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

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

RESPONDENT INTUIT INC.'S POST-TRIAL BRIEF

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INTRODUCTION

Complaint Counsel seek a do-over from their unsuccessful attempt to enjoin in federal court the very same advertisements they challenge here. The judge in that case rejected the injunction request that Complaint Counsel renew here after correctly observing that "nobody" believes Complaint Counsel's theory of deception. On the full evidentiary record now created, it is even clearer that Complaint Counsel have not met their burden of proving that the challenged advertisements are deceptive. After a three-year investigation and another year of fact discovery, Complaint Counsel did not come forward at trial with evidence that proves *any* of the elements of their claim. Complaint Counsel instead sought to carry their burden merely by introducing advertisements into the record, establishing that those advertisements ran, and arguing to the Court why *they* think the ads are deceptive. But argument is not evidence, and the evidence in the record compels the conclusion that the Intuit's ads were not deceptive in years past, are not deceptive now, and most certainly will not be deceptive going forward. Complaint Counsel's bid for another bite at the apple should be rejected, judgment should be entered in Intuit's favor, and a cease-and-desist order should not be issued.

1. Complaint Counsel's theory of deception, to the extent one remains, is baffling. The challenged ads are for products that are free—no one can pay for those products, even if anyone wanted to. That fact is not genuinely disputed. Complaint Counsel's theory is instead that the ads are deceptive because not *every* taxpayer in the United States can use the free product, and some people who see one or more of the ads might think that they can use it when they can't. If this were true, it could have been proven, whether through a reliable, test-and-control study; a meaningful number of genuine consumer complaints; or other extrinsic evidence consistent with deception. But Complaint Counsel offered none of that. The survey offered through Professor Nathan Novemsky was not reliable for myriad reasons, including that it was

not a test-and-control survey and that participants were not shown a single one of the ads that were the subject of the survey (and of this case). And after what the parties agree was a multi-year, multi-channel, multi-modal advertising campaign where the challenged ads were served to consumers *billions* of times, Complaint Counsel's (inflated) estimate of 228 consumer complaints is only 0.0003% of the number of unique consumers who used TurboTax during that same time. As an article written by an FTC economist confirms, this is many orders of magnitude lower than the volume of complaints one sees when advertisements are truly deceptive.

What is perhaps most striking about Complaint Counsel's theory, however, is that it depends on the assumption that Intuit acted contrary to its economic interests, i.e., in ways that would harm rather than help Intuit's bottom line. In successful FTC deception cases, the theory is that the deception would further the defendant's economic interests because consumers are fooled into buying a product that they otherwise would not have bought. But here, Intuit's fact witnesses—current and former senior executives in the TurboTax business—all testified credibly and without rebuttal that the deception alleged would have threatened the business's viability. That testimony was buttressed by the expert analysis and opinions of economist Bruce Deal and Professor Peter Golder. There is also no evidence that any consumer who paid to use TurboTax would not have done so absent the challenged advertisements.

Complaint Counsel's theory of deception is also refuted by the challenged ads themselves, which, as the Court heard or observed, all contain multiple disclosures that meet or exceed industry benchmarks based on the FTC's own guidelines. And the theory ignores the TurboTax website along with its mobile app equivalent, which consumers must visit before paying anything to file their taxes with TurboTax—in fact the challenged ads encourage

consumers to visit the website—and which contain an abundance of prominent disclosures about the qualifications to file for free (along with tools to help consumers find the right TurboTax product for them).

Finally, the key point underpinning Complaint Counsel's theory that supposedly two-thirds of *all* U.S. taxpayers do not qualify for TurboTax's free products was shown to be completely irrelevant. As the Court recognized in opening statements, that figure (itself inaccurate) is a useless benchmark. About half of all taxpayers do not consider online tax preparation at all. And a significant percentage of the rest have very complex tax returns and thus could not have reasonably believed that a product for "simple tax returns only" (as the challenged ads described TurboTax's free products) was one they could use. Looking at *relevant* benchmarks, most American taxpayers who file their taxes online are eligible to file their federal and state taxes for free using TurboTax Free Edition—and well over *ten million* taxpayers do so each year, including (each year) the vast majority of new TurboTax consumers. Intuit was thus advertising a free product that reached its intended audience: consumers who most likely qualified to use it.

2. Complaint Counsel's evidentiary failings, and the mountain of evidence refuting their arguments, doom their case with respect to each element of deception: (1) the express or implied claims conveyed by the challenged ads, (2) whether a significant minority of reasonable consumers were likely to take away a misleading claim, and (3) whether any such claim was material.

First, Complaint Counsel have failed to establish that any of the challenged ads expressly or implicitly conveyed any of the deceptive claims Complaint Counsel allege. Inexplicably, Complaint Counsel maintain that this is an express-claim case in which the challenged ads said

that "TurboTax is free," or "TurboTax is free *for them*," or TurboTax is "free for me." As Complaint Counsel have *conceded*, none of the challenged ads made any such statement. Complaint Counsel's express-claim theory must therefore be rejected.

Nor have Complaint Counsel proved that the challenged ads *implied* any misleading claims. The challenged ads—as the Court repeatedly saw and heard at trial—made clear in writing, and often verbally, both the specific TurboTax product being advertised and the fact that the free product was for "simple tax returns only." Many of the ads also pointed consumers to the TurboTax website to "see if you qualify" or "see details." And many others included (or themselves were) hyperlinks that took consumers to the TurboTax website, where full details on eligibility was readily accessible. Considering the ads as a whole, including their disclosures, it would not have been reasonable for customers to believe from any of the challenged ads that all TurboTax products were free or even that TurboTax was necessarily free for them.

Unsurprisingly given the ads' content, Complaint Counsel's implied-claim theory has already, as noted at the outset, been rebuffed by a federal judge. Judge Charles Breyer in the Northern District of California examined the challenged ads and observed that they "don't say it is free to everybody." PFF ¶15. And looking at one ad, he noted that the disclosure "is right there; isn't it? ... it says 'TurboTax free edition, for simple tax returns only,'" PFF ¶15. That is as true now as it was a year ago.

The unrebutted evidence of what Intuit intended to convey in the challenged ads provides further support for rejecting the notion that the ads implied any of the misleading claims Complaint Counsel allege. Every Intuit executive (current or former) who testified at trial explained that Intuit's intent in running the challenged ads was to convey that a particular free TurboTax product or offer was available, and was for qualifying consumers only. Each witness

also testified that Intuit would never run advertising it thought was deceptive, and would have immediately stopped running ads if there were any indication of deception. Lastly, the witnesses testified that Intuit would have "go[ne] out of business" "if Intuit had run a multiyear, multi-ad, multichannel, multimodal, integrated marketing campaign that was deceptive." PFF ¶647. Intuit is aware of no other deceptive-advertising case in which the advertiser would have *suffered* from the alleged deception.

Second, Complaint Counsel have failed to prove that a significant minority of reasonable consumers were likely to be deceived, i.e., likely to take away from the challenged ads the alleged misleading claims. Complaint Counsel's "deceptive door opener" theory—which is all that is left in the case in light of the concessions that Complaint Counsel and its witnesses made at trial—is both legally and factually infirm. Legally, deceptive advertising claims must take into account all information readily available to consumers. Here, that includes the TurboTax website, which is expressly mentioned in many of the challenged ads (including all of the video ads) and linked to directly by the remaining ads. Complaint Counsel and their witnesses conceded that the information on the website addresses any customer confusion. Complaint Counsel offer no legal or factual support for their theory that the ads were deceptive simply because consumers may have briefly visited the TurboTax website to obtain additional details about Intuit's free offers.

Complaint Counsel's theory fares no better considering the evidence. To begin, Complaint Counsel drastically underestimate reasonable consumers in this industry, calling them lazy "misers." Suffice to say, Complaint Counsel were unable to substantiate that offensive theory. And aside from the Novemsky survey, which is flawed for the reasons mentioned above (and below), Complaint Counsel tried to prove deception by citing 228 consumer complaints

filed over the course of six years. But those complaints—some of which were not even about TurboTax or its advertising—constitute an incredibly tiny fraction of the millions of consumers who saw the challenged ads and filed their taxes with TurboTax. Professor Golder's complaint benchmarking analysis likewise reflects that consumers have not complained about Intuit at rates that reflect deception. The evidence regarding complaints thus proves that no significant minority of reasonable consumers was likely deceived.

The substantial fact and expert evidence Intuit offered (despite having no burden of proof) confirms that. Dr. John Hauser's "Disclosure Efficacy Survey," for example, showed that modifying TurboTax's marketing as Complaint Counsel have said was necessary to avoid deception had no effect on consumer behavior. Intuit's witnesses also explained that various metrics show consumers were not deceived. Those include the fact that the vast majority of Intuit consumers who start filing their taxes in a free product finish using that product, that customers abandon TurboTax Free Edition at the same rate as TurboTax's paid products, and that most new TurboTax customers use Free Edition. Lastly, Bruce Deal's analysis of TurboTax's Tax Year 2021 customer data showed that there was no evidence of the widespread deception alleged by Complaint Counsel, because most of the consumers at issue had previous experience with TurboTax where they would have necessarily learned that they did not qualify for free tax filing.

Third, Complaint Counsel did not prove that any of the allegedly deceptive claims were material. Complaint Counsel did not show that those claims affected consumers' decisions to visit the TurboTax website, or that the mere act of visiting the TurboTax website establishes the materiality of the challenged ads. To the contrary, a Complaint Counsel expert conceded that it took only "a few seconds" to reach the TurboTax website, and that once there it took only "five

to ten seconds" to encounter full eligibility information for free TurboTax offers. PFF ¶790. There is no basis for concluding that the challenged ads made materially deceptive claims merely because consumers visited the precise location where the qualifications for free TurboTax offers were clearly and accessibly stated.

3. Merits aside, Complaint Counsel did not meet their burden to show that *any* cease-and-desist order, let alone the massively overbroad order they seek in this case, is warranted. Complaint Counsel made clear that they are not challenging Intuit's current advertising (as to which they offered no evidence of deceptiveness). And Intuit's uncontested evidence—including a Tax Year 2022 copy test that showed that consumers were not misled by Intuit's current ads—establishes that Intuit's current advertising is not deceptive. Complaint Counsel thus had to rely on past ads to show that relief was necessary to prevent future violations. They did not do so, because any allegedly deceptive conduct in any past ads is already enjoined by Intuit's consent order with the attorneys general of all 50 states and the District of Columbia. That binding order, enforceable in California state court (and elsewhere), both moots Complaint Counsel's claim and assures that Intuit's advertisements will continue to comply with the law going forward. Confirming that, Intuit presented unrebutted testimony from its executives that the company has complied with the consent order and has processes in place to ensure that it will continue to do so. That testimony is consistent with other evidence of Intuit's longstanding commitment to—and business interest in—clarity in its free advertising, including the fact that Intuit's free ads have continued to improve over time wholly apart from the consent order and the FTC's investigation, *see infra* p.14. Complaint Counsel therefore did not demonstrate the cognizable danger of future unlawful activity required to obtain injunctive relief. And if that were not enough, prospective relief is unwarranted because Complaint

Counsel's proposed remedy would unconstitutionally compel speech that not only is unnecessary, but that also (as the Court heard) would harm consumers by discouraging free filing. Finally, Complaint Counsel never even tried to justify their punitive proposal that their scattershot order apply to *all* Intuit products, not just TurboTax.

4. Complaint Counsel's claim is untimely. Section 5 claims should be subject to a three-year statute of limitations. As such, any advertisements that last ran before January 5, 2019—three years before the date of the tolling agreement in this case—may not be considered. The doctrine of laches also, and independently, bars any attempt to punish Intuit for outdated ads of which the FTC has long been aware. It is inequitable to penalize Intuit for outdated ads when the FTC waited years and years, across three different administrations, before filing this case.

5. Finally, Complaint Counsel cannot prevail because this proceeding is rife with constitutional infirmities. The proceeding violates due process (both because of the FTC's administrative process in general and because of the Commission's conduct in this case), the separation of powers, and the non-delegation doctrine. These problems are exacerbated in this case, where Complaint Counsel already tried—and were unsuccessful—in the same case, in federal court.

At bottom, Complaint Counsel have failed to marshal any probative evidence of deception. The reason is simple: The challenged ads are not deceptive.

BACKGROUND

A. Intuit And Its TurboTax Products

Intuit was founded in 1984 with the mission of helping customers manage their finances through innovative technology. PFF ¶29. For nearly 40 years, it has been a customer-focused company that endeavors to deliver leading financial software products that provide customers with unmatched value and benefit. PFF ¶30.

"TurboTax" is the brand name of a suite of Intuit's online tax-preparation products and services. PFF ¶60. The TurboTax brand encompasses three tiers of products—Do-It-Yourself ("DIY"), Live Assisted, and Live Full Service—that offer different levels of tax-filing assistance. PFF ¶64. Each tier includes four different products, or "SKUs." PFF ¶66. The various SKUs cover tax situations of different complexity. PFF ¶62. To simplify matters for consumers, eligibility for a particular SKU is determined based on the IRS form or forms an individual uses to file her return. PFF ¶63.

Intuit is committed to having as many consumers as possible begin preparing their tax returns in the SKU that is "right" for their tax situation. PFF ¶73. Intuit defines the "right" SKU as the lowest priced TurboTax product (including a free product) for which the consumer's tax situation qualifies. PFF ¶74. Getting customers in the right SKU as soon as possible is critical to TurboTax's business because consumers who start in the proper SKU have a better overall experience and thus are more likely to return to TurboTax in future years. PFF ¶¶73, 75-76.

B. Consumers With "Simple Tax Returns" Are Eligible To Use TurboTax Free Edition, Live Assisted Basic, And Full Service Basic

As elaborated in the next subsection, Intuit offers three free TurboTax products: Free Edition, Live Assisted Basic, and Full Service Basic. PFF ¶67. These products are available to consumers who are filing "simple tax returns." PFF ¶67. Intuit's definition of "simple tax returns" has always aligned with the IRS's, which is a return filed using the most basic IRS form or forms. PFF ¶122.

The phrase "simple tax return" is ubiquitous in the tax-preparation industry. The IRS itself uses that term, as do state agencies like the California Franchise Tax Board. PFF ¶119, 122, 142. All major online tax-preparation industry companies do so as well, and in the same way Intuit does: to describe qualifications for their free product. PFF ¶141. Intuit chose to use

the phrase "for … alignment and understanding … to reflect the fact that this is the simplest way to file using the IRS tax code." PFF ¶123. Conforming with the IRS's definition of simple tax returns was important to Intuit because it believes such conformity minimizes consumer confusion. PFF ¶122.

Today, a "simple tax return" is one that can be filed on IRS Form 1040 without any attached forms or schedules. PFF ¶¶121, 124. Before Tax Year 2018, the most basic IRS forms available (and thus the ones whose use made a tax return "simple") were Forms 1040EZ and 1040A. PFF ¶120. The IRS discontinued those forms in response to tax-reform legislation enacted in 2017. PFF ¶121. When the IRS changed what qualified as a simple return, Intuit did the same. PFF ¶121. If Intuit had not modified its definition of simple tax returns to continue to match the IRS's definition, no one would have qualified to use its free TurboTax products. PFF ¶125.

C. TurboTax's Free Products

1. To drive long-term customer growth and retention, Intuit offers free TurboTax products to consumers with simple returns. PFF ¶83. Intuit hopes that consumers with simple returns will use a TurboTax product to file for free, have a good experience doing so, and thereby develop life-long relationships with Intuit, prompting them to stay with Intuit as their tax situations become more complex and thus require the use of paid products. PFF ¶83. Intuit's long-term growth strategy therefore depends not just on getting a simple filer to use a free product, but on making sure the customer has a positive experience doing so. PFF ¶¶87, 90. While all companies strive to retain customers, repeat business is especially important in the tax-preparation industry because the customer base is largely static year to year. PFF ¶44.

Given the importance of repeat business, Intuit recognizes that creating a mistaken expectation amongst consumers who do not qualify to file for free that they do would cause

consumers to both leave TurboTax and share their dissatisfaction with others. PFF ¶134. That would erode consumer trust in the TurboTax brand and lower customer retention, hurting Intuit's business. PFF ¶96.

Intuit's data show that it has succeeded in being clear with customers and ensuring that their experiences match their expectations. TurboTax's paid SKUs have a customer-retention rate of 83%, which is greater than the retention rate for TurboTax's free SKUs. PFF ¶650. That high paid retention rate demonstrates that customers derive value from TurboTax's products and use it year-after-year, not that they are angry, dissatisfied, or somehow misled. PFF ¶651. And even when customers do leave TurboTax, they do so at the same rate for both free and paid products (22%), suggesting that customers leave not because they thought they could file for free but then couldn't (a reason specific to free products), but for other reasons common to both free and paid ones. PFF ¶¶656-657. Other metrics—like consumer reviews—also show that customers' expectations regarding their ability to file for free with TurboTax are being met. PFF ¶653. Customers have consistently rated TurboTax products between 4.3 and 4.9 out of 5 stars on the TurboTax website. PFF ¶653.

