable insight straight from consumers and corroborates the allegations in the Complaint. Such consumer complaints are routinely admitted in FTC consumer protection cases and there is no reason to exclude them from the record in this case.

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

² Sentinel receives reports submitted directly to the FTC by consumers, as well as reports submitted and shared by data contributors such as the Better Business Bureau. *See* ftc.gov/enforcement/consumer-sentinel-network (last visited Feb. 10, 2023).

As the Court is familiar with the standard on motions *in limine*, Complaint Counsel will simply refer the Court to § I of its Opposition to Intuit's Motion *In Limine* to Exclude Outdate Advertisements, filed contemporaneously, for a restatement of the standard. Here, the consumer complaints in question are relevant, material, and reliable. And Intuit has failed to demonstrate that such evidence is prejudicial or clearly inadmissible on all potential grounds, or that preclusion of the evidence, at this stage in the proceedings, is necessary to ensure evenhanded and expeditious management of the hearing. Thus, Intuit's motion *in limine* should be denied.

I. Background

Consumer narratives contained in reports submitted by consumers directly to the FTC, as well as reports submitted and shared by data contributors to Sentinel, such as the Better Business Bureau, offer valuable and relevant insight regarding the misimpression Intuit's marketing of TurboTax as "free" left with consumers.

No fewer than 228 complaints recorded in Sentinel between January 1, 2016 and March 28, 2022 go to the core of Count One of the Complaint. *See* Complaint Counsel's Reply to Respondent Intuit Inc.'s Supplemental Response to the Statement of Material Facts As to Which There Is No Genuine Issue for Trial (filed Sep. 30, 2022) at p. 3 & Attachment A (summarizing GX 502-03); *see also* GX 504. Of the 228 complaints, 44 were recorded between January 1, 2021, and March 28, 2022, and 26 were recorded between November 1, 2021, and March 28, 2022. *Id.* Of the 26 complaints referenced above: (a) 26 of 26 consumers indicated that they believed or TurboTax communicated that filing taxes with TurboTax would be free; (b) 22 of 26 consumers mentioned advertising about a free TurboTax option; and (c) 20 of 26 consumers indicated they were charged for or paid for TurboTax. *Id.*

Intuit took several depositions of consumers, including those that submitted Sentinel Complaints. Those depositions corroborate the Sentinel Complaints. Counsel

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for Intuit deposed 16 consumers that complained about TurboTax.³ Of those deposed, 11 consumers began using TurboTax because they thought or hoped that they could use it for free. GX 138 (Adamson Dep.) at 42: 7-16, 56:11-15 & 57:14-17; GX 125 (Beck Dep.) at 55:8-14; GX 128 (Benbrook Dep.) at 55:11-20; GX 124 (Bodi Dep.) at 31:23-33:14; GX 139 (Derscha Dep.) at 76:1-21; GX 122 (DeRyke Dep.) at 15:25-16:9; GX 137 (DuKatz Dep.) at 27:9-28:5, 82:16-83:24; GX 142 (Keahiolalo Dep.) at 76:21-77:11; GX 123 (Lee Dep.) at 53:17-54:18; GX 135 (Phyfer Dep.) at 79:19-81:5, 88:24-90:2 & 104:4-105:7; GX 130 (Tew Dep.) at 52:24-54:20.

Nine consumers remembered Intuit's free advertising. GX 125 (Beck Dep.) at 22:3-23:10, 30:8-14 & 55:8-24; GX 128 (Benbrook Dep.) at 53:3-55:7; GX 139 (Derscha Dep.) at 58:15-59:19; 88:8-19; GX 137 (DuKatz Dep.) at 29:8-31:8 & 93:13-94:6; GX 142 (Keahiolalo Dep.) at 25:16-24, 26:16-19, 32:19-33:6 & 42:11-16; GX 123 (Lee Dep.) at 53:17-54:18; GX 135 (Phyfer Dep.) at 79:19-81:5; GX 141 (Robinson Dep.) at 40:13-41:6; GX 136 (Schulte Dep.) at 14:19-15:19). This included consumers noting how "ubiquitous" the free advertising was, GX 138 (Adamson Dep.) at 55:22-56:19, with one consumer testifying that the free advertising was "the key message that brought me to TurboTax in the first place." GX 125 (Beck Dep.) at 55:8-15.

At least ten consumer deponents did not understand Intuit's eligibility criteria for Free Edition. GX 138 (Adamson Dep.) at 44:4-12 & 58:19-59:7; GX 131 (Bansal Dep.) at 15:15-21; GX 128 (Benbrook Dep.) at 27:22-28:3 & 31:1-15; GX 139 (Derscha Dep.) at 47:20-48:3; GX 132 (Dougher Dep.) at 35:2-36:21; GX 137 (DuKatz Dep.) at 18:10-19:19, 56:4-22 & 63:16-64:2; GX 142 (Keahiolalo Dep.) at 37:20-38:4; GX 135 (Phyfer Dep.) at 66:7-67:5, 75:9-76:8 & 92:20-93:6; GX 141 (Robinson Dep.) at 41:21-42:3 & 58:4-59:5; GX 136 (Schulte Dep.) at 70:4-18.

