

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

In the matter of:

**Intuit Inc.,**  
a corporation,  
  
Respondent.

Docket No. 9408

**OPPOSITION TO INTUIT INC.’S MOTION *IN LIMINE* TO EXCLUDE  
TESTIMONY OF PROFESSOR NATHAN NOVEMSKY**

Complaint Counsel intends to call at trial Professor Nathan Novemsky, an expert in consumer psychology and marketing who designed and supervised a Consumer Perception Survey (“Survey”) that shows that a “substantial portion of the taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria have the misimpression that they can file their income taxes for free using TurboTax, and that Intuit’s TurboTax advertisements and the TurboTax website are the two most common sources identified as playing a role in taxpayers forming the misimpression.” GX303 (Novemsky Report) ¶¶8-9.<sup>1</sup> Respondent Intuit Inc. (“Intuit”), through its Motion *in Limine* (“MIL”), seeks to exclude Professor Novemsky’s Survey and opinions related to the Survey as irrelevant and unreliable; but Intuit has not met its burden to exclude any of Professor Novemsky’s testimony.

Professor Novemsky’s survey and related opinions are squarely relevant to the central issue of this case: whether Intuit’s advertising misled consumers to think they could use TurboTax for free when that was not the case. Professor Novemsky used sound, reliable survey methodology to empirically investigate the effect of Intuit’s multiyear, multichannel marketing and advertising campaign. Intuit’s motion should be denied.

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<sup>1</sup> 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.

## BACKGROUND

Professor Novemsky is a Professor of Marketing and Psychology at Yale University. He is a widely published expert in the psychology of judgment and decision-making, an area that overlaps with behavioral economics and consumer behavior. GX303 ¶¶12-13. Professor Novemsky has extensive experience with survey design, having conducted, supervised, or evaluated hundreds of surveys. *Id.* at ¶16.

In designing the Survey, Professor Novemsky relied on scientific methods to ensure the reliability of the results, including by following accepted methodological guidelines. *Id.* at ¶5 & n.10. In particular, the Survey sample was chosen to be representative of the population of interest. In this case, that population is “potential taxpayers who at the time the survey was conducted were considering using an online tax software to file their 2021 taxes and would not have qualified for TurboTax Free Edition.” *Id.* at ¶21. Professor Novemsky excluded “respondents who had already filed an income tax return in 2022, since (1) such consumers may already know for a fact whether they are eligible to use TurboTax to file their returns for free ... and (2) the intended audience for TurboTax marketing at the time the survey was conducted was taxpayers who have not yet filed their returns.” *Id.* at ¶22.

Professor Novemsky conducted the Survey in March 2022. Fielding the survey at that time “ha[d] the advantage of reaching potential taxpayers when tax filing is more top-of-mind and as many consumers are thinking in earnest about how they will file their taxes .... [T]his is the time when potential misperceptions about the cost of filing options are most likely to be consequential. If the survey was conducted much earlier in the tax season, consumers who have not yet filed their tax returns may not have been thinking about tax filing or engaging with the topic of tax filing. As such, the attention consumers pay to advertisements about tax filing and how carefully they have thought about how they will approach filing their taxes would not be representative of their behavior when they are actually making tax filing decisions.” *Id.*

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Pursuant to the binding legal requirements of the Privacy Act, 5 U.S.C. § 552a(e)(3), respondents were provided with information about the purpose of the Survey and had the choice to opt-out at the conclusion of the Survey. Answers provided by respondents who chose to opt out were not retained in accordance with the Privacy Act.

The purpose of the Survey was to measure the cumulative effect of Intuit's marketing. In designing the Survey, Professor Novemsky determined that "a test / control framework would be inappropriate for the objectives of this survey – that is, to measure the extent of taxpayers' opinions and beliefs as to whether they can file their taxes for free using TurboTax online software." *Id.* at ¶30. Testing a single ad or stimulus would not realistically replicate "long running and pervasive marketing campaigns in which the allegedly deceptive messages were communicated to consumers repeatedly and over various communication channels." *Id.* at ¶31; GX749 (Rebuttal Report) ¶¶18 & 24 ("[A]cademic research demonstrates that test/control studies are particularly ill-suited to studying the[] effects [of long-running advertising campaigns]."). Moreover, because of the marketing campaigns, Professor Novemsky determined through empirical preliminary testing (not impermissible assumptions, as Intuit claims, MIL at 9) that there was no appropriate control group not previously exposed to Intuit's deceptive marketing. GX303 ¶33.