2. As noted, one of Intuit's free TurboTax products is Free Edition. PFF ¶¶67, 100. Over the years, Intuit has repeatedly expanded Free Edition's functions to include features that the company previously offered for a fee. PFF ¶99. For example, in Tax Year 2014, Intuit launched "Absolute Zero," which allowed consumers to file both their federal and state taxes for free during part of the tax-filing season. PFF ¶102. Then, starting in Tax Year 2018, Intuit further expanded Free Edition so that consumers could file both federal and state taxes for free for the entire season. PFF ¶102. Other features that likewise used to require a fee have also been made free, such as year-over-year data transfer and "Tax Return Access," which allows

customers to review their prior years' returns. PFF ¶¶106-107. Intuit has even used artificial intelligence and machine learning to reduce the time it takes to complete a return using Free Edition and other TurboTax products. PFF ¶108. The goal of these improvements was to get more consumers to file their taxes for free with TurboTax and have the best experience possible doing so, again in furtherance of the long-term Intuit business strategy described above. PFF ¶105.

Today, more than half of consumers who file their taxes online have simple tax returns and therefore qualify to file for free using Free Edition and other free TurboTax offers. PFF ¶129. More than 60 million U.S. taxpayers have simple returns, and more could file using a simple tax return but choose not to do so. PFF ¶127-128. Every year, between 11 and 14 million taxpayers use TurboTax's free products to file their taxes for free. PFF ¶113. Further, [redacted] ([redacted] in Tax Year 2018, for instance). PFF ¶659.

3. Intuit has free offers beyond TurboTax Free Edition. For example, during certain times of the year it offers both TurboTax Live Basic (which provides expert tax assistance for do-it-yourself filing) and Live Basic Full Service (which provides a tax professional who prepares the return) for free to filers with simple returns. PFF ¶¶109-111. Intuit also allows all enlisted military personnel (i.e., ranks E-1 to E-9) to file for free in any TurboTax product, regardless of the complexity of their returns. PFF ¶¶151-152. In 2022, approximately 627,000 of the 1.7 million eligible military service members filed their taxes for free using TurboTax. PFF ¶154.

D. Intuit's Free Advertising

1. Intuit's advertising strategy

a. Like most consumer-facing businesses, Intuit advertises its products. PFF ¶161. To increase the likelihood that its TurboTax ads are relevant to the consumers viewing them, Intuit targets its advertisements for specific TurboTax products both toward and away from certain individuals and groups, based on Intuit's understanding of what product would likely suit those consumers' tax situations. PFF ¶¶190, 197.

For its free SKUs, Intuit targets individuals most likely to have simple tax returns, as these individuals qualify for and are relatively likely to try free TurboTax products. PFF ¶191. For example, Intuit targets individuals ages 18-35, as they are more likely than older individuals to have simple tax situations. PFF ¶¶191-193.

To reach these demographics, Intuit advertises its free offers through "media channels and platforms that skew heavily towards that population … like Snapchat and TikTok." PFF ¶194. Conversely, where possible, Intuit uses "exclusionary targeting" to prevent an ad from being shown to customers for whom it is irrelevant. PFF ¶197. For instance, if Intuit knows that an individual does not have a simple tax return, Intuit will not intentionally show that person ads for free products. PFF ¶197.

b. All ads for free TurboTax products include language that the free offers are available only for consumers with "simple tax returns" (or other appropriate qualifying language). PFF ¶322. Ads for free TurboTax products also identify the specific SKU or offer that is free (e.g., TurboTax Free Edition). PFF ¶317. And many TurboTax ads for free products (including all the video ads challenged here) invite consumers to visit the TurboTax website, using language like "see if you qualify at turbotax.com" and "see details at TurboTax.com" that reinforces that not everyone is eligible for TurboTax's free products *and* directs consumers to the

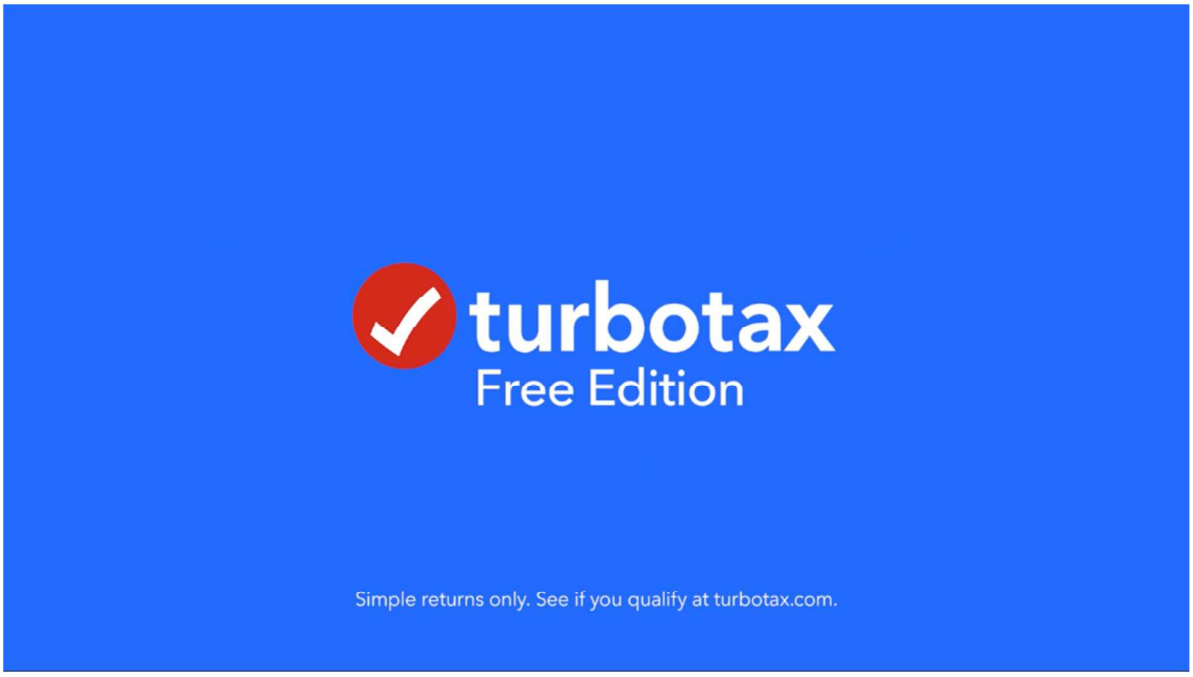
TurboTax website where they could, in fact, see if they qualified to file for free. PFF ¶¶215, 294, 323. Consumers can reach the TurboTax website by clicking on display ads, paid search ads, or email ads (as well as entering the URL directly into their browser). PFF ¶385.

Intuit aims to improve the clarity of its ads over time. PFF ¶353. To that end, every year Intuit evaluates ways to improve or clarify how its ads convey any qualifications for TurboTax products. PFF ¶353. As part of the ad-development process, Intuit's marketing team, outside ad agencies, and legal team all review every TurboTax ad to ensure that none is deceptive or misleading. PFF ¶163. And during that review, multiple stakeholders examine the clarity and legibility of the ads' disclosures. PFF ¶163. In this process—which can take up to nine months—if a stakeholder believes that a draft TurboTax ad is deceptive or misleading, the ad is either revised to eliminate the problem, or else it does not make it to the public at all. PFF ¶¶165, 168.

2. Current free TurboTax advertisements

In Tax Year 2022, Intuit ran ads for Free Edition across television, display, paid-search, and email channels. PFF ¶¶337, 342, 347, 350. Intuit also advertised a free Live Assisted Basic offer, which was available to simple filers through March 31, 2023. PFF ¶¶342, 348.

An example of Intuit's Tax Year 2022 advertising is the television "Taxbourine" ad. PFF ¶¶340-341. This ad includes a voiceover stating that the offer is only available to consumers "filing a simple return" and inviting consumers to "see if you qualify at turbotax.com." PFF ¶¶338, 340. Beyond the voiceover, the "Taxbourine" ad contains a prominent written disclosure reading "Simple U.S. returns only. See if you qualify at turbotax.com." PFF ¶340. And at the ad's conclusion, the TurboTax Free Edition logo is displayed above the written disclosure, as depicted below. PFF ¶341.



TurboTax's Tax Year 2022 display ads for free products all similarly include prominent written disclosures stating "Simple tax returns only. See if you qualify," and each identifies the product being advertised. PFF ¶342. The video display ads also include a spoken voiceover stating that free filing is available with "simple returns only," and inviting consumers to "see if you qualify" at the TurboTax website. PFF ¶343.

A screenshot of a representative Tax Year 2022 TurboTax video display ad for free filing is provided below. PFF ¶344.

3. Challenged advertisements

Complaint Counsel contend that several hundred of Intuit's advertisements across various channels—video, display, search, email, and radio—that ran between Tax Years 2014 and 2021 were deceptive. PFF ¶¶205, 207. None of the challenged ads stated that "TurboTax is free," "TurboTax is free for them," "TurboTax is free for you," or TurboTax is "free for me." PFF ¶210. All of the ads identified the specific product being advertised and made plain in writing that the free offer being advertised was only available to taxpayers with "simple tax returns" or similar language. PFF ¶¶215, 248, 266-267, 281, 294.

Video Ads. Every video ad at issue—including TurboTax television ads—conveyed in writing that the free offer was for a specific product, that the offer was available only to taxpayers with simple tax returns, and that consumers could find additional information on the TurboTax website. PFF ¶215. Nearly every video ad at issue also included audio identifying the TurboTax product or offer being advertised. PFF ¶215. And starting in Tax Year 2021, TurboTax video ads included a spoken voiceover inviting consumers to "see details at

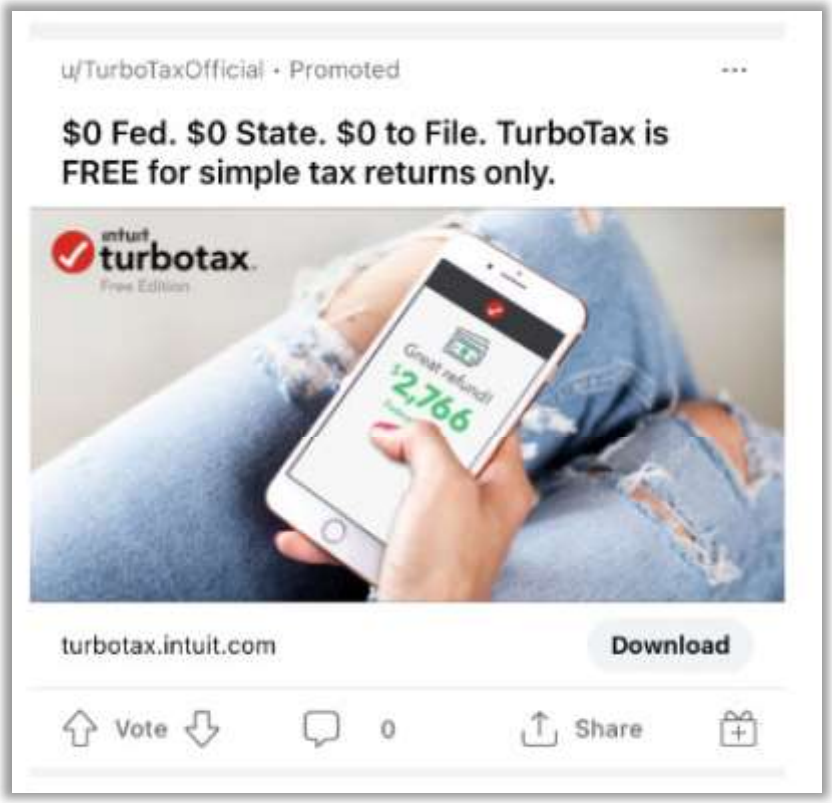
turbotax.com," while some also included multiple verbal disclosures stating that offers to file for free were for "simple returns" only. PFF ¶218. None of the video ads stated that TurboTax was free to the viewer or that all TurboTax products were free. PFF ¶242.

A screenshot of a representative video ad from Tax Year 2021 is provided below. PFF ¶216.

Display ads. Every challenged display ad—such as online banner ads or social media ads—similarly conveyed in writing that the free offer was for a specific TurboTax SKU and available only to taxpayers with simple tax returns. PFF ¶¶248, 250-251. For static (i.e., non-video) display ads, these written disclosures were visible the entire time a consumer would view the ad. *See* PFF ¶249. Almost all of the challenged video display ads (which are distinct from the "video ads" discussed above) also included a spoken voiceover describing the offer's qualifications. PFF ¶252. For many such ads, "simple tax returns only" is the first thing consumers would have heard when viewing the advertisement. *See* PFF ¶252. And the display ads either were links or provided links that, when clicked, took a consumer to the TurboTax website—or, for TurboTax Free Edition ads, to the Free Edition landing page—where they could

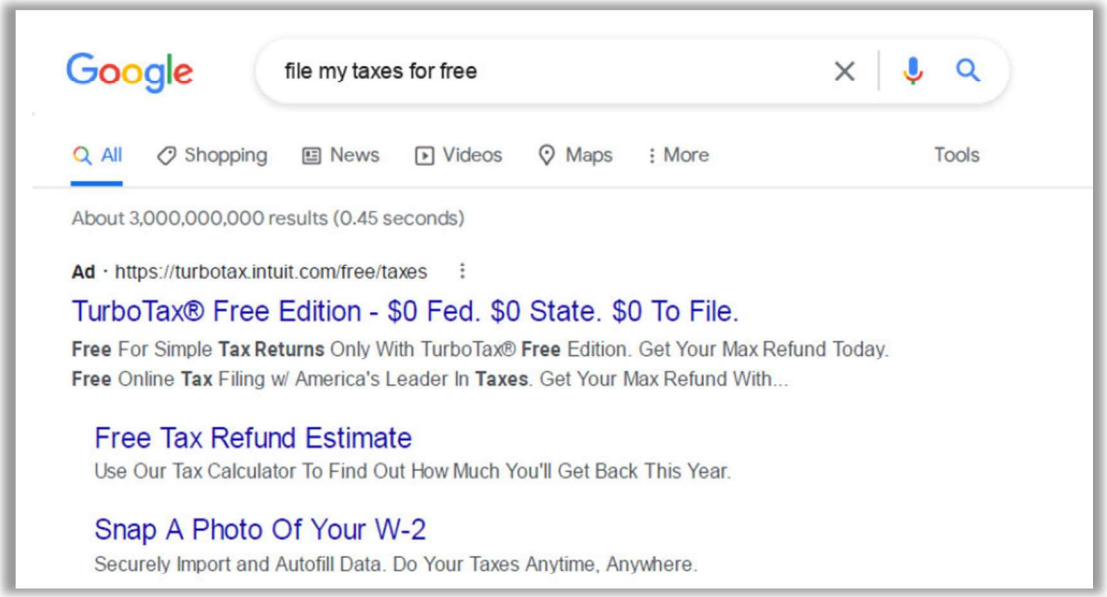
learn more about qualifications. PFF ¶253. Moreover, consumers understood from their experiences that they could click on online advertisements like display ads to get more information. PFF ¶254. None of the display ads stated that TurboTax was free to the viewer or that all TurboTax products were free. PFF ¶260.

A screenshot of GX198, a representative static display ad, is provided below. PFF ¶249.



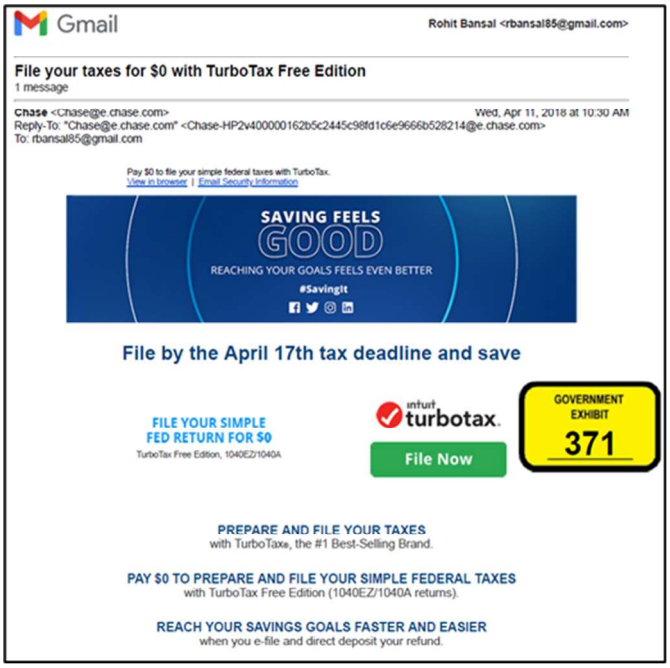
Paid search ads. The challenged search ads—such as those that appeared on Google—likewise conveyed in writing that the free offer was for a specific product and that it had qualifications. PFF ¶¶266-267. Because paid search ads are static, moreover, *see* PFF ¶268, this language was present the entire time consumers viewed such ads. When consumers clicked on a search ad, they were taken to the TurboTax website, often the TurboTax Free Edition landing page, where they could learn more about qualifications. PFF ¶269. None of the search ads stated that TurboTax was free to the viewer or that all TurboTax products were free. PFF ¶273.

A screenshot of one search ad, GX195, is shown below. PFF ¶268.



Email ads. Each challenged email ad conveyed in writing (often multiple times) that only consumers with simple tax returns qualified, and most of the challenged email ads conveyed in writing that the free offer was for a specific product. PFF ¶281. Consumers who clicked an email ad were taken to the TurboTax website to learn more about qualifications. PFF ¶284. None of the email ads stated that TurboTax was free to the viewer or that all TurboTax products were free. PFF ¶288.

A representative email ad is provided below. PFF ¶282.



Radio ads. Finally, the challenged radio ads conveyed that the free offer was for a specific product, that only consumers with simple tax returns qualified, and that consumers could learn more at the TurboTax website. PFF ¶294. None of the radio ads stated that TurboTax was free to the listener or that all TurboTax was free. PFF ¶297.