³ Though Intuit only took 16 consumer depositions, Intuit issued deposition testimony subpoenas to 66 consumers. Six consumers did not appear for their depositions, and Intuit withdrew 42 subpoenas. Two depositions were canceled and never rescheduled.

II. Argument

Intuit is mistaken when it argues the Sentinel complaints should be excluded from evidence in the upcoming trial. Intuit's primary evidentiary objection is that the Sentinel complaints constitute hearsay. However, as Intuit recognizes, Mot. at 3, under the Commission Rules: "[e]vidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." 16 C.F.R. §3.43(b). Even if the stricter prohibition against hearsay in the Federal Rules of Evidence applied in Part 3, the Sentinel complaints fall within a traditional exception to the hearsay rule and should not be excluded on that basis. Intuit's remaining arguments concerning the Sentinel complaints go to the weight of the evidence and not to admissibility. Intuit will, of course, have an opportunity to make arguments about the weight this Court should give the Sentinel complaints during the upcoming trial. Those arguments should not be resolved on a motion *in limine*.

A. The Sentinel Complaints are Relevant, Material, and Bear Satisfactory Indicia of Reliability

The Sentinel complaints are relevant, material, and reliable and are admissible in Part 3 even if they constitute hearsay. 16 C.F.R. §3.43(b). The Sentinel complaints are unquestionably relevant and material. As explained above, no fewer than 228 complaints recorded in Sentinel between January 1, 2016, and March 28, 2022, go to the core of Count One of the Complaint. *See supra* Part I. Courts have found consumer complaints submitted to the FTC to be reliable and trustworthy because they "were sent independently to the FTC from unrelated members of the public," "reported roughly similar experiences," and "the declarants had no motive to lie to the FTC." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993). There is no reason to doubt the reliability of the Sentinel complaints pertaining to TurboTax. Moreover, the complaints are consistent with Intuit's "free" TurboTax advertising itself, the investigation conducted by FTC Investigator Diana Shiller, GX 342 (Shiller Dec.), the results of a consumer

survey conducted by Professor Novemsky, GX 303 (Novemsky Expert Report) at ¶¶ 8, 69 & Figure 1, the FTC's testifying expert, and Intuit's own internal research and documents, *see, e.g.*, GX 460, p. 28; GX 340 at CC-00006857, GX 51 at CC-00000552-53; GX 411 at CC-00007561. Moreover, the depositions taken and documents produced in response to Intuit subpoenas to complaining consumers were consistent with the Sentinel complaints. *See supra* Part I at pp. 2-3.

B. The Residual Exception to the Hearsay Rule Applies to the Sentinel Complaints

Even if the stricter Federal Rules of Evidence applied in Part 3, the Sentinel complaints are admissible under the residual exception to the hearsay rule, FRE 807. Under FRE 807, the Court may admit any out-of-court statement that: (1) has circumstantial guarantees of trustworthiness; (2) is offered as evidence of a material fact; (3) is more probative on the point for which it is offered than any other evidence that can be procured through reasonable efforts; and (4) best serves the general purposes of the Federal Rules of Evidence and the interests of justice. The proponent of the evidence must also notify the opposing party of its intent to offer the evidence, which the FTC has done here.

Courts routinely admit consumer complaints under the residual exception. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993) (upholding trial court's holding that consumer complaint letters were admissible under the residual hearsay rule);⁴ *FTC v. AMG Services, Inc.*, No. 2:12-cv-00536, 2014 U.S. Dist. LEXIS 10240 at *44-47 (D. Nev. January 28, 2014) (written complaints, transcripts and recordings by employees and consumers admissible under FRE 807); *FTC v. Instant Response Systems*, 2015 U.S. Dist. LEXIS 49060 at *13-14 (E.D.N.Y. April 14, 2015) (elderly consumers' caretakers' declarations and complaints to BBBs satisfied Rule 807 and were admitted in evidence); *FTC v. Ewing*, No. 2:07-cv-479, 2014 WL 5489210, at *2-3 (D. Nev. Oct. 29, 2014)

⁴ *Figgie* addressed Rule 807's predecessor, Rule 803(24).

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(granting FTC motion *in limine* to admit 162 consumer complaints and three consumer declarations under FRE 807); *FTC v. Direct Benefits Group*, No. 6:11-cv-1186, 2012 U.S. Dist. LEXIS 162696 at *5-6 (November 14, 2012) (same); *FTC v. Magazine Solutions, LLC*, No. 7-692, 2009 U.S. Dist. LEXIS 20629 at *1-2 (W.D. Pa. Mar. 16, 2009) (same), *affirmed* 432 Fed. Appx. 155 (3d Cir. 2011); *FTC v. Cyberspace.com, LLC*, No. CV-00-01806, 2002 U.S. Dist. LEXIS 25565, at *13, n.5 (W.D. Wash. July 10, 2002) (consumer e-mails and complaint letter admissible), *affirmed* 453 F.3d 1196 (9th Cir. 2006).