In keeping with best practices, to avoid guessing and other biases, Professor Novemsky took appropriate measures – for example through the types of questions asked and the use of quasi-filters. GX749 ¶26. The design and sampling used in the Survey were reliable to evaluate the effect that Intuit's "free" marketing has had on consumers in the marketplace.

## ARGUMENT

### I. The High Bar for Motions *in Limine* Compels Denial of Respondent's Motion

Under Rule 3.43(b), only relevant, material, and reliable evidence is admissible. 16 C.F.R. § 3.43(b). This Court has consistently relied on *Daubert* to assess the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993); *see also In re LabMD, Inc.*, 2014 FTC LEXIS 115, \*3 (May 5, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 142, at \*8 (Aug. 16, 2012). Under *Daubert*, “courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue.” *McWane*, 2012 FTC LEXIS at \*8. Excluding expert testimony is rare. *See, e.g., PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 123 (4th Cir. 2011).

This Court stated in its Scheduling Order and in numerous prior decisions that parties should only seek to exclude evidence when it is “clearly inadmissible on all potential grounds.” Scheduling Order ¶13 (Apr. 27, 2022) (citations omitted); *see also In re McWane*, 2012 FTC LEXIS at \*6-7. As this Court has laid out, “the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.” Scheduling Order ¶13.

Here, Professor Novemsky, a respected and well-qualified expert in consumer psychology and marketing, used best practices to design and implement the Survey, producing relevant and reliable results. Thus, there is no reason to exclude his expert testimony and Intuit's motion should be denied.

### II. The Survey Evidence is Squarely Relevant and Will Assist the Trier of Fact

Professor Novemsky designed a reliable Survey in this matter that establishes direct evidence of consumer beliefs based on Intuit's multichannel, multiyear marketing and advertising campaign, as well as Intuit's purported disclaimer regarding “simple returns.” His Survey and opinions will help the Court assess that campaign, and the

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effectiveness of Intuit's purported disclaimers. Intuit's claim that the Survey is not relevant are disingenuous and appear to misinterpret both Complaint Counsel's theory of the case and the purpose of the Survey.

Intuit first claims that the Survey is not relevant because it does not copy test any one ad. MIL at 5. While Intuit claims this is an infirmity, it is precisely the design of the Survey: to test the cumulative effect of Intuit's marketing and the impression that such marketing has left on consumers. This is particularly relevant given Intuit's ubiquitous advertising, with free-themed ads garnering billions of impressions between 2018 and 2022. GX749, fig. 4. Because of the purpose of the Survey, the Survey is also distinguishable from the case cited by Intuit, in which the issue for jury trial was a particular product label. *See Mier v. CVS Pharmacy, Inc.*, 2022 WL 1599633, at \*3 (C.D. Cal. May 9, 2022).

Intuit incorrectly argues that because the survey is an "unaided" memory test it does not provide any relevant information to aid this Court's understanding. This criticism also fails. Unaided questions are routinely used in surveys, including by Intuit's own expert. *See* RX1017 (Hauser Report) ¶103. Intuit further argues that the Survey is not relevant because, by not showing consumers any ads, it does not replicate the real world. MIL at 4-5. Contrary to Intuit's claims, the survey design replicates the real world: the world in which, for years, Intuit spent millions of dollars advertising free TurboTax. As Professor Novemsky explains, showing consumers individual ads does not realistically replicate "long running and pervasive marketing campaigns in which the allegedly deceptive messages were communicated to consumers repeatedly and over various communication channels." GX303 ¶31. Moreover, courts have held that failure to replicate advertising and websites does not render survey results irrelevant. *See FTC v. LendingClub Corp.*, 2020 U.S. Dist. LEXIS 95703, at \*39 (N.D. Cal. June 1, 2020).

While Intuit argues throughout its Motion that the instant case requires extrinsic evidence on par with trademark cases, *e.g.*, MIL at 5, the issues in the trademark cases cited are vastly different and involve comparing consumer confusion between two trademarks, which naturally requires showing consumers those trademarks. *See, e.g., Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 562 (S.D.N.Y. 2007) (“In cases arising under the Lanham Act, the Court’s gatekeeper function is of heightened importance because the pivotal legal question virtually demands expert survey research on issues such as consumer perception”) (cleaned up).

Professor Novemsky’s Survey clearly helps the Court assess the impressions and misimpressions consumers have formed based on Intuit’s marketing of a “free” TurboTax option over several years and across multiple channels.