E. Competitor Advertisements

Like TurboTax, other online tax-preparation companies offer free federal tax-filing products that have eligibility qualifications based on customers' tax complexity. PFF ¶453. For example, H&R Block, TaxAct, and TaxSlayer—which together with TurboTax serve most taxpayers who use online tax-preparation services, PFF ¶482—each provide both (1) a free version of their tax-preparation software that can be used for filing simple personal tax returns and (2) tiers of paid offerings that include additional features for more complicated returns. PFF ¶482.

These competitors advertise their free tax-preparation products using language and disclosures similar to those in TurboTax's free ads. H&R Block, for instance, markets its DIY

"Free Online" product as limited to taxpayers with "simple returns." PFF ¶141. TaxSlayer similarly limits the eligibility for its free online tax-preparation product, "Simply Free," to qualifying "simple tax situations." PFF ¶141. And TaxAct's "Free" online tax-preparation product is billed as being "perfect for simple federal filers." PFF ¶141. A screenshot of the title card of an exemplary TaxSlayer ad is shown below:

PFF ¶457.

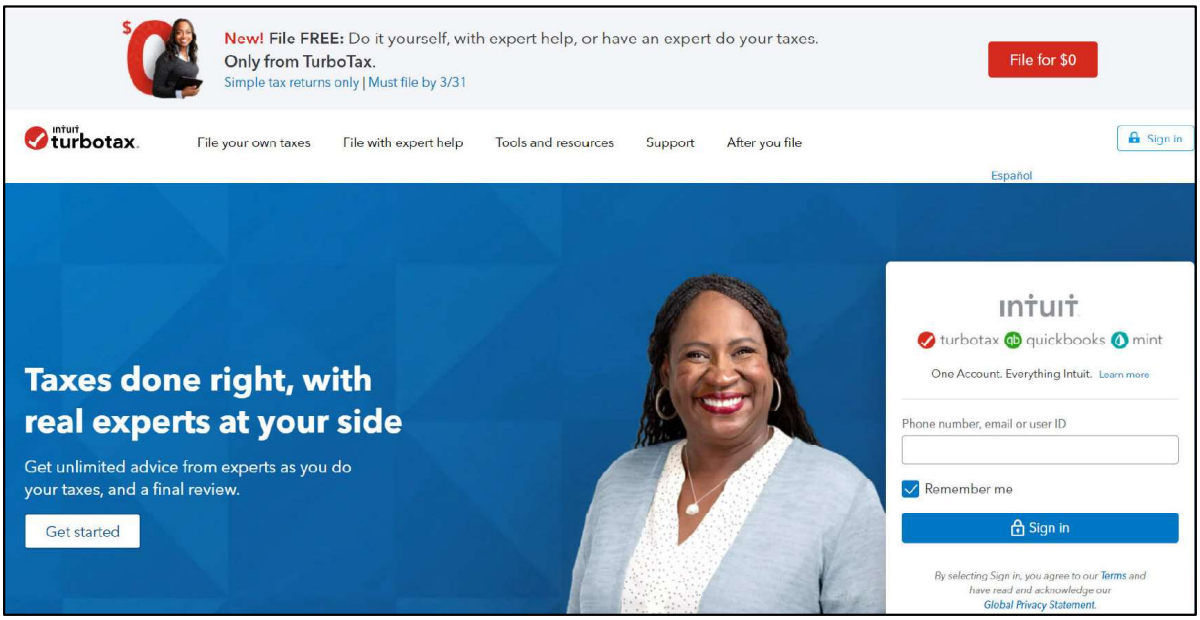
F. The TurboTax Website

1. All consumers who want to use an online TurboTax product must visit the TurboTax website or mobile application. PFF ¶364. The website is the online equivalent of an Intuit brick-and-mortar store, where consumers can learn information about and purchase (or use for free, depending on their tax situation) every TurboTax SKU. *See* PFF ¶364.

Given the importance Intuit places on ensuring that consumers get to the correct SKU as soon as possible (and ideally from the very start), *see supra* p.9, Intuit designed the TurboTax website to provide, in multiple places, clear, unavoidable, and effective disclosures regarding the qualifications for TurboTax Free Edition, PFF ¶¶365-367.

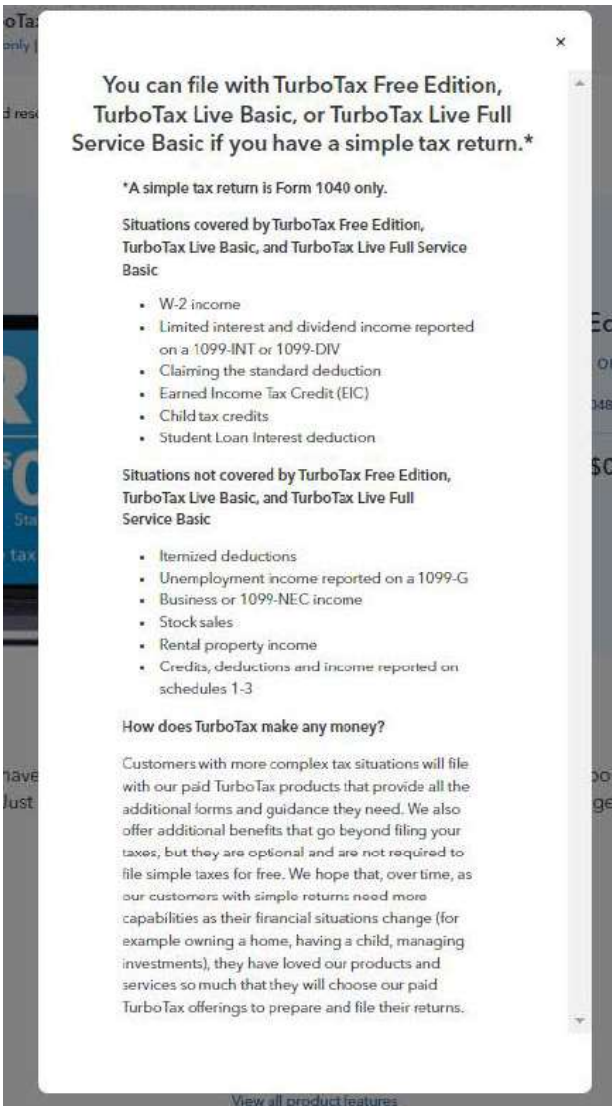
Those disclosures begin on the TurboTax homepage. There, references for free products and services are accompanied by a hyperlinked disclosure, in color-contrasted text, that the offer is for "simple tax returns only." PFF ¶374. Since Tax Year 2019, free promotions have also been accompanied by hyperlinked disclosures, in color-contrasted text, that the offer is for "simple tax returns only." PFF ¶374. Other TurboTax webpages, such as the Free Edition landing page and the Free Edition "[s]ee why it's free" webpage, have long included similar qualifications. PFF ¶¶389-390. Earlier versions of the TurboTax website, from Tax Years 2016 through 2018, also disclosed, in close proximity to Free Edition promotions, that Free Edition covered "simple tax returns," and included a color-contrasted, hyperlinked disclosure stating "[s]ee why it's free." PFF ¶376.

A screenshot of the TurboTax homepage from Tax Year 2021 appears below. PFF ¶377.



When consumers clicked on any of the hyperlinked disclosures on the TurboTax homepage or any other page on the TurboTax website, they were shown a pop-up screen that (as Complaint Counsel recognized) provided consumers with "detailed information about the tax

situations covered by" free TurboTax SKUs. PFF ¶379. A screenshot of the pop-up from Tax Year 2021 appears below. PFF ¶380.



2. When consumers take steps to start preparing their tax return using TurboTax, such as by clicking on the "File for $0" button on the TurboTax homepage, they are directed to the Products & Pricing page. PFF ¶408. All new consumers are shown this page before they can start preparing their taxes with TurboTax. PFF ¶409. The page provides details about each TurboTax product, including the price of each and relevant qualifying language. PFF ¶¶411-415.

The top of the Products & Pricing page includes a "SKU selector" tool, which enables consumers to receive a recommendation for the SKU most likely suited to their tax situation. PFF ¶¶419-420. Consumers operate the SKU selector by clicking all the tiles that apply to their tax situation. PFF ¶¶424-425. Based on the tiles chosen, the selector presents the consumer with the best SKU for his or her tax situation. PFF ¶¶424-425.

Below is a screenshot from the SKU selector for Tax Year 2022:

PFF ¶421.

Only after consumers select a SKU do they begin preparing their taxes by entering personal and financial information. PFF ¶442. If at any point a customer provides information indicating that she does not qualify for the SKU being used, a large screen appears alerting the consumer. PFF ¶444. The screen also offers the consumer the opportunity to switch to the least expensive SKU for which she qualifies. PFF ¶444. In Tax Year 2021, only 14% of TurboTax customers encountered such a screen. PFF ¶447. And those screens were almost always seen quickly: Customers who encounter an upgrade screen typically do so in much less than the 28 minutes that it takes the average user of TurboTax Free Edition to *complete* her return. PFF ¶¶449-450.

G. The Settlement Agreement And Consent Order

On May 4, 2022, Intuit executed a consent order with the attorneys general of all 50 states and the District of Columbia ("Consent Order"). PFF ¶¶805-806. The Consent Order resolved potential claims relating to Intuit's marketing of its free online tax-preparation products. PFF ¶805. Intuit did not (and does not) concede any liability or wrongdoing as part of the order. PFF ¶807. The Consent Order is captured in a June 25, 2022, final judgment and permanent injunction issued by a California state court (in Los Angeles County Superior Court case number 19STCV15644), as well as in various other documents filed with courts and regulators in other states, pursuant to those states' laws. PFF ¶806.

The Consent Order includes multiple injunctive provisions. PFF ¶809. For instance, it prohibits Intuit from running the so-called "Free, Free, Free" video advertisements or any substantially similar ones. PFF ¶810. It also provides that going forward, all ads for TurboTax free products must clearly and conspicuously disclose that there are eligibility requirements and that not all taxpayers qualify. PFF ¶¶812-814. These binding provisions, effective since August 2022, ensure that Intuit's advertising of its free SKUs makes all relevant and necessary disclosures in a clear and conspicuous fashion. PFF ¶¶811-814, 818-819. The Consent Order also includes several compliance-related provisions to ensure that Intuit is adhering to its terms. PFF ¶820.

Since the Consent Order took effect, Intuit has fully complied with it. PFF ¶¶821, 823. For example, Intuit has not run any "Free, Free, Free" video advertisements, nor any other video ads that repeat the word "free." PFF ¶824. Moreover, Intuit has disclaimed any intention to run such ads in the future. PFF ¶824. Intuit has also created a team responsible for ensuring that its marketing and advertising complies with the Consent Order. PFF ¶821. And it has prioritized providing clear and comprehensive training on the Consent Order's provisions to all Intuit

employees in marketing roles or leadership roles, including any new marketing-team members. PFF ¶822.

H. Procedural History

1. Pre-hearing proceedings

The FTC began investigating Intuit's marketing practices in May 2019. PFF ¶1. The commissioners voted to issue an administrative complaint against Intuit on March 28, 2022. PFF ¶9. The complaint raised one count of deceptive advertising under section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a). PFF ¶10.

The FTC also filed a complaint and sought a temporary restraining order and a preliminary injunction in the United States District Court for the Northern District of California. PFF ¶12. After briefing and a hearing, which occurred before Intuit had a chance to conduct any discovery and at which Complaint Counsel presented much of the same evidence introduced in this proceeding, the preliminary-injunction motion was denied. PFF ¶16; *see* PFF ¶18. At the hearing, the court expressed skepticism about Complaint's Counsel's theory of liability. For example, it observed that Free Edition ads "don't say it is free to everybody and nobody thinks it is free to everybody." PFF ¶15. When viewing a particular ad as an example, moreover, the court observed that the disclosures are "right under the word 'free, free, free' or 'zero, zero, zero,' it says 'TurboTax free edition, for simple tax returns only.'" PFF ¶15. Similarly, the court noted that the exemplary ad "tells me that it is limited to simple tax returns," and "says 'TurboTax free edition, for simple tax returns only[.] That's what it is." PFF ¶15.

On August 22, Complaint Counsel moved for summary decision on the administrative complaint. PFF ¶21. The Commission denied that motion on January 31, 2023, stating that Intuit's marketing should be evaluated after a complete factual record was developed at trial.

Op. and Order Denying Summ. Decision at 2 (Jan. 31, 2023). The commissioners also reserved decision on several of Intuit's arguments about the appropriate remedy. *Id.* at 18.

2. The trial

a. Complaint Counsel's case-in-chief

At trial, Complaint Counsel presented three witnesses for its case-in-chief. The first was Diana Shiller, a former H&R Block employee who had previously filed her taxes for free with TurboTax. PFF ¶¶912-913. Though styled as an FTC "investigator," her primary role in this case was to collect public TurboTax ads that were sent to her by others or that she obtained by posing as a TurboTax customer who qualified to file for free (and who, as a result, received emails touting Free Edition). PFF ¶¶198, 913. Her testimony at trial was limited to (1) serving as a vehicle to re-show advertisements the Court had previously seen and (2) attempting to authenticate consumer complaints that needed no authentication because they were already in evidence. PFF ¶914.

On cross-examination, Ms. Shiller admitted to not reviewing most of the complaints that her sworn declaration had represented were "about 'free' TurboTax." PFF ¶917. She also admitted that she did not even seek to verify most of the complaints at issue. PFF ¶918. And she repeatedly acknowledged that the TurboTax ads discussed in her declaration consistently included both written and voiceover disclosures identifying the specific TurboTax product or offer that was being advertised (such as TurboTax Free Edition), disclosing that the product or offer was available only for consumers with simple tax returns, and instructing consumers to visit the TurboTax website for more information. PFF ¶306. As just one example, Ms. Shiller read aloud to the Court a 20-second video ad that ran in Tax Year 2021, an ad that contained a voiceover stating both that "anyone with a simple tax return can get help from an expert for free"

and that "[f]or a limited time TurboTax is free for simple returns no matter how you file." PFF ¶306.

Ms. Shiller's cross-examination also included her characterizing a search result for the IRS Free File program as not deceptive. In particular, she was shown a screenshot containing online search results for "free file taxes ONLINE." PFF ¶278. One of the results listed on that screenshot was a snippet of an IRS website that said "[w]elcome to Free File, where you can prepare and file your federal individual income tax return for free." PFF ¶278. The IRS Free File program is a program that allows taxpayers with adjusted gross income below a certain level to file their taxes for free. PFF ¶59. Ms. Shiller was asked if the snippet just quoted, which provided no information about the qualifications to participate in the program, was deceptive, to which she responded "I don't know." PFF ¶278. She then suggested the snippet may not have been deceptive because "it says you can file your taxes for free by going to the website, and I do believe taxpayers can file their taxes for free going through the Free File Program." PFF ¶278. When Ms. Shiller was reminded that "taxpayers can file for free going to the TurboTax website," she noted that was true for only "[s]ome taxpayers," but then acknowledged that "only some taxpayers can file for free if they go to IRS.gov," and that the snippet did not include that limitation. PFF ¶278.

Complaint Counsel next called Megan Baburek, an FTC data analyst who summarized dissemination data for online and television advertising for TurboTax Free Edition. PFF ¶¶919-920. Like Ms. Shiller, Ms. Baburek's testimony was limited to a technical issue: how she summarized the dissemination data. PFF ¶920. She testified that the challenged ads ran frequently—an undisputed fact—but she admitted on cross-examination that she did not have personal knowledge of how TurboTax ads were placed. PFF ¶¶922-923. She also admitted that

she was unaware of the text that would be included in the version of the ads viewed by consumers. PFF ¶924. This text would frequently contain the terms of the free offer being advertised. PFF ¶924. Finally, Ms. Baburek acknowledged that TurboTax ads included qualifications limiting free offers and products to "simple tax returns only." PFF ¶307.

The third and final witness of Complaint Counsel's case-in-chief was Nathan Novemsky. He testified about his March 2022 study purporting to show that TurboTax advertising or the TurboTax website has caused some consumers who do not qualify for TurboTax Free Edition to erroneously believe that they do. PFF ¶528. On cross-examination, Professor Novemsky admitted that he did not show any of the participants in his survey either any of the challenged ads or the TurboTax website. PFF ¶534. And he did not do so even though he himself went to the TurboTax website to determine the qualifications for Free Edition when designing his survey. PFF ¶534. He also admitted that, because he did not show his survey participants any of the challenged ads or the TurboTax website, the participants would have had to answer the questions based on memory—even though "[m]emory is not perfect," and the participants "could have forgotten anything." PFF ¶536. Professor Novemsky acknowledged as well that that he did not use a test-and-control experiment in drawing his conclusion that TurboTax's marketing had caused consumer misimpression, PFF ¶533, even though he had testified in a prior false-advertising case that drawing any reliable causal inference is "impossible" without a test-and-control design. PFF ¶532. And Professor Novemsky testified that the results from his main survey group somehow showed that Intuit had deceived "tens of millions" of people into using TurboTax or visiting the TurboTax website, even though *none* of the respondents in that group had used TurboTax in the prior three years and it was possible that none of them had *ever* used TurboTax. PFF ¶¶550, 608, 615.