The numerous complaints that Intuit's customers submitted to the FTC, or Sentinel contributors such the State Attorneys General and the BBBs, are reliable because they were sent by unrelated members of the public, who reported similar experiences, at different times. *See Figgie*, 994 F.2d 595 at 608 ("The fact that [the complaints] all reported roughly similar experiences suggests their truthfulness."); *see also Barker v. Morris*, 761 F.2d 1400, 1402 (9th Cir. 1985) (independent corroboration of a statement by others is a sign of reliability or trustworthiness); *Flow Control Industries, Inc. v. AMHI, Inc.*, 278 F. Supp. 2d 1193, 1197-98 (W.D. Wash. 2003) (communications found trustworthy where they were made independently by unrelated consumers who had similar experience and "no identifiable motive to lie"). As the trial judge found in *FTC v. Ewing*, an FTC enforcement case: "[T]he complaints have circumstantial guarantees of trustworthiness that are equivalent to the hearsay exceptions. The complaints were made independently by numerous unrelated consumers to different sources, and they report 'roughly similar experiences' regarding [defendants' marketing]." *Ewing*, 2014 WL 5489210, at *2.

Intuit's customers had no apparent motive to lie about their similar experiences; rather, the contents of their complaints show their sincerity.⁵ *Figgie*, 994 F.2d at 608;

⁵ Moreover, the Sentinel complaints are consistent with Intuit's own internal research and documents. *E.g.* GX 460, p. 28; GX 340 at CC-00006857; GX 51 at CC-00000552-53; GX 411 at CC-00007561.

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United States v. Murillo, 288 F.3d 1126, 1138 (9th Cir. 2002) (when statement is made by a person with “no motive or incentive to lie,” this weighs in favor of finding it trustworthy). Consumers tended to simply report their experience with TurboTax and their inability to use it for free or to request a refund. There is therefore little risk that the Sentinel complaints were “the product of faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard.” *Figgie*, 994 F.2d at 608 (quoting 4 Weinstein & Berger; Evidence at 803-375).

III. Conclusion

For the foregoing reasons, the FTC respectfully requests that the Court deny Intuit’s motion *in limine*.

Respectfully submitted,

Dated: February 24, 2023

/s/ Roberto Anguizola

Roberto Anguizola, IL Bar No. 6270874

Rebecca Plett, VA Bar No. 90988

James Evans, VA Bar No. 83866

Sara Tonnesen, MD Bar No. 1312190241

Federal Trade Commission

600 Pennsylvania Ave., NW, CC-6316

Washington, DC 20580

(202) 326-3284 / ranguizola@ftc.gov

(202) 326-3664 / rplett@ftc.gov

(202) 326-2026 / james.evans@ftc.gov

(202) 326-2879 / stonnesen@ftc.gov

Counsel Supporting the Complaint
Federal Trade Commission

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CERTIFICATE OF SERVICE

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

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580
ElectronicFilings@ftc.gov

Secretary of the Commission

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite H-110
Washington, DC 20580

Administrative Law Judge

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

David Z. Gringer
Phoebe Silos
Charles Bridge
Wilmer Cutler Pickering Hale & Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
David.Gringer@wilmerhale.com
Phoebe.Silos@wilmerhale.com
Charles.Bridge@wilmerhale.com
(212) 230-8800

Shelby Martin
Wilmer Cutler Pickering Hale & Dorr LLP
1225 Seventeenth Street, Suite 2600
Denver, CO 80202
Shelby.Martin@wilmerhale.com
(720) 274-3135

Katherine Mackey
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, MA 02109
Katherine.Mackey@wilmerhale.com
(617) 526-6000

Jonathan E. Paikin
Jennifer Milici
Derek A. Woodman
Vinecia Perkins
Andres Salinas
Spencer Todd
Jocelyn Berteaud
Benjamin Chapin
Margaret (Molly) Dillaway
Reade Jacob
Wilmer Cutler Pickering Hale & Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Jonathan.Paikin@wilmerhale.com
Jennifer.Milici@wilmerhale.com
Derek.Woodman@wilmerhale.com
Vinecia.Perkins@wilmerhale.com
Andres.Salinas@wilmerhale.com
Spencer.Todd@wilmerhale.com
Joss.Berteaud@wilmerhale.com
Benjamin.Chapin@wilmerhale.com
Molly.Dillaway@wilmerhale.com
Reade.Jacob@wilmerhale.com
(202) 663-6000

Attorneys for Respondent, Intuit Inc.

/s/ Roberto Anguizola
Complaint Counsel