### **III. Professor Novemsky Used Well-Established and Reliable Survey Methodology to Design the Survey**

In determining whether a consumer survey is methodologically sound, the Court should consider whether it “draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly.” *In re Thompson Med. Co.*, 104 F.T.C. 648, 790 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986). The Court need not require methodological perfection before it will rely on a copy test or other type of consumer survey but looks to whether such evidence is reasonably reliable and probative. *See In re Bristol-Myers Co.*, 85 F.T.C. 688, 743-44 (1975). “Flaws in the methodology may affect the weight that is given to the results of the copy test or other consumer survey.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, \*486-87 (F.T.C. May 17, 2012). And the “perceived flaws in an expert’s testimony ... should be ... tested in the crucible of the adversarial system, not [serve] as the basis for truncating that process.” *McWane*, 2012 FTC LEXIS 142, at \*10-11 (cleaned up).

Not only did Professor Novemsky design a reliable survey, but any doubts that this Court may have about his survey methodology can be appropriately addressed at the Hearing.

**A. Sampling Methodology Was Appropriate and Reliable**

In selecting the Survey sample, Professor Novemsky applied reliable methods, including by properly identifying the survey population at issue. Intuit raises various concerns with Professor Novemsky's sampling methodology which are unpersuasive.

First, Intuit claims that because Professor Novemsky allowed consumers to opt out of the survey and did not record responses by consumers who opted out, the survey responses are biased. MIL at 6. This proposition is absurd, as it would necessarily lead to the conclusion that government agencies complying with Privacy Act requirements can never conduct reliable surveys. Moreover, Professor Novemsky provides analysis in his report that, even assuming all respondents who opted out did *not* have the misimpression that they could file for free, the Survey establishes significant levels of misimpressions. *See* GX303 ¶71. Additionally, courts have found that disclosure of a survey's sponsor is not fatal. *LendingClub*, 2020 U.S. Dist. LEXIS 95703, at \*42.

Intuit also claims that because Professor Novemsky included only those respondents who had not yet filed their taxes in March 2022, his results are infirm. MIL at 7. But as explained above, the sampling methodology properly considered important factors and captured consumer impressions during a time when consumers are most likely to be actively engaged in the selection of a tax filing method, *see supra* p.2. Even assuming, *arguendo*, that consumers who filed later in the tax filing season differed in some significant way from consumers filing early, as Intuit seems to argue, MIL at 6-7, the Survey provides information representative of millions of tax filers.

Intuit's argument that the Survey was biased because it did not include consumers who were eligible to file for free ignores that this case is focused on those consumers who were *not* eligible to file for free, as they are most likely to be misled by

Intuit's advertising. Finally, Intuit criticizes Professor Novemsky's sample for including those consumers who may have been aware of litigation against Intuit. MIL at 7. But, if anything, litigation-aware consumers or consumers who participated in arbitrations would likely be more aware that they could *not* file for free, biasing the Survey results in Intuit's favor.

**B. Survey Design Was Appropriate and Reliable**

Intuit insists that drawing reliable conclusions about the source of consumer misimpressions about *individual* ads requires a test and control design. MIL at 7-8. While this may be the case when considering individual ads, it is not when testing a widely disseminated advertising campaign, which was this Survey's objective.

The survey methodology employed by Professor Novemsky is routinely applied, and in fact used by Intuit's own expert. *See* RX1017 ¶103.<sup>2</sup> And while having some control is important, "[t]here is nothing in Commission precedent that requires the use of a control ad for closed-ended questions." *In re Stouffer* 1994 FTC LEXIS 196, \*31 (Sept. 26, 1994). Courts routinely admit surveys that do not use a control group. *See, e.g., Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262 (9th Cir. June 1, 2001); *see also Moroccanoil, Inc. v. Marc Anthony Cosmetics, Inc.*, 2014 U.S. Dist. LEXIS 184585, \*25 (C.D. Cal. Oct. 7, 2014). The decision not to employ a control group can be mitigated by "other methods to prevent bias, e.g., including 'none of the above,' 'don't know/can't recall' and 'other' as possible answers to closed-ended questions." *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1078 (C.D. Cal. Aug. 14, 2015). These are precisely the measures employed by Professor Novemsky in the design of the Survey. *See* GX749 ¶26.

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<sup>2</sup> Intuit points to prior testimony by Professor Novemsky in an attempt to undermine his credibility. MIL at 8. However, during his deposition, Professor Novemsky explained that his experience since providing that testimony as well as the circumstances surrounding Intuit's pervasive marketing campaign, and academic literature support his survey design and opinions in this matter. Novemsky Tr. 79:1-82:2.



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## CONCLUSION

For the foregoing reasons, Intuit's motion should be denied.

Respectfully submitted,

Dated: February 24, 2023

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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 Inc.'s Motion to Exclude Testimony of Professor Nathan Novemsky electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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