Complaint Counsel presented no evidence in their case-in-chief to support their *express*-claims theory, presented no extrinsic evidence to support their theory of *implied* claims, and offered only Mr. Novemsky's perception study as proof of deception. No evidence at all was offered either on materiality or on the efficacy of or need for the cease-and-desist order Complaint Counsel seek.

b. Intuit's case-in-chief

Intuit offered live testimony from six witnesses—three current or former Intuit executives and three experts. Intuit also offered testimony of a fourth expert through trial deposition. The fact witnesses covered a wide variety of topics, including the values of the company, the strategy and goals behind Intuit's free offers, the metrics Intuit uses to determine whether those goals are being met, the rigorous process any advertisement must go through before the ad gets run, the absence of data suggesting deception (and the existence of data suggesting no deception), the overall incentives that guide Intuit's advertising and the imperative that it not deceive consumers, and Intuit's compliance with the Consent Order. The four experts, meanwhile, presented scientific evidence explaining how Complaint Counsel's theories of deception were inconsistent with the evidence. They also touched on topics—such as the understandings and cognitive approaches of reasonable consumers—that helped contextualize Complaint Counsel's theory of deception and the harmful consequences that would result from Complaint Counsel's proposed remedy.

Intuit's first witness was Greg Johnson, an Air Force veteran who from 2018 to 2022 served as General Manager of Intuit's Consumer Group, which is "akin to being the CEO of the TurboTax business." PFF ¶¶848, 850. Mr. Johnson testified that Intuit's values, which include "integrity without compromise," drive the company's culture and decisionmaking, including regarding the challenged ads. PFF ¶¶33-36, 850. He also explained that Intuit offers free tax-

preparation services in the hope that customers with simple tax returns will file for free with TurboTax and have a positive experience doing so, and that those customers will choose to use one of TurboTax's paid offerings if their taxes become more complex in the future. PFF ¶83. Because of this strategic focus on long-term relationships with customers, Intuit places particular importance on metrics that measure whether consumers' experience with TurboTax meets their expectations. PFF ¶652. And consistent with wanting to ensure positive customer experiences, Mr. Johnson testified that Intuit designed the TurboTax website "to make sure that [consumers] are aware of the qualifications and to make sure we … get consumers in the right products." PFF ¶413. Finally, Mr. Johnson detailed how a deceptive marketing campaign like the one alleged by Complaint Counsel would undermine Intuit's business strategy, including the retention of customers year after year. PFF ¶¶94-96.

Cathleen Ryan, the current Senior Vice President of Marketing at Intuit who oversees TurboTax's advertising, testified next. PFF ¶857. She walked the Court through the various channels in which Intuit advertises its TurboTax online products, and explained that Intuit targets its advertising for TurboTax Free Edition at individuals likely to have simple tax returns. PFF ¶¶179-186, 860. Ms. Ryan also explained that Intuit uses the phrase "simple tax returns" to describe the products' eligibility because it aligns with how the IRS and Intuit's competitors use it. PFF ¶¶122-123, 141. She testified as well that the ads Intuit has run since the Consent Order comply with the order's provisions, and that Intuit fully intends to abide by those provisions going forward. PFF ¶¶823, 825, 864. And she emphasized that Intuit would "absolutely not" deliberately air any deceptive or misleading advertisement. PFF ¶169.

Intuit's final fact witness was Jack Rubin, an Intuit Vice President in the Consumer Group. PFF ¶866. Mr. Rubin explained that Intuit advertises its free products to qualifying

consumers so that they will file for free; that Intuit would not have run any advertisements that it believed were deceptive; that engaging in the deception alleged would have been disastrous for TurboTax's business, threatening its very existence; and that Intuit has taken several steps to ensure its compliance with the Consent Order moving forward. PFF ¶¶95, 134, 162, 174, 191, 647, 769, 821-822, 870, 872, 875. He also testified about how Intuit has designed the TurboTax website to ensure that consumers are made aware as soon as possible of terms of any free offers, and the importance of getting consumers to the right SKU as early as possible (and ideally from the outset). PFF ¶¶73, 365, 413, 871-872.

Intuit also offered testimony from four experts. The first was Professor John Hauser, the Kirin Professor of Marketing at the MIT Sloan School of Management. PFF ¶878. He explained that a double-blind, randomized test-control experiment he conducted (the Disclosure Efficacy Survey) provided strong evidence that the challenged ads were not deceptive. PFF ¶¶722-745, 882. Contrary to what would be expected if the ads were deceptive, he testified, the survey showed that incorporating 13 changes sought by Complaint Counsel to TurboTax Free Edition advertising did not affect the likelihood that a consumer would use the product. PFF ¶¶722-745, 882. Dr. Hauser also explained how an internal copy test Intuit conducted in Tax Year 2020 did not indicate that Intuit's ads were deceptive. PFF ¶¶694-696, 700-701, 883. He also opined that numerous flaws in Professor Novemsky's survey rendered it scientifically invalid and unreliable. PFF ¶¶530-531, 535, 539-540, 545-622, 884.

Peter Golder, a professor of marketing at Dartmouth College's Tuck School of Business was Intuit's next expert witness. PFF ¶886. He testified about reasonable consumers in the tax-preparation industry and the "high-involvement" buying process that consumers engage in when selecting a tax-preparation product. PFF ¶¶502-506, 510-527, 891. Professor Golder explained

that reasonable consumers understand that "free" offers often come with qualifications or limitations, even if those limitations are not expressly stated, and thus that reasonable consumers understood that free TurboTax offers were qualified, even if they did not see the qualifications. PFF ¶¶487, 493, 890.

Professor Golder also testified about two analyses he performed comparing Intuit to 18 "benchmark" companies across two different dimensions. The first dimension was how well Intuit's and the benchmark companies' television and social-media advertisements satisfied six components of the FTC's ".com Disclosures Guidelines" for online advertising disclosure; Professor Golder found that Intuit's disclosures were comparable or superior to those of the benchmark companies. PFF ¶¶229, 232, 234-241, 258-259, 894. The second dimension was Intuit's and the benchmark companies' complaint rate on the Better Business Bureau ("BBB") website; Professor Golder found that Intuit's rate was significantly lower. PFF ¶¶638-640, 896. Finally, Professor Golder explained how the disclosures Complaint Counsel demand be included in Intuit's ads would lead to less consumer engagement with the ads (and the relevant qualifications), decreased consumer awareness of free tax-filing options, and fewer consumers who qualify to file for free actually doing so, i.e., more consumers unnecessarily paying to file. PFF ¶¶830, 834-835, 838-840, 842-845, 847.

Intuit's next expert was Bruce Deal, an economist who testified that structural features of the tax-preparation market, such as the stable customer base and repeat interactions between customers and providers, provide a strong disincentive for Intuit to pursue a business strategy based on deceiving customers. PFF ¶¶41, 44-46, 51-52, 88, 95, 898, 901. He also testified that Intuit's customer data for Tax Year 2021 showed that only a miniscule percentage of Intuit's

customer base could possibly have been deceived in the manner Complaint Counsel allege. PFF ¶¶663-682, 899, 902.

Lastly, Rebecca Kirk Fair, an economist and expert in survey design and evaluation, testified via trial deposition about a survey she conducted showing that reasonable consumers were aware of tax-filing alternatives, knew how to locate them, and relied on factors other than price (including brand name, product quality, and their tax situation) in choosing a tax-preparation product. PFF ¶¶758-759, 904. She also testified that her survey demonstrated that reasonable consumers were not likely deceived by the challenged ads, because even after receiving more information about free tax-filing alternatives, the same proportion of respondents chose to start filing with TurboTax. PFF ¶¶747-757, 909.

c. Complaint Counsel's rebuttal case

In rebuttal, Complaint Counsel called two expert witnesses, each of whom responded to particular experts of Intuit's.

The first rebuttal witness was Erez Yoeli, who responded to Mr. Deal's testimony. PFF ¶929. Mr. Yoeli's direct testimony largely consisted of offering hypotheticals about Mr. Deal's analysis. PFF ¶930. On cross-examination, he conceded that consumers are unlikely to use TurboTax again if they believe they have been deceived. PFF ¶930. He also admitted that he did not take independent steps to understand the underlying data relied on by Mr. Deal before forming his opinions, and that he had not reviewed many of the materials that Mr. Deal had relied on. PFF ¶930. Finally, Mr. Yoeli conceded that the rate of complaints made against TurboTax was so low that he could not "keep track of the zeros." PFF ¶645.

Complaint Counsel concluded with Professor Novemsky, who responded to three of Intuit's expert witnesses. PFF ¶927. On cross-examination, Professor Novemsky conceded that the metrics Professor Golder used for his ad benchmarking analysis were based on the FTC's

own .com Disclosure Guidelines. PFF ¶927. Professor Novemsky also agreed with Professor Golder that lengthy disclosures in short-form television and social-media advertisements are impractical and counterproductive. PFF ¶523. And although Professor Novemsky criticized Dr. Hauser's survey as flawed because it could not eliminate the possibility that both the original and revised ads were equally deceptive, he admitted that his survey did not test consumer understanding of any of the ads or disclosures in Dr. Hauser's survey. PFF ¶928. Instead, Professor Novemsky testified, his survey measured the impact of "[e]verything that was in the marketplace up until the time [of the] survey"—not just the impact of TurboTax marketing. PFF ¶538. Professor Novemsky did not control for "everything."

ARGUMENT

Complaint Counsel failed to meet their burden of proving that all (or any) of the challenged advertisements was deceptive. Moreover, the record is crystal clear that no cease-and-desist order is warranted and certainly not the overbroad and unprecedented order Complaint Counsel seek.

"A practice is deceptive in violation of § 5(a) [of the FTC Act] only 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." *FTC v. DirecTV, Inc.*, 2018 WL 3911196, at *5 (N.D. Cal. Aug. 16, 2018) (quotation marks omitted). Complaint Counsel have the burden to prove each element by a "preponderance of the evidence." *Telebrands Corp.*, 140 F.T.C. 278, 426 (2005). Actionable representations can be made through either express or implied claims. *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016). A claim is "express" when the ad "directly state[s] the representation at issue." *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984). Implied claims are ones that, although not

directly stated, are nevertheless conveyed by the "overall net impression" of an advertisement. *Fanning*, 821 F.3d at 171.

Complaint Counsel do not discharge that burden by sharing with the Court their opinion that the challenged ads are deceptive. Instead, to prevail by a "preponderance of the evidence," Complaint Counsel needed to come forward with competent evidence. *Telebrands*, 140 F.T.C. at 425-426. If in fact the ads *were* deceptive, evidence of that deception should not have been difficult to come by. The challenged ads ran frequently, across multiple formats, for many years. And yet it is largely undisputed that no such evidence of deception exists. Instead, Complaint Counsel's case focuses on excuses for why there is no evidence of deception. Not only are these excuses not persuasive, but they also do not suffice to carry Complaint Counsel's burden.

Ultimately, Complaint Counsel failed to prove each element, offering only the (facially non-deceptive) ads themselves, a fatally flawed survey, and a miniscule number of complaints. Complaint Counsel also failed to prove that prospective relief is warranted. And although Intuit had no burden here, it offered a plethora of evidence—including unrebutted testimony from Intuit executives and reliable expert and survey evidence—that the challenged ads did not make any false or misleading claim, that in fact no significant minority of reasonable consumers was deceived, and that the Consent Order eliminates any sound basis for prospective relief here.

Finally, even apart from Complaint Counsel's failures of proof, a host of threshold legal issues—including mootness, the statute of limitations, laches, and a variety of constitutional infirmities in these proceedings—each independently bars relief.

I. COMPLAINT COUNSEL FAILED TO MEET THEIR BURDEN TO PROVE THAT THE CHALLENGED ADS CONVEYED ANY OF THE CLAIMS THEY ALLEGE

Complaint Counsel have not established that any of the challenged ads expressly or implicitly conveyed any of the deceptive claims Complaint Counsel allege.

Complaint Counsel have focused almost exclusively on their alleged claims were conveyed by challenged *video* ads, all but ignoring the 108 challenged display ads, 17 challenged paid-search ads, 24 challenged email ads, and 4 challenged radio ads. PFF ¶207. In other words, Complaint Counsel did not address how *most* of the challenged ads could have conveyed the claims they allege. That omission was particularly notable given that the Commission's order denying summary decision—which acknowledged (at 8) that it too "focused heavily on [Intuit's] video ads"—specifically called for "the analysis of [the] other, equally important ads [to] be further developed during the course of trial." Complaint Counsel wholly failed to "develop[]" the analysis of the challenged non-video ads "during the course of trial," offering next to no analysis of those "equally important ads," *id.*

In any event, the evidence does not satisfy Complaint Counsel's burden, *see* 16 C.F.R. §3.43(a), to prove that *any of* the challenged ads conveyed *any* of the alleged claims, either expressly or implicitly. And although Intuit has no burden to prove the absence of the alleged claims, *see id*., the evidence confirms that the ads did *not* convey any of them. Instead, the ads conveyed the critical information: that the free offers being advertised were qualified, those qualifications were tied to the complexity of your tax return, additional information was available on the TurboTax website, and the free offers were limited to the specific product named.

A. The Challenged Ads Made None Of The Express Claims Complaint Counsel Allege

Complaint Counsel have not proven that any challenged ad expressly stated any of the claims Complaint Counsel allege. In fact, it is not even close. Again, "[e]xpress claims are ones that directly state the representation at issue." *Thompson*, 104 F.T.C. at 788. There is *no* evidence that any challenged ad directly stated that "TurboTax is free," that "TurboTax is free

for me," or any of the other express claims Complaint Counsel have alleged. As Complaint Counsel's first witness, FTC investigator Diana Shiller, confirmed (expressly, as it happens), the challenged ads did *not* "say all TurboTax products are free" or that "everyone can file for free using TurboTax Free Edition." PFF ¶306.

By failing to present any evidence that the challenged ads expressly claimed what Complaint Counsel allege, and instead conceding (as discussed below, *see* p.39) that the ads did *not* expressly make those claims, Complaint Counsel in effect abandoned their express-claim theory. Yet Complaint Counsel still insisted on the last day of trial that this "is an express claim case." PFF ¶206. The trial record shows otherwise, but to the extent Complaint Counsel continue to push this theory, it clearly fails.

The only "evidence" Complaint Counsel have for their express-claim theory is the repetition of the word "free" in some of the challenged video ads, which Complaint Counsel say constitutes an express claim that *all* consumers viewing those ads can necessarily file their taxes for free using TurboTax. PFF ¶219. That is borderline frivolous. As an initial matter, this repetition is missing from the vast majority (more than two-thirds) of the challenged ads, including most challenged display ads and all paid search and email ads. PFF ¶220. That aside, the word "free" by itself, even when repeated, is not a claim about TurboTax at all. PFF ¶221. The Commission's designee admitted this, explaining in his deposition that the word "free" is not an express claim about *anything* because its meaning "depends [on] whether there is any other context for the person that is hearing" it. PFF ¶221. The "other context" provided by the challenged ads (PFF ¶221) was that a specific TurboTax SKU was free, that the SKU was available for simple tax returns only, and that further details were available on the TurboTax website. PFF ¶222. Indeed, the challenged ads did not state *anything* about TurboTax without

supplying that context. PFF ¶223. As Ms. Shiller testified, for instance, the challenged "Free, Free, Free" ads first made viewers aware that the ads were for TurboTax only when a voiceover stated "TurboTax *Free Edition* is free" and invited viewers to "see details at TurboTax.com." PFF ¶223 (emphasis added). Intuit copy testing confirmed that consumers did not associate the "Free, Free, Free" ads with TurboTax until Free Edition was mentioned. PFF ¶224.

Complaint Counsel's failure of proof is reinforced by their concessions before trial. For example, they conceded that "Intuit's Free Edition advertisements do not expressly contain the phrase 'all consumers can file their taxes for free with TurboTax.'" PFF ¶303. They were also unable to identify a single "advertisement saying TurboTax is free." PFF ¶305. Even Appendix B to their pretrial brief, which lists the express claims purportedly made by each challenged advertisement, identifies no ad expressly stating that "TurboTax is free" or any of the other claims Complaint Counsel have alleged. PFF ¶304. The Court saw no shortage of ads at trial, so it no doubt saw for itself that *none* of the challenged ads expressly made any of the claims Complaint Counsel allege.

Because Complaint Counsel failed to offer evidence that any challenged ad directly stated any of the claims Complaint Counsel allege were conveyed, and in fact Complaint Counsel conceded the opposite, their express-claim theory must be rejected.

B. The Challenged Ads Did Not Imply Any Of The Claims Complaint Counsel Allege

Complaint Counsel also have not proven that any of the challenged ads implied that "TurboTax is free," that "TurboTax is free *for them*," or any other claim suggesting that all TurboTax products are free or that any TurboTax product was free to consumers not eligible to use it. *See* PFF ¶206.

"An advertisement will only be found to contain implied claims where the language or depictions are clear enough to permit [a court] to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances." *Telebrands*, 140 F.T.C. at 429 (quotation marks omitted). Accordingly, "if, based on initial review of the evidence from the advertisement itself, [the court] cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, [the court] will not find the ad to have made the claim unless extrinsic evidence allows [it] to conclude that such a reading of the ad is reasonable." *Id*. Applying these standards, the challenged ads make no deceptive claim implicitly. To the contrary, "the interaction of all the constituent elements" in the challenged ads, *id.*, makes plain that Intuit's free offers are not unqualified.

1. The challenged ads conveyed that there were qualifications to use the SKU advertised

Complaint Counsel's implied-claim theory impermissibly relies on "disputatious dissection" of the ads, *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001), rather than on (as the law requires) the "overall net impression" left by the ads, *Fanning*, 821 F.3d at 171. In discerning "implied claims" from an ad's "net impression," courts must consider "the entire document," including "the juxtaposition of various phrases in the document." *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 & n.7 (1984), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984). In contravention of that rule, Complaint Counsel ignore "various phrases" that are clear and conspicuous in every ad. For example, when asked to confirm that the phrase "'see if you qualify at turbotax.com' was included" in one ad, Complaint Counsel's expert replied "If you say so" and "I don't recall." PFF ¶208. But it is not Intuit's counsel that "say so." The challenged video ads indisputably included that exact phrase (or the

similar "see details") and more, which made clear that the free product or offer being advertised was qualified.

a. Contrary to Complaint Counsel's assertion that the challenged ads implied that all TurboTax products were free (or some variation on that claim), all of the challenged video, display, search, email, and radio ads contained qualifications in writing, voiceover, or both showing that the offer being advertised was *not* for all TurboTax or for all consumers. *See* PFF ¶¶215-218, 248-251, 266-268, 281, 294. In fact, as elaborated in the paragraphs that follow, many of the ads (including all of the video ads) had multiple qualifications, such as stating (1) that the ad was for a specific TurboTax SKU, (2) that consumers' ability to use the SKU was qualified, *and* (3) that there was additional information about the SKU and its qualifications on the TurboTax website. PFF ¶¶244, 262, 275, 290, 299. Taken together (as they must be), the disclosures left an unmistakable impression that TurboTax was advertising a free product with specific qualifications.

First, most of the challenged ads clearly conveyed that they were for a specific, identified product or offer—TurboTax Free Edition, Absolute Zero, or TurboTax Live Basic—not for every product in the TurboTax product line (or for TurboTax as a whole in any other sense). *See* PFF ¶¶215, 250, 266, 281-282, 294. Ms. Shiller conceded this at trial. PFF ¶317. The ads' inclusion of the product name alone was sufficient to prevent reasonable consumers from misunderstanding that all TurboTax products were free. *See* PFF ¶319.

Second, the challenged ads included language conveying that not all consumers would qualify for the free TurboTax product. Most of the ads, for example, specified that the free offer was for "simple tax returns only" (and/or, before the 2017 change to the tax laws, "Forms 1040EZ/1040A"). PFF ¶¶215-127, 248-249, 252, 267-268, 281-282, 294. Indeed, as the Court

heard during Ms. Baburek's testimony, it was impossible to ignore those disclosures, which were the first words spoken in many of the ads. *See* PFF ¶252. And while Complaint Counsel have argued that reasonable consumers did not understand the precise meaning of "simple tax returns," *see* PFF ¶130, that is both wrong, *see infra* pp.65-66, and irrelevant. It is irrelevant because even if some reasonable consumers were unsure precisely what counted as a "simple tax return," the qualification that the advertised product was for "simple tax returns only" unmistakably conveyed that there was *some* limitation, i.e., unmistakably did *not* convey that "TurboTax is free for everyone," or any of the other similar claims Complaint Counsel have alleged. Given the ads' clear explication that not all tax returns were covered by the free SKU being advertised, no reasonable consumer would take away from any of the challenged ads that Intuit's offer was unqualified. As Professor Golder put it, both "simple" and "only" *mean* (at the very least) not "all." PFF ¶135.

Complaint Counsel have also carped that the challenged ads' disclosures did not fully detail the qualifications of Intuit's free offers. PFF ¶137. But courts routinely approve disclosures like Intuit's (in fact, disclosures far inferior). One court, for example, held that a disclosure that a fast-food promotion was available "[a]t participating locations for a limited time" and that "[p]rices may vary" was "consistent with 'the norm of reasonable business practice'" in television advertising and sufficient to put reasonable consumers on notice of the promotion's restrictions, even though the disclosure did not specify the participating locations, the limited time, or the range of prices. *Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617, at *2 (D.N.J. Apr. 7, 2020); *see also DirecTV*, 2018 WL 3911196, at *15 (reasonable consumers "understand the limitations of how information is presented in a" space-constrained ad for a complex product like tax-preparation software). Another court likewise approved a disclosure

that a particular price applied "at participating stores," because that phrase told consumers "that not *all* franchises may follow the advertised price," even though it did not specify *which* franchises did so. *Little Caesars Enterprises, Inc. v. Smith*, 895 F.Supp.884, 888, 899 (E.D. Mich. 1995) (emphasis added). Just so here: The phrase "simple tax returns only" conveyed that not *all* tax returns were covered.

Finally, many of the challenged ads—including all of the challenged video ads—conveyed that consumers could find more information about the qualifications for free TurboTax products or offers atTurboTax.com, expressly inviting consumers to "see if you qualify" or "see details" at the TurboTax website. PFF ¶¶215, 218, 294. And most of the ads that did not expressly refer to the website were themselves hyperlinks that took consumers directly there. PFF ¶¶253, 269, 284. That disclosure, or the link to the website, served two purposes. The "see if you qualify" language "presents the existence of the disclosure" by "clearly" informing consumers "that there will be some restrictions," and that not every taxpayer will qualify for the free offer. PFF ¶324. That prevented the challenged ad from implying that all TurboTax products were free or that TurboTax was necessarily free for all consumers. And by directing consumers to the TurboTax website, the ads incorporated the information on the website. PFF ¶¶254, 285, 370. That detailed information did not imply any of the claims that Complaint Counsel allege. *See supra* §H; *infra* Part II.E.

b. Complaint Counsel offered *no* evidence that the disclosure language could not be seen (or heard) by reasonable consumers. PFF ¶¶230-231, 255-256, 271, 286, 295. To the contrary, all of these qualifications were sufficiently "legible" (or audible) to ensure that consumers would notice them, *FTC Policy Statement on Deception*, 103 F.T.C. at 180. PFF ¶¶232, 257, 272, 287, 296. And the evidence Complaint Counsel did offer only underscores the

qualifications' sufficiency: Complaint Counsel's witnesses repeatedly acknowledged that the challenged ads contained visible and/or audible qualifying language, including a specific product name; that the product was for simple tax returns only; and/or that consumers could see if they qualified at TurboTax.com. *See* PFF ¶¶223, 233, 306-307, 317. In fact, when the Court properly observed that the challenged ads contained prominent qualifying language like "simple returns only," PFF ¶208, Complaint Counsel agreed, stating that "there is a ['simple []tax returns only'" qualifier in "most, if not all" of the challenged ads, PFF ¶308. To the extent Complaint Counsel nonetheless maintain that the qualifications in the challenged ads were not visible, they offered no evidence to support that view, and thus have failed to carry their burden.

Intuit, meanwhile (though having no burden, as noted), presented substantial evidence that the qualifying language in the challenged ads was sufficiently prominent to be seen and heard by reasonable consumers. For example, Professor Golder compared Intuit's video and social-media ads to the ads of 18 benchmark companies across four industries, using seven metrics drawn from the FTC's ".com Disclosures" guidelines on "How to Make Effective Disclosures in Digital Advertising": placement, height, color, duration, repetition, proximity in time to the claim being qualified, and the presence or absence of distracting factors. PFF ¶¶234-236, 258. These metrics, in addition to coming from the FTC's own guidance, responded directly to Complaint Counsel's criticisms of the ads and related to the relief sought in this proceeding. *See* PFF ¶235. On every metric, TurboTax television ads were statistically comparable to the benchmark companies' ads or better. PFF ¶¶237. Indeed, for two metrics—height and duration—the TurboTax ads' disclosures were superior. PFF ¶237. TurboTax social-media ads were likewise in line with benchmark companies' ads. PFF ¶259. Based on that analysis, Professor Golder concluded that the qualifications in Intuit's ads were (1) in line with

FTC guidelines and (2) presented in the form and manner that consumers expect. PFF ¶¶238, 259. Because Complaint Counsel did not rebut that evidence for either the television or social media ads—Professor Novemsky *scorned* Professor Golder's analysis but could not and did not *dispute* it, PFF ¶927—it establishes that the qualifications in the challenged ads were sufficiently conspicuous to be noticed by reasonable consumers.

Professor Golder's benchmarking analysis also belies the unsupported assertion in the Commission's summary-decision order (at 11-12) that Intuit's ads performed poorly on the metrics in the FTC's guidelines. Even Professor Novemsky made no similar assertion, instead arguing that compliance with the FTC's guidelines does not *necessarily* mean an ad is not deceptive. PFF ¶927. That opinion, of course, does not help Complaint Counsel, as it is their burden to *prove* deception, not show merely that an ad was "not necessarily" not deceptive. Moreover, the qualifying language in the challenged ads meets or exceeds the standards established by case law, further undermining the Commission's assertion. For example, disclosures have been held adequate even when the language appeared only "in the closing seconds of the commercial," *Estrella-Rosales*, 2020 WL 1685617, at *2, or was "smaller than most of the text in the advertisement," *DirecTV*, 2018 WL 3911196, at *8.

Lastly, it bears emphasis that just the *existence* of noticeable qualifications—regardless of whether consumers read or understood them (although they did, *see infra* pp.65-66)—put reasonable consumers on notice that the offer was qualified. PFF ¶¶239, 314. That alone is enough to decide this case, because it means consumers viewing Intuit's ads could not reasonably have formed the net impression from the ads that they necessarily could file for free using TurboTax regardless of their filing circumstances, and would need to go to the TurboTax website if they wanted additional details.

2. Intuit never intended to imply that all TurboTax products are free or that any given TurboTax product was free for those not eligible

Intuit's "intent" not to imply to consumers who had more complicated tax returns that they could file for free with TurboTax "is powerful evidence" of the claim that "in fact was conveyed to consumers." *Telebrands*, 140 F.T.C. at 304. The unrebutted evidence of that intent further undermines Complaint Counsel's assertion that the challenged ads implied any of the claims allegedly conveyed.

Every Intuit executive (current or former) who testified at trial explained that Intuit's intent in running the challenged ads was to convey that the free TurboTax product or offer was available for qualifying consumers only. PFF ¶¶171, 852, 860, 870. For instance, Ms. Ryan, Intuit's Senior Vice President of Marketing responsible for overseeing the development and distribution of the challenged ads, explained that Intuit developed the ads to target consumers who qualified. PFF ¶¶192-198, 857. She further explained that the claim Intuit intended to convey to those consumers was that TurboTax offered a free product that was available to qualifying consumers. PFF ¶171.

This credible testimony was reinforced by what Intuit was doing and saying *outside* the litigation context, as shown in countless normal-course documents. For example, Intuit required the ad agencies that developed the ads to include the language "TurboTax Free Edition is for simple U.S. returns only" and "See if you qualify at turbotax.com" in television ads. PFF ¶173. Intuit also directed the ad agencies to [redacted] in email ads. PFF ¶173. And Intuit told the agencies that the [redacted]. PFF ¶172.

Intuit's efforts to target its free TurboTax ads at qualifying consumers, and to show other consumers ads for the product right for their tax situation, further undermines any intent to communicate a deceptive message. Ms. Ryan, for example, described Intuit's efforts to ensure that its advertisements would "be relevant" to their audience so that "people … get started in the [TurboTax] product that's right for them." PFF ¶190. And she described Intuit's use of "exclusionary targeting," which Intuit uses to avoid showing free ads to those who are unlikely to qualify. PFF ¶197. Mr. Rubin, meanwhile, explained that Intuit designed its website using "search engine optimization" techniques to ensure that when consumers use search engines to find tax-preparation solutions for their particular circumstances, the right TurboTax SKU for the consumer's tax situation will appear near the top of the organic search results. PFF ¶¶199-202. For instance, if a consumer searches for "TurboTax sold new investments," the consumer would "see content for TurboTax Premier appearing in those search results." PFF ¶201. Free Edition, by contrast, would not feature highly in these search results because selling investments "doesn't fit on a simple tax return." PFF ¶201. Relatedly, Mr. Rubin explained that Intuit also uses search-engine optimization techniques to ensure that specific webpages enumerating detailed information about which tax situations qualify for free offers appear prominently in search results for consumers who used search terms that suggested that they were looking for free tax preparation options. PFF ¶405.

Ms. Ryan and every other Intuit executive to take the stand also stated unequivocally (and without contradiction) that Intuit would have immediately stopped running the ads if it believed it was deceiving consumers in the manner alleged by Complaint Counsel (or otherwise). PFF ¶174. Ms. Ryan testified that if anyone at Intuit believed an ad was misleading, Intuit "would immediately address it" and would "[a]bsolutely not" run the ad. PFF ¶¶168-169. Mr.

Johnson similarly testified that if he believed a TurboTax ad was misleading consumers, "we would have stopped the ad." PFF ¶174. And Mr. Rubin testified that Intuit does "a lot of work to be clear with [its] customers" and "wouldn't run" any ad it had reason to believe was deceptive. PFF ¶¶167, 169. Indeed, as explained further below, *see* Part IV.C, Intuit has *always* been, and remains, committed to clarity in its free (and other) advertising. *See, e.g.*, PFF ¶¶353-363.

This commitment to clarity—and the Intuit business interests that reinforce it—highlight that this case differs from virtually all other deceptive-advertising cases, which target companies seeking to "profit by deceiving their customers," *Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Alvaro M. Bedoya Regarding the Issuance of a Notice of Penalty Offenses on Substantiation of Product Claims* (Mar. 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/rks_substantiation_pno_statement_lk_ab_final.pdf. Here, the unrebutted evidence establishes that the deception alleged by Complaint Counsel would have *hurt*, not helped, Intuit's bottom line. As Mr. Rubin testified, "if Intuit had run a multiyear, multi-ad, multichannel, multimodal, integrated marketing campaign that was deceptive," as Complaint Counsel allege, the company "would [have] go[ne] out of business." PFF ¶647. Mr. Johnson likewise testified that, "if when Intuit was marketing TurboTax Free Edition, it was creating an expectation among consumers who did not qualify to file for free that they could, in fact, do so," consumers would have been "incredibly disappoint[ed]" and "would leave" TurboTax and find "another way of filing." PFF ¶96. And as Ms. Ryan testified, Intuit's "business depends on" TurboTax users "start[ing] in the right product for them." PFF ¶73. This unrebutted evidence about Intuit's business interests is consistent with the unrebutted evidence of Intuit's commitment to clarity in its advertising. Again, that commitment provides "powerful

evidence" that the ads did not imply any of the false or misleading claims Complaint Counsel allege. *Telebrands*, 140 F.T.C. at 304.

II. COMPLAINT COUNSEL FAILED TO PROVE THAT A SIGNIFICANT MINORITY OF REASONABLE CONSUMERS WAS LIKELY TO BE DECEIVED

Complaint Counsel's case independently fails because Complaint Counsel have not carried their burden to prove a likelihood of deception. Advertising "is misleading [only] if at least a significant minority of reasonable consumers are likely to take away [a] misleading claim" from it. *Telebrands*, 140 F.T.C. at 291. Complaint Counsel thus had to prove that claims made in the challenged ads were "'likely to mislead consumers acting reasonably under the circumstances,'" *DirecTV*, 2018 WL 3911196, at *5. Not just any consumers, but "*reasonable* consumers." *Telebrands*, 140 F.T.C. at 291 (emphasis added). And not just any number of those consumers, but a "*significant* minority" of them. *Id*. (emphasis added). Complaint Counsel did not carry that burden. They have not articulated a viable theory of deception, missing the mark both on the relevant population of consumers in this case and on what it means for consumers in that population to have been deceived. In any event, Complaint Counsel have not offered evidence that any reasonable consumers were likely to be deceived. In fact, the evidence refutes any notion that a significant minority of reasonable consumers was deceived.

A. Complaint Counsel's Theory Of Deception Is Misplaced And Unsupported

1. Complaint Counsel's theory of deception proceeds from an egregious misconception of the population of consumers at issue in this case. Their theory is that the challenged ads conveyed some version of the claim that "TurboTax will be free for the consumer watching the ad," PFF ¶206, and that that claim was "likely to mislead reasonable consumers" because "[i]t was not true for two-thirds of American taxpayers," PFF ¶463. When the Court asked to clarify whether Complaint Counsel meant two-thirds "of those who attempt to go to the

website and use TurboTax, or" if they instead "mean[t] all tax filers, which is a heck of a lot bigger sample and makes your number pretty much meaningless," Complaint Counsel confirmed that the denominator in their two-thirds fraction was "all American taxpayers"—that is, the denominator that "makes [Complaint Counsel's] number pretty much meaningless." PFF ¶463. As Professor Golder explained at trial, the "appropriate denominator" to "assess who qualifies" for free TurboTax products is not "[a]ll U.S. taxpayers" because "many consumers," such as those who file "through paid preparers" like "CPAs," are simply "not … in the market for an online tax preparation product." PFF ¶464. And as Mr. Johnson testified, "of those who [actually] use software [do-it-yourself] solutions" (i.e., those who file their taxes online), "a majority" have a "simple return" and thus are eligible to file their federal and state taxes completely for free using TurboTax Free Edition. PFF ¶464; *see also* PFF ¶129. Of the remaining minority, moreover, some are "very complex filers," PFF ¶464, who could not reasonably believe they could use a product for "simple tax returns only." This proper framing devastates Complaint Counsel's deception claim.

Complaint Counsel have also offered no viable theory of what it means for consumers to have been deceived. The lawsuit the Commission authorized contended that consumers were deceived by TurboTax ads into coming to the TurboTax website, and that the website then further duped consumers into spending substantial time and effort before Intuit performed a "bait and switch," telling consumers at the last minute that their taxes would not be free. PFF ¶11. This theory was a total bust, with *no* evidence adduced to support it and even Professor Novemsky conceding that by the time consumers had invested time and effort in preparing their taxes, they had ample opportunity to learn of the qualifications for Free Edition. PFF ¶370; *see also* PFF ¶452. Intuit's fact witnesses likewise walked through the website repeatedly,

demonstrating for the Court that consumers had, over and over again, a full and fair opportunity to learn of the qualifications to file for free on TurboTax, before consumers even gave Intuit their names. PFF ¶¶364-441.

2. That has left Complaint Counsel with the theory that the ads are "deceptive door-openers." PFF ¶467. Complaint Counsel argue, that is, that the challenged ads were deceptive simply by virtue of driving consumers to the TurboTax website. PFF ¶467. As the Court observed, the upshot of this theory is that "it doesn't matter what a consumer sees at the website"; all that matters is that the ads "induced [consumers] to the website." PFF ¶467. That theory is incompatible with the law and in any event is disproved by the evidence.

a. As a threshold matter, Complaint Counsel's "deceptive door-opener" theory makes no sense because just inducing a consumer to visit the TurboTax website could not be actionable deception unless the consumer, once there, pays money that she otherwise would not have or is otherwise deceived into doing something that harms her. Complaint Counsel have identified no authority suggesting that, absent such circumstances, the mere fact of the door "opening" constitutes actionable deception. To the contrary, courts have *rejected* deception claims even where consumers had to spend significant time on a website before encountering price disclosures. *See, e.g.*, *Washington v. Hyatt Hotels Corp.*, 2020 WL 3058118, at *5 (N.D. Ill. June 9, 2020); *Harris v. Las Vegas Sands L.L.C.*, 2013 WL 5291142, at *2, *5-6 (C.D. Cal. Aug. 16, 2013). And common sense confirms that merely opening the door to the TurboTax website is not enough to establish actionable deception, especially since Free Edition's qualifications were accessible at the top of the TurboTax homepage and Free Edition landing page throughout the relevant period, PFF ¶¶374-384, 388-398. Simply put, the law does not—

and should not—support a finding of actionable deception based on a consumer spending five seconds on the TurboTax website.

b. Complaint Counsel's theory is independently infirm as a matter of law because, as noted, "deceptive advertising claims should take into account all the information available to consumers," *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 477 (7th Cir. 2020). In other words, "[t]o analyze whether … ambiguity could mislead a reasonable consumer," courts must "consider[] other information *readily available* to the consumer that could easily resolve the alleged ambiguity," *Moore v. Trader Joe's Co.*, 4 F.4th 874, 882 (9th Cir. 2021) (emphasis added). This principle is flatly inconsistent with the premise of Complaint Counsel's theory that (again as stated by the Court) "it doesn't matter what a consumer sees at the website," PFF ¶467. It is flatly inconsistent because the TurboTax website is expressly mentioned—in writing, voiceover, or both—in all 131 of the challenged video ads, *see* PFF ¶¶215, 218, 222, 244, and each of the four challenged radio ads, PFF ¶¶294, 299. It also was linked directly by each of the 108 challenged display ads, 17 challenged paid-search ads, and 24 challenged email ads, such that consumers who clicked on any one of those ads were taken directly to the website. PFF ¶¶253-254, 269-270, 284-285. The website was thus without a doubt "readily available to the consumer." *Moore*, 4 F.4th at 882. That is confirmed by the fact that consumers could readily reach the website "through search results," "TurboTax Blog content," "press releases," or "articles written by the media." PFF ¶¶387, 469, 871. And Complaint Counsel's expert recognized both that it takes only "a few seconds" to get to the website by typing "TurboTax" into a web browser, and that once on the website it takes only "five to ten seconds" to encounter full eligibility information for free TurboTax offers. PFF ¶790. It is even easier for consumers to click on an online ad, which reasonable consumers understand links to the TurboTax website,

where they can get more information about a free offer. PFF ¶¶254, 270, 285, 520, 522. The information on the website, moreover, is accessible before consumers "have to input their name or any other personal information." PFF ¶469. Indeed, the information is impossible to avoid, as any consumer "interested in trying to use TurboTax" *must* "access the product through" the TurboTax website (or mobile app equivalent). PFF ¶364; *accord* PFF ¶785. For all these reasons, the website cannot be disregarded in analyzing whether a substantial minority of reasonable consumers was likely to be misled by any claim in the challenged ads.

Such disregard assuredly finds no support in "deceptive door-opener" case law. That doctrine began with *Resort Car Rental Systems, Inc. v. FTC*, 518 F.2d 962 (9th Cir. 1975) (per curiam); *see also* PFF ¶467, a case about a rental-car company that called itself "Dollar-A-Day." The rental cars were in fact *not* a dollar-a-day, but consumers could not learn that until they physically traveled to the brick-and-mortar rental-car facility. *Resort Car Rental Systems, Inc.*, 83 F.T.C. 234, 281-282 (1973). That is nothing like this case. For starters, the product advertised here as free *is in fact free* for the tens of millions of taxpayers who qualify. PFF ¶¶69, 113-114, 117. By contrast, not a single consumer could get the rental car for the advertised dollar-a-day price. *Resort Car*, 83 F.T.C. at 281-282. And as explained, *see supra* §D.3, all of the challenged ads either linked to the TurboTax website— where complete product information was accessible in "a few seconds," PFF ¶790—and/or expressly directed consumers to visit it. Unlike in *Resort Car*, then, obtaining full information about the product, including about price and eligibility, entails virtually no time or effort and is expected by consumers from the ads themselves. PFF ¶¶364-370, 484, 526-527, 790-791.

Also unlike in *Resort Car*, consumers could (and can) visit two or more competitors' websites "simultaneously," permitting them to "look[] at other software[] *at the same time* to

decide which one to use." PFF ¶¶55, 509 (emphasis added). Complaint Counsel's expert agreed, stating that consumers could "have more than one browser window open at a time," such that they "could be in TurboTax and TaxSlayer at the same time." PFF ¶509. Such accessibility and "cross-shopping," PFF ¶¶55, 509, is not possible in the physical stores for which the "deceptive door-opener" concept was developed.

Put simply, the online context is different—which is why Complaint Counsel have not cited a single case applying the door-opener theory in that context. To the contrary, courts in that context have, as noted, rejected deception claims even where price disclosures occurred at the point of sale, i.e., much later than consumers see qualifications on the TurboTax website. The court in *Washington v. Hyatt Hotels*, for example, dismissed a deception claim as a matter of law because the defendant's online purchase "process … provide[d] clear and easy access to the existence, purpose, and amount of the [allegedly deceptive] fee." 2020 WL 3058118, at *5; *see also Harris*, 2013 WL 5291142, at *2, *5-6. The same is true of the TurboTax website, which provides prompt, repeated, and conspicuous information regarding the qualifications for its free offers to all consumers who visit. *Supra* §F; *infra* Part II.E.

Other case law confirms that the door-opener concept is inapposite here, even setting aside the accessibility of the TurboTax website that distinguishes this case from *Resort Car*. In *DirecTV*, for instance, the court held the "deceptive door opener" concept "inapplicable" where (1) "nothing in [the advertisement at issue] contradicts the true terms of [the advertiser's] provision of services" and (2) the advertisement at issue is "for a complex product." 2018 WL 3911196, at *15. The court rejected the concept under those circumstances—each of which is also present here—because "a reasonable consumer would understand the limitations of how information is presented in a" space-constrained ad for a complex product. *Id.* The same is true

in this case: As explained in Part I, nothing in the challenged ads contradicts the true terms of the advertised offers. And as Professor Golder explained at trial, the disclosures Complaint Counsel seek to require "would be out of step with what consumers are seeing," would be "overwhelming" for ads "on TV [and] even more so in social media," and "would not give them time to process [the] information." PFF ¶845; *see also* PFF ¶¶829-835, 839-844, 846-847. Even Professor Novemsky agreed that "the level of information … in the eligibility requirements [for Intuit's free TurboTax offers] could not be effectively communicated in a 30-second television commercial." PFF ¶841. In his words, Intuit would "overload consumers by providing lots of complicated qualification criteria in a 30-second commercial or in a 6-second TikTok." PFF ¶841. Reasonable consumers thus would not be deceived by any "door-opening" ad because they "would understand the limitations of how information is presented in a" space-constrained ad for a complex product like tax-preparation software. *DirecTV*, 2018 WL 3911196, at *15.

In short, this case is unlike those (like *Resort Car Rental*) in which the "deceptive door-opener" concept has been applied. It instead resembles cases (like *DirecTV*, *Washington*, and *Harris v. Las Vegas Sands*) in which the concept has been rejected.

c. Complaint Counsel's door-opener theory is also refuted by the record. For example, Dr. Hauser explained at trial that the results of his Disclosure Efficacy Survey were "inconsistent with the hypothesis that TurboTax's ad[s] served as misleading door openers," because had the ads done so, "we should see fewer people statistically considering" TurboTax when he "change[d] the advertisements" in the manner Complaint Counsel seek to require. PFF ¶737. Instead, Dr. Hauser found that "when we actually make these changes …, there is no statistical difference" in the number of consumers who consider TurboTax. PFF ¶738; *see also* PFF ¶¶739-745. In other words, Complaint Counsel's door-opener "hypothesis is rejected

scientifically by the results" of the survey because they show the allegedly deceptive characteristics of the challenged ads are not what cause consumers to consider using TurboTax to start their return. PFF ¶738; *see also* PFF ¶¶739-745.

The bottom line is Complaint Counsel have offered no viable theory of deception. The "deceptive door-opener" concept is inapplicable here, and regardless it finds no support in the record.

B. Reasonable Consumers Understand That Free Offers Are Qualified And Are Skeptical Of Those Offers

Complaint Counsel's deception theory ignores the requirement that the challenged ads must be likely to mislead "not just any consumers," but a significant minority of "consumers acting reasonably." *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986). Complaint Counsel offered no evidence about what reasonable consumers are like in this industry, PFF ¶470, and their theory necessarily disregards the experience reasonable consumers have with TurboTax, the industry, and the challenged ads. Reasonable consumers simply deserve far more credit than Complaint Counsel allow.

The analysis on this point must "start[] with the background knowledge of the reasonable consumer." *Dinan v. Sandisk LLC*, 2019 WL 2327923, at *6 (N.D. Cal. May 31, 2019). Yet Complaint Counsel provided no evidence about reasonable consumers' familiarity with the tax-preparation industry (including with free offers in that industry), let alone whether deception was likely given that familiarity. PFF ¶470. The total absence of such evidence is likely because courts hold that reasonable consumers understand concepts that "are commonplace in the [relevant] market," *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016), including that qualifications or requirements are "often … associated with" a product, *Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1081 (D. Kan. 2022). And case law aside, Intuit offered ample

evidence establishing that reasonable consumers understand that free offers are qualified, even if those qualifications are not provided. PFF ¶¶471-484. This is exactly the type of evidence that the Commission recognized "might provide insights concerning consumers' knowledge and expectations concerning 'free' claims in Intuit's ads." Opinion and Order Denying Summary Decision (Jan. 31, 2023), at 12.

More specifically, reasonable consumers understand that free *online tax-preparation offers* are qualified. PFF ¶¶474-484. Consumers understand that because all major players in the tax-preparation industry use the same business model, offering a basic free product for consumers with simple tax returns and paid products for more complex tax situations. *See* PFF ¶481-482. Indeed, as far back as 2011, that model was already "an entrenched part of the … market." *United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 46-48 (D.D.C. 2011). The model's ubiquity in that market leads reasonable consumers to expect free tax-preparation offers to have qualifications tied to the complexity of one's tax returns—even if those qualifications are not expressly stated. PFF ¶¶483-484; *see also* PFF¶¶488-490.

Moreover, many consumers are familiar with TurboTax's offerings in particular. Nearly [redacted] of tax returns filed online are filed using TurboTax, and nearly [redacted] of TurboTax customers each year are returning customers, meaning that most consumers using TurboTax to file their taxes used TurboTax in the past. PFF ¶¶48, 93. Many of those consumers are aware of TurboTax's paid products based on their personal experience with the brand. PFF ¶¶669-670. For example, of the 24.4 million consumers who paid to file their taxes with TurboTax in Tax Year 2021, 22.1 million—over 90%—were aware of paid TurboTax products because in one or both of the prior two tax years they were recommended a paid product, started in a paid product, or actually used a paid product to file their taxes. PFF ¶¶669-670. That familiarity with

TurboTax's paid products would prevent reasonable consumers from believing that all TurboTax products were free or that TurboTax necessarily would be free for them. PFF ¶671. Instead, those consumers would understand at a minimum that they would need to determine whether they qualified for a free TurboTax product in a given year and that (unless their tax situations had become simple) they were unlikely to be eligible. PFF ¶671.

On top of that, reasonable consumers understand that for-profit companies (like Intuit) need to make money to stay in business. *See* PFF ¶485. Even complaining consumers identified by Complaint Counsel acknowledged that because it is a profit-seeking business, Intuit cannot offer all its products for free to everyone. PFF ¶485. As a result, reasonable consumers viewing a free TurboTax ad would understand that TurboTax products are not all free for everyone, and hence would not conclude that all "TurboTax is free" or that TurboTax will necessarily be free for them. PFF ¶¶483-484, 487-488, 493.

Even if reasonable consumers were not familiar with free tax-preparation offers, unrebutted evidence shows that they would nevertheless understand that free offers more generally almost always have limitations. PPF ¶¶473-483, 485-488. Indeed, consumers are consistently exposed to a variety of free offers—including Buy One Get One (or BOGO) offers. PFF ¶474. Those offers are virtually always qualified. PPF ¶474. As a result, reasonable consumers understand that free offers have limitations, even when advertisements for an offer do not state its limitations. PPF ¶¶473-474, 476, 480. That is why hotels can claim "kids eat free" without elaborating that the kids must eat with a paying adult, or why pizzerias can claim "buy one get one free" without specifying that the second (free) item must cost the same or less than the first. PFF ¶¶474, 477. Even the FTC's "free" guidelines recognize that the "public

understands" that free offers are usually coupled with the *requirement* to purchase paid products. PFF ¶476.

Intuit's witnesses testified to all this, and documentary evidence confirms it. Mr. Rubin and Mr. Johnson both explained that consumers in the tax-preparation industry exhibit "free skepticism" and a natural tendency to disbelieve "free" offers or expect they are too good to be true. PFF ¶¶486, 488. Market research likewise reflects "free skepticism," finding that consumers have a "a natural expectation that … costs are involved" with tax-preparation products. PFF ¶¶489-490. Research from 2018, for instance, shows that only 22% of consumers were "confident" that TurboTax Free Edition was free—even though it is. PFF ¶490. That skepticism means that reasonable consumers do not rush to believe, i.e., are not easily deceived into believing, that free offers are free for everyone or necessarily free for them. PFF ¶¶485-488.

Instead, reasonable consumers' skepticism leads them to conduct additional research, especially when encouraged to do so (as they are by the clear invitation in many of the challenged ads, *supra* pp.52-53). PFF ¶506; *see also* PFF ¶¶471-472, 487, 503-505, 507-508. In this industry, reasonable consumers exhibit "care and consideration" generally, by engaging with a variety of information sources and evaluating alternative offers from competitors as part of the "high-involvement" process for selecting tax-preparation products. PFF ¶¶513, 782; *see also* PFF ¶¶502-509. That care and consideration—as seen in Dr. Hauser's Purchase Driver Survey (a "census survey of all the various things that people do" when choosing a tax-preparation provider, PFF ¶786), and Ms. Kirk Fair's survey—refutes any likelihood of consumers assuming based on the challenged ads that TurboTax must be free for them. PFF ¶¶503, 513, 758, 786-787.

Reasonable consumers were particularly unlikely to be deceived by Intuit's ads because the information the ads provided was appropriate for the stage in the "marketing funnel" where those ads were seen, i.e., before consumers had completed or had even started the high-involvement selection process. PFF ¶¶158-160, 180-181, 183, 188-190, 512-513. The marketing funnel represents the various points at which a consumer could learn about a brand or product. PFF ¶¶156-157. At the top of TurboTax's marketing funnel, for example, is television and other advertising designed to reach consumers early in their buying process, in order to "drive awareness and consideration of the brand and its products." PFF ¶¶157, 159, 510. That advertising is meant to "move [consumers] from being unaware to being aware" of their different tax-filing options. PFF ¶¶180, 510. Reasonable consumers expect and understand that information conveyed at the top of the marketing funnel will be limited, and that more information is available. PFF ¶511. Those consumers are thus not likely to be misled by that top-of-funnel advertising. PFF ¶¶510-513.

The differences between consumers' understanding of and interactions with video and online ads underscore Complaint Counsel's failure to prove that a significant minority of reasonable consumers was likely to be misled by the challenged ads. As Professor Golder explained, "medium matters" because consumers interact with television and online ads differently. PFF ¶522. Consumers viewing online ads—including display, paid-search, and email ads—understand based on experience that they can get additional information by clicking on the ads. PFF ¶¶520, 522, 524. That ability to quickly gain access to complete details about a free offer, and consumers' understanding that they can do so, reinforce that consumers do not expect that all information will be provided in an online ad or immediately jump to the conclusion that they will qualify for a free offer. PFF ¶¶522-524, 527. In fact, the evidence

reflects not only that consumers do not expect those details to be provided in online ads, but also that they would be overwhelmed if full details *were* provided in that format. PFF ¶¶522-524. Notwithstanding these key distinctions, Complaint Counsel offered no evidence specific to online ads (or video ads or any other kind of ad) demonstrating that consumers were likely to be misled. PFF ¶525.

Complaint Counsel are also wrong that consumers expected TurboTax's free offers to be available for everyone because a *different* company has a tax-preparation product that is supposedly provided "at no charge to all consumers." PFF ¶494. That other company, Cash App Taxes, engages in [redacted] and is used by few consumers. PFF ¶495. It is thus unlikely that reasonable consumers would even be aware of that offer, let alone rely on it to form their understanding of other companies in the tax-preparation industry—notwithstanding the actual practices of those other companies. PFF ¶¶495-498. And even if consumers were aware of Cash App Taxes, it is in fact *not* free for "all consumers." PFF ¶496. For instance, it is not available to taxpayers who wish to file multiple state tax returns, part-year state tax returns, or non-resident state tax returns. PFF ¶496. Nor is it available for taxpayers who require any of almost two dozen different forms for their federal or state returns. PFF ¶496. Cash App Taxes' limitations only reinforce consumer skepticism when it comes to free tax-preparation offers. PFF ¶497. Reasonable consumers would not necessarily assume that Cash App Taxes (or TurboTax) is free for them, or free to "all consumers," as there are no free tax-preparation products available to all consumers for all tax situations. PFF ¶497.

Finally, Complaint Counsel are wrong that the existence of "many online products" that *are* free—such as Google, Facebook, YouTube, and Spotify—would lead reasonable consumers to understand that all TurboTax products were free. PFF ¶400. Rather than identifying

"completely free" products, Complaint Counsel mostly identified additional examples of products that have free offers with restrictions along with paid options with additional features. PFF ¶500. YouTube and Spotify, for example, each offer free versions of their products that require consumers to view ads in order to use them, alongside paid versions of the products that are ad-free and offer additional features. PFF ¶500. Google similarly offers a basic free version of its mail service alongside a paid version that includes more features. PFF ¶500. These examples confirm that consumers are familiar with (and thus would expect) free offers to have certain restrictions while being accompanied by paid options. PFF ¶¶478-480, 500. Complaint Counsel also point to Facebook as an example of a completely free product, PFF ¶501, but the FTC has rightly argued in litigation that Facebook is not really free, PFF ¶501 (citing FTC Opposition to Motion to Dismiss at 11, *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. Apr. 7, 2021), ECF No. 59). In any event, Facebook—like Google, YouTube, and Spotify—is nothing like a tax-preparation product and says nothing about what is commonplace in the relevant market in this case, *Ebner*, 838 F.3d at 965.

In sum, reasonable consumers know that the free tax-preparation offers made by Intuit and all its major competitors are qualified, as most free offers are. PFF ¶¶473, 480, 483. Complaint Counsel offered no contrary evidence about reasonable consumers' knowledge, nor any justification for ignoring that free offers like Intuit's "are commonplace in the [tax-preparation] market," *Ebner*, 838 F.3d at 965. That failure provides another reason to reject their claims. *See Critcher v. L'Oreal USA Inc.*, 2019 WL 3066394, at *5 (S.D.N.Y. July 11, 2019) (dismissing deceptive labeling claims based in part on consumers' understanding of the products "grounded in both common knowledge … and consumer familiarity" with the products), *aff'd*, 959 F.3d 31 (2d Cir. 2020).

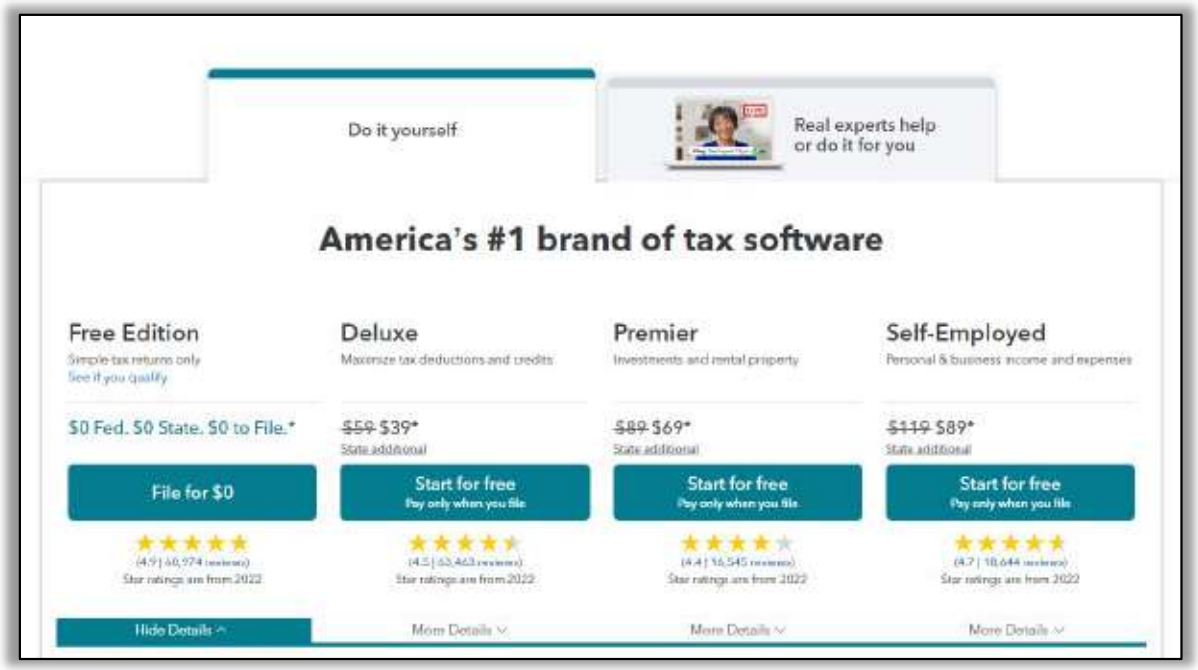
C. The Ads Communicated To Consumers The Limitations On The Free Offer Being Advertised

Complaint Counsel have no legally tenable theory of deception, and the ads themselves belie the theory they offer. PFF ¶¶209-212, 244-246, 262-264, 275-277, 290-292, 299-301. As explained, none of Intuit's ads ever conveyed—expressly or implicitly—that the free offer being advertised was unqualified. PFF ¶¶209-211, 242-243, 260-261, 273-274, 288-289, 297-298; *see also supra* Part I. But beyond communicating the *existence* of qualifications, the ads made consumers aware of the category of qualification and where to get more information, and did so at the level of detail appropriate for where consumers were in the buying process. PFF ¶¶241, 315, 892. The ads thus satisfied the "key criteria" of "effective disclosure[s]." PFF ¶¶312-316. And "[b]ecause the advertisement[s] adequately disclose[d]" the advertised products' qualifications, "the net impression of the advertisement[s] on [their] face would not be likely to mislead a reasonable consumer." *DirecTV*, 2018 WL 3911196, at *9.

1. Explicit SKU identification

To begin with, nearly all of the challenged ads expressly informed consumers of the specific SKU being advertised. PFF ¶¶212, 215, 226-228, 250-251, 281, 294, 306, 310. Most display ads, for instance, stated that the ad was for "TurboTax Free Edition" or "TurboTax Live Basic." PFF ¶¶250-251. And unrebutted testimony from Intuit's executives confirms that the company mandated that its Free Edition video ads include a "[b]lue end card with [the] TurboTax Free Edition logo" (or the TurboTax Live Basic logo) precisely for the purpose "of being clear on what product [it was] advertising, versus other products that [the company] offer[s]." PFF ¶173. Similarly, before Tax Year 2018, because "the name of [Intuit's free] offer [was] Absolute Zero," PFF ¶¶102-103, video ads for that offer included the "Absolute Zero" name, PFF ¶103.

The inclusion of the product name in the challenged ads not only makes for an effective disclosure (in line with respected marketing research literature), but also is critical under the FTC's ".com Disclosure" guidelines, which specify that "[w]hen identifying the[] claims" in an ad, the analysis must "consider the ad as a whole, including the … product name." PFF ¶320. That consideration further dooms Complaint Counsel's deception argument because, as Professor Golder testified, including the product name in the ads made clear to reasonable consumers that there were multiple TurboTax SKUs and that only the one being advertised was free. PFF ¶319. The TurboTax product lineup likewise made this fact clear.



PFF ¶411. Complaint Counsel offered no contrary evidence. PFF ¶321.

2. "Simple tax returns only"

Complaint Counsel's claim of deception also fails because they did not establish that consumers were misled by the phrase "simple tax returns." As noted, the "simple tax returns only" qualification was included in most of the challenged ads, including all the video ads. PFF ¶¶215-217, 227, 232-233, 248-249, 252, 257, 267-268, 272, 281-282, 294, 836; *see also supra*

p.41. And again, a precise understanding of that phrase is not necessary to avoid deception; what matters is that consumers are made aware that only some tax returns may be filed for free. *Supra* pp.42-43; *see also* PFF ¶¶131, 135-136, 310, 312. In using a well-known phrase, Intuit went beyond that basic requirement, communicating the eligibility criteria for the advertised free offers in a way that was effective for consumers. PFF ¶¶122-123, 134-136, 139-145.

The term "simple tax returns" originated with the IRS, and has long been used by other federal and state agencies. *See* PFF ¶¶119, 122-123, 142. It is also pervasive in the online tax-preparation industry, used by Intuit and its competitors for years specifically for the purpose of describing the qualifications for their free offers. *See* PFF ¶¶141, 143, 453-454, 458-459. Intuit chose to include the term for just that reason: As Ms. Ryan testified, [redacted] because [redacted] and because it [redacted] PFF ¶123; *see also* PFF ¶122. This widespread and long-standing use is dispositive, because the "reasonable consumer understands" concepts that "are commonplace in the [relevant] market," *Ebner*, 838 F.3d at 965. As Professor Golder explained, the ubiquity of the phrase "simple tax returns" and its use by Intuit's competitors is "critically important" from consumers' perspective. PFF ¶¶143-144.

Additional evidence confirms that consumers understood "simple tax returns." Intuit's internal testing showed that consumers found the term "easy to understand." PFF ¶¶134, 869. Furthermore, several consumers provided deposition testimony confirming that they (correctly) understood the phrase to convey that the ability to use a free TurboTax product depends on the complexity of one's tax return. PFF ¶635. And Professor Novemsky admitted that participants in his survey had the same understanding. PFF ¶136. All this belies the assertion in the Commission's order denying summary decision that Intuit "has not put forward … evidence

regarding common usage of language." Op. and Order Denying Summ. Decision at 12 (Jan. 31, 2023).

Complaint Counsel cannot rebut all this evidence simply by disagreeing with it. They had to offer their own evidence, and they didn't. PFF ¶130. Instead, they incorrectly suggested before trial that what qualified as a "simple tax return" changed repeatedly over the years, which they say proves that consumers did not understand that phrase. Complaint Counsel's Pretrial Brief at 7 (Feb. 17, 2023); Complaint Counsel's Pretrial Proposed Findings of Fact at 3-4 (Feb. 17, 2023). This factual assertion had to be proven, not just argued. It was not proven, because Intuit's definition of "simple tax returns"—returns filed using the most basic form made available by the IRS—did not change. PFF ¶¶119-123, 147. The *IRS's* definition changed (once in the relevant time period), when Congress passed tax-reform legislation before Tax Year 2018 and the IRS consequently eliminated Forms 1040EZ and 1040A, replacing them with Form 1040. PFF ¶¶119-121, 124. That single change—which in any event does nothing to undermine the evidence that reasonable consumers understand the phrase "simple tax returns"—assuredly cannot be held against Intuit, as Intuit obviously had no control over Congress's or the IRS actions. PFF ¶125. Moreover, if Intuit had refused to align its use of "simple tax returns" to the post-tax reform reality (as the Commission and Complaint Counsel apparently believe it should have), *no one* would have qualified to use Free Edition. PFF ¶125.

Nor does the fact that Intuit has occasionally expanded the tax situations covered by TurboTax Free Edition *beyond* those with simple tax returns do anything to show that consumers did not understand the phrase "simple tax returns." For example, consumers in Tax Years 2020 and 2021 were threatened with serious hardship as a result of the COVID-19 and student-debt crises. PFF ¶148. Rather than trying to profit from those unfortunate situations, Intuit decided to

forego additional revenue by making Free Edition available to taxpayers receiving unemployment income and paying off student loans. PFF ¶¶146, 148-149. Those actions are evidence of compassion, not deception. PFF ¶¶146-150. But the point for present purposes is that these expansions did not alter the definition of "simple tax returns." The definition remained tied to the IRS's. *See* PFF ¶147. The eligibility expansion meant only that a taxpayer with an [redacted] would not "[redacted] PFF ¶148 (emphasis added).

In short, Intuit's definition of "simple tax returns" has remained constantly tied to the IRS's definition, and consumers have always understood it. PFF ¶¶119-124, 134-136, 139-145.

As Intuit's experts and executives testified, in fact, the level of detail provided by the phrase "simple tax returns only" was appropriate for both the particular media and the stage of the buying process in which the phrase was used. PFF ¶¶122-123, 134-140, 160, 241, 313, 315-316, 512. Lengthier disclosures (especially in space- and time-constrained ads) would have been ineffective, overwhelming consumers with a block of inscrutable text that they likely would have ignored. PFF ¶¶138-140, 332-333, 523, 833-835, 840-842, 845-846. Providing the same information included on the TurboTax website, for example, would have resulted in information overload, which as mentioned occurs when consumers are given too much information in a context where they are unable to process it. PFF ¶¶332, 834-835, 332-333, 379, 834-835, 841. To avoid such overload, advertisers offer highly detailed information—such as a full list of qualifications and tax situations—only when consumers are "motivated and ready to process" the information, and in an environment where consumers can "control the flow" of the information provided. PFF ¶838.

The use of "simple tax returns" is also appropriate because it is straightforward and avoids complicated tax jargon. PFF ¶¶122-123, 135-136, 139-140, 333. As Intuit's executives explained, "[c]onsumers don't really understand tax speak," and hence listing all the covered tax forms in the challenged ads would have been [redacted] PFF ¶333. Testimony from consumers themselves confirms that reasonable consumers understand the phrase "simple tax returns" better than references to specific IRS forms when describing the qualifications for free tax-preparation products. PFF ¶139. Likewise, qualitative consumer feedback gathered by Intuit in 2017 shows that more detailed disclosures would overload consumers with excessive information—reflecting that consumers *appreciate* TurboTax disclosures that do not contain "complicated tax terminology" but instead are worded in "laymen's terms," PFF ¶140.

Finally, even if reasonable consumers were uncertain about whether they had a "simple tax return," they would not merely assume that they did. PFF ¶131. They would as discussed conduct research—and the answer was exceedingly easy to find, in the places reasonable consumers knew to look, including countless online reviews and the TurboTax website (which many of the ads specifically invited consumers to visit for more information, *see infra* Part II.C.3). PFF ¶¶131-133, 503-509, 786. Complaint Counsel's expert acknowledged this. PFF ¶505. In fact, a basic Google search for "what is a simple tax return turbotax" typically provided the answer (drawn from the TurboTax website) in less than *half a second*. PFF ¶¶131-132.

3. "See If You Qualify At TurboTax.com" or "See Details At TurboTax.com"

The conclusion that a significant minority of reasonable consumers would not likely be deceived by the challenged ads is reinforced by the challenged ads' explicit invitation to consumers to visit the TurboTax website. PFF ¶¶215, 218, 222, 226, 233, 244, 262, 281-282, 290, 294, 306, 310, 323-326, 893. This language told consumers precisely where to go to find full information about eligibility qualifications, satisfying yet another important criterion for

effective disclosures. PFF ¶¶323-326. As the Ninth Circuit recently explained, "[t]o analyze whether … ambiguity could mislead a reasonable consumer," courts must "consider[] other information readily available to the consumer that could easily resolve the alleged ambiguity," *Moore*, 4 F.4th at 882. Other courts have likewise "st[oo]d by the general principle that deceptive advertising claims should take into account all the information available to consumers." *Bell*, 982 F.3d at 477. Here, that additional information, which was expressly referred to and incorporated into the advertisements, plainly communicated the qualifications of free TurboTax products or offers. *See infra* Part II.E.

Moreover, because most of the challenged ads "specifically invoked" the TurboTax website, or linked directly to it, the content of that site was effectively "integrated" into the ads themselves. PFF ¶¶328, 893; *supra* pp.52-53. The website is also *completely* integrated into the product experience, as consumers must visit it (or mobile application) to use Free Edition. PFF ¶329. Under similar circumstances, courts have approved disclosures that, like the ones here, "put consumers on notice that the complete details of the" offer may be found elsewhere. *Platt v. Winnebago Industries, Inc.*, 960 F.3d 1264, 1277 (10th Cir. 2020). For example, the court in *Marksberry* held that "the mere fact that each advertisement" for a vehicle warranty "did not set forth all the details or requirements of the Warranty *on the advertisement* does not indicate" deception because "[t]he advertisements informed consumers to review the Warranty for full details, and the full details were included in the warranty booklet," 606 F.Supp.3d at 1083.

Testimony from Complaint Counsel's investigator, Ms. Shiller, bolsters the adequacy of Intuit's disclosures directing consumers to the TurboTax website. PFF ¶278. As recounted above, p.28, Ms. Shiller was shown online search results that included a snippet for the IRS Free

File program website that said, "Welcome to Free File, where you can prepare and file your federal individual income tax return for free." PFF ¶278.

PFF ¶279. Even though only taxpayers with adjusted gross income below a certain level are eligible for the IRS Free File program, PFF ¶59, nothing in the IRS search result indicated that there were qualifications for the program, PFF ¶¶278-279. Ms. Shiller nonetheless suggested that the IRS search result was not deceptive because "it says you can file your taxes for free by going to the website, and I do believe taxpayers can file their taxes for free going through the Free File Program." PFF ¶278. It did not matter, according to Ms. Shiller, that "only some taxpayers can file for free if they go to IRS.gov" "depending on their qualification," or that the search result did not identify those qualifications. PFF ¶278. Intuit's ads, by contrast, went above and beyond the IRS's search result by both telling consumers that they can find more information on the TurboTax website and also disclosing qualifications.

In fact, the ability of consumers to easily access complete offer details renders an advertisement for the offer not deceptive even if, unlike here, the advertisement does *not* specifically direct consumers to those details. For instance, one court held that "the absence of complete price information in the advertisements" for a pharmacy did not make the ads misleading because "the information which the state would require plaintiff to include in the advertisements—complete information as to the price of every prescription drug offered at plaintiff's store—[was] readily available to consumers," including "by telephoning the store … or by asking store personnel." *South Ogden CVS Store, Inc. v. Ambach*, 493 F.Supp. 374, 380

(S.D.N.Y. 1980). *A fortiori*, the qualifying language here is adequate because it *does* specify where complete offer information is available.

Finally, the challenged ads' instruction to visit the website was appropriate for the stage in the buying process at which consumers viewed the ads. PFF ¶¶160, 241, 313, 326. That invitation reinforced what consumers already knew to do, and what they routinely do for "high-involvement" products like tax-preparation software (especially products that consumers use and/or purchase online): go to the product's website for further details. PFF ¶¶326, 369-370, 505, 526, 790. It is assuredly not deceptive for an ad to give consumers accurate information (that they expect to receive) about where they can learn complete information about a free product or offer being advertised.

D. The Extrinsic Evidence Does Not Reflect That A Significant Minority Of Reasonable Consumers Was Likely To Be Deceived

To the extent the ads themselves left any doubt, extrinsic evidence confirms Complaint Counsel's failure to prove that "at least a significant minority of reasonable consumers [was] likely to take away the misleading claim" from the challenged ads. *Telebrands*, 140 F.T.C. at 291. Instead, the extrinsic evidence *refutes* that notion.

1. Professor Novemsky's survey does not show that Intuit's ads were likely to deceive reasonable consumers

Complaint Counsel sought to carry their burden of proving that TurboTax's ads were likely to deceive a significant minority of reasonable consumers largely through the opinions of Nathan Novemsky and the "perception study" on which those opinions rested. But his opinions cannot remotely carry the weight Complaint Counsel place on them, as it is difficult to imagine a survey that runs afoul of more widely accepted indicia of reliability than Professor Novemsky's, or one so clearly designed to reach its desired outcome. Professor Novemsky did not show survey participants *any* TurboTax ads (or the website), he failed to employ a scientifically sound

test-control design, he asked questions that led participants to provide the answers he wanted, he used an unrepresentative sample that was particularly prone to biases, and he then overstated his already-flawed results. Any one of these defects would alone render Professor Novemsky's survey scientifically invalid; together they leave no doubt that the survey should be given no weight at all.

a. Improper survey design. In a case about whether TurboTax's marketing deceived consumers, Professor Novemsky inexplicably chose not to show his survey participants a single TurboTax ad, or the TurboTax website. PFF ¶¶534-536. As Professor Novemsky acknowledged, therefore, survey participants would have answered the questions "having seen whatever they saw in the world"—which may well not have included any TurboTax ads. PFF ¶538. Moreover, given that participants were not shown any TurboTax marketing—or *any* information about TurboTax's products, for that matter—they had to answer entirely from memory. PFF ¶536. As other courts have recognized, this kind of "memory test" is "useless" for determining consumer confusion. *Instant Media, Inc. v. Microsoft Corp.*, 2007 WL 2318948, at *15 (N.D. Cal. Aug. 13, 2007). Courts accordingly have excluded surveys that were "little more than a memory test." *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999).

The survey also did not employ the foundational scientific approach for any experimental survey: use of a control group and a test group. PFF ¶¶531-540; *see also Valador, Inc. v. HTC Corp.*, 242 F.Supp.3d 448, 463 (E.D. Va. 2017) ("courts routinely hold[] a survey's lack of a control group or control questions constitutes [a] ground for granting a Rule 702 motion to exclude"), *aff'd*, 707 F.App'x 138 (4th Cir. 2017); *Reinsdorf v. Skechers U.S.A.*, 922 F.Supp.2d 866, 878-879 (C.D. Cal. 2013) (excluding a control-less survey because it lacked "fundamental reliability"). Given that, Professor Novemsky has no way of testing causality—even though the

opinion he offers in this matter is that TurboTax's marketing *caused* consumer misimpression. PFF ¶¶530-534. As Professor Novemsky himself opined in a prior false-advertising case, it is "impossible" to "draw any causal inference" without "an experimental design that includes a control a group and a test group." PFF ¶532. Absent a control group, Professor Novemsky stated under oath, one cannot evaluate what an "ad caused consumers to understand or not understand." PFF ¶532. Yet Professor Novemsky admits that his survey here did not use a test-control design; he did not assign his participants to test and control groups, and he did not show the participants any ads or other stimuli. PFF ¶¶533-534. As Intuit's survey expert, Dr. Hauser, explained at trial, Professor Novemsky could have "give[n] just [the] TurboTax brand name to one group and then [the] TurboTax brand name plus advertising plus websites" to another group, and compared perceptions across the groups. PFF ¶535. But Professor Novemsky did not do that. He therefore has no way of establishing that TurboTax's marketing "caused a change in perceptions." PFF ¶535. Put differently, Professor Novemsky's survey tested for "everything," as he testified, while controlling for nothing. PFF ¶¶534, 538.

Professor Novemsky's failure to use a control group also means he had no way of preventing the survey questions from influencing his results. PFF ¶539. As Dr. Hauser explained, Professor Novemsky could have asked a control group the same questions but with a fictional brand (one that by definition does no actual marketing) substituted for TurboTax; this would have permitted Professor Novemsky to estimate the portion of his survey results that were caused by the survey itself, and remove that portion from the results concerning TurboTax. PFF ¶539. Because he did not do so, Professor Novemsky could not eliminate his own survey as a possible cause for his results. PFF ¶539.

b. Leading survey questions. Professor Novemsky's survey is further flawed because his results derive entirely from two multiple-choice questions, each of which was "contaminated by bias [in that] their wording primed respondents to" give particular responses, *Fish v. Kobach*, 309 F.Supp.3d 1048, 1060 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

The first was question "TAT240," which Professor Novemsky used to identify survey participants who were under a misimpression about their ability to file for free. PFF ¶567. In both the question and the answer choices, TAT240's wording invited participants to guess. TAT240 asked participants to select the answer that "best describe[d]" their "understanding" based on their "current information and understanding"; that phrasing alone invited participants to select answers about which they were uncertain. PFF ¶¶568-569. Then, as answer choices, TAT240 included "I think I can file … for free" and "I don't think I can file … for free" (underlines in original). PFF ¶568. The use of "I think" and "I don't think" further encouraged unsure respondents to select one of those answers rather than a third option—"I do not have enough information," *id.* (underline in original)—that was phrased more definitively. PFF ¶569.

Moreover, participants were especially likely to guess that they *could* file for free, because three previous questions in the survey, including the two that immediately preceded TAT240, asked about respondents' ability to file for free with TurboTax. PFF ¶572. As Dr. Hauser explained, "by themselves," these other questions may have been "reasonable," but "the cumulative effect of asking about free" over and over again was to signal to respondents that the researcher wanted them to choose "I think I can file … for free" by the time they got to TAT240. PFF ¶573.

Several of Professor Novemsky's survey participants confirmed Dr. Hauser's opinion. PFF ¶574. When subsequently asked why they thought they could file for free, respondents provided answers like:

- "It's been said a few times now during survey that you can file for free using TurboTax."
- "It is evident form [sic] the past questions that it is free."
- "Because you keep yelling [sic] me I can."
- "Because this survey is suggesting that I can file it for free."

PFF ¶¶575-576. These responses strongly indicate that many other participants were similarly affected by the survey but simply did not voice it. PFF ¶577.

The second key question in Professor Novemsky's survey was "TAT255," which was the sole question Professor Novemsky relied on to identify the source(s) of information that caused participants' purported misimpressions. PFF ¶591. TAT255 read as follows:

> You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?
>
> *Select all that apply.*
>
> (1) TurboTax advertisements
>
> (2) TurboTax website
>
> (3) Word-of-mouth (such as information from family, friends, etc.)
>
> (4) Advice for a financial professional (such as an accountant or a tax-preparer)
>
> (5) Information online not from TurboTax (such as articles on websites, blog posts, etc.)
>
> (6) Other

(7) Don't know / Not sure

PFF ¶592.

This question was leading because two of the five substantive answer choices—"TurboTax advertisements" and "TurboTax website"—conformed to Complaint Counsel's allegations in this case, increasing the likelihood that participants would respond in the way that Professor Novemsky wanted. PFF ¶593. On top of that, by the time participants reached TAT255, they were well aware that TurboTax was the focus of the survey—and thus likely understood (consciously or subconsciously) that the researcher wanted them to choose a TurboTax-related answer. PFF ¶594. Indeed, over the course of just five questions in the main questionnaire, "TurboTax" had been mentioned *twelve* times. PFF ¶594. As noted, *supra* p.73, had Professor Novemsky used a control group(s) with a fictional tax brand (or even other real tax brands), he could have measured the magnitude of this effect and subtracted it out of his results. PFF ¶539, 595. But whether because of a desire to reach certain results or otherwise, he chose not to. PFF ¶539.

The survey's leading nature was exacerbated by the fact that TAT255 was not the kind of question people can be expected to answer from memory—as participants had to do because of Professor Novemsky's decision not to show them any of the challenged ads. It is well-established that individuals typically have difficulty remembering accurately the source from which they obtained particular information. PFF ¶604. Here, rather than ask respondents what they did or saw, TAT255 asked how they learned something. PFF ¶606. As Dr. Hauser explained, that is precisely the type of question that individuals cannot be expected to answer reliably, which means that Professor Novemsky's survey participants were especially vulnerable to leading questions and answers like those Professor Novemsky used. PFF ¶¶606-607.

c. Unrepresentative and biased survey population. Professor Novemsky's survey is also entitled to no weight due to flaws with his survey population.

For starters, the 607 people who completed the survey represented less than *five percent* of the 12,249 who started it. *See* PFF ¶542. Courts have deemed similarly paltry response rates "woefully low" and inadequate to support reliable results. *In re Autozone, Inc.*, 2016 WL 4208200, at *17 (N.D. Cal. Aug. 10, 2016), *aff'd*, 789 F.App'x 9 (9th Cir. 2019); *see also University of Kansas v. Sinks*, 2008 WL 755065, at *4 (D. Kan. Mar. 19, 2008) (noting that a 2.16% response rate is "by any standard ... quite low" and that it was "extremely likely that [such a low response rate] exerted a bias on the results" (citation omitted)).

In addition, Professor Novemsky shaped his survey population (in several ways) to include only respondents who were likely unfamiliar with TurboTax's advertising. *First*, by screening out respondents who indicated they had simple tax returns, Professor Novemsky excluded the group that Intuit targets with its Free Edition ads, and the one most likely to have seen them. PFF ¶¶543-545. *Second*, by excluding everyone who had filed a Tax Year 2021 tax return by the time the survey was administered, Professor Novemsky eliminated a group that, having recently been in the market for tax software, was more likely to be familiar with TurboTax's products and their qualifications. PFF ¶¶546-549. *Third*, by designing "Group A"—which he called his "main group of interest"—to include only the survey participants who had not used TurboTax in at least the three previous years, Professor Novemsky focused on a population that was particularly unlikely to have seen or paid attention to TurboTax advertising, and for whom that advertising was immaterial. PFF ¶¶550-552. Indeed, there is no way of knowing whether any Group A respondents had *ever* used a TurboTax product or even visited the TurboTax website. PFF ¶551. And Professor Novemsky's survey data reveal that 69.1% of

Group A participants had filed with a TurboTax *competitor* in the prior three years. PFF ¶551. Thus, Group A participants were, if anything, likely to have been influenced by TurboTax's competitors' advertising—not by TurboTax's. PFF ¶552.

Finally, Professor Novemsky did not adequately safeguard against possible biases within his survey population. For one thing, given the media coverage about the issues related to the FTC's investigation—including in response to private litigation against Intuit—it is likely that a meaningful number of participants were aware of allegations against Intuit. PFF ¶¶560-564. In fact, in one of Dr. Hauser's surveys for this case, 24.4% of respondents indicated ligation awareness. PFF ¶562. Yet Professor Novemsky did not ask any questions to identify and screen out participants who might have been biased due to being "litigation aware." PFF ¶563.

Another likely source of bias lies in Professor Novemsky's indefensible decision to permit participants who completed his survey to opt out after he informed them that his survey was "being conducted on behalf of the [FTC], the nation's consumer protection agency, in order to collect information about the reactions and experiences of potential customers to advertisements by Intuit, the maker of TurboTax," and that respondents' answers "could help [the FTC] further [its] mission under the FTC Act to protect consumers." PFF ¶¶555-556. Ultimately, 164 of 771 participants (or roughly 21%) did opt out, and their answers to the survey questions were deleted. PFF ¶557. As the Commission itself has recognized, "complete[] transparen[cy] about the nature or purpose of a survey" may "create bias in … consumers' decision to participate in the survey or potentially result in biased responses"—a flaw that "would affect the accuracy and validity of the information collected and effectively nullify the survey." PFF ¶558; *see also* PFF ¶559. The Commission has repeatedly argued to federal courts, in fact, that revealing a survey's sponsor and purpose is an error that, at minimum,

warrants giving the survey less weight. FTC's Mot. To Exclude Expert Testimony (Dkt. 155) at 7, *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. Feb. 27, 2020); FTC's Reply ISO Mot. for Summ. J. (Dkt. 315) at 8, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Aug. 14, 2017); *see also Autozone*, 2016 WL 4208200, at *8 (excluding a survey because its purpose "was no mystery," creating "a problem of self-interest bias"). In light of Professor Novemsky's blatantly slanted message to potential respondents—again, telling them they "could help [the FTC] … protect consumers" by assisting with its investigation of Intuit, PFF ¶556—the survey warrants no weight at all.

Indeed, courts routinely reject surveys that have an unrepresentative and biased survey population, as Professor Novemsky's survey plainly does. *See Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, 383 F.3d 110, 118-121 (3d Cir. 2004) (affirming the exclusion of a survey that used an unrepresentative sample); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980) ("[W]e do not believe that the proper universe was examined, and the results of the survey must therefore be discounted."); *In re Fluidmaster, Inc., Water Connector Components Product Liability Litigation*, 2017 WL 1196990, at *28 (N.D. Ill. Mar. 31, 2017) (finding survey testimony unreliable where the expert did not survey a representative sample population); *Malletier v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558, 630-631 (S.D.N.Y. 2007) (finding a survey methodology unreliable where respondents were not representative of the consumers whose confusion mattered in the case). The same approach is warranted here.

d. Overstated results that are inconsistent with other metrics. When compared to other evidence in this case—evidence lacking the myriad flaws in Professor Novemsky's survey—Professor Novemsky's results are dubious on their face. According to Professor

Novemsky, his survey showed that 52.7% of taxpayers who cannot file for free with TurboTax erroneously believe that they can. PFF ¶609. But when respondents were presented with only the TurboTax brand name in an Intuit copy test from Tax Year 2020 (a test Professor Novemsky himself relied on as evidence that the challenged ads cause viewers to believe "they can use TurboTax for free," PFF ¶609, only 33% of survey respondents—a group that included taxpayers who *did* qualify to file for free with Free Edition—believed they could file for free, PFF ¶¶609-610. Likewise, in an Intuit copy test from Tax Year 2022, [redacted]. PFF ¶¶702-711. Finally, in Dr. Hauser's Disclosure Efficacy Survey, which once again included taxpayers who would qualify to file for free, roughly one-third of all participants indicated that they would actually start in Free Edition. PFF ¶611; *see also* PFF ¶¶743-745. While Dr. Hauser was not attempting to measure the same thing as Professor Novemsky, the two surveys nonetheless measure the same general "construct," so that a researcher would expect them to be "in about the same place." PFF ¶611. Yet Professor Novemsky reports a substantially higher percentage of individuals who believed they could file for free than these other similar measures, despite focusing on a narrower population.

As Dr. Hauser put it, Professor Novemsky's results simply do not pass the "smell test relative to the numbers we've seen elsewhere." PFF ¶612. When confronted with that reality, Dr. Hauser testified, any reputable scientist would "want to see if we have some good explanations as to why the 52.7 percent is just high relative to these other numbers." PFF ¶612. But Professor Novemsky was uninterested in finding such an explanation—likely because he knew that the explanation would be unhelpful for his preferred outcome.

Professor Novemsky drastically overstates his results in other ways as well. For example, in order to be able to say that 52.7% of his respondents mistakenly believed that they could file for free, and that 72% of those respondents attributed that to TurboTax ads and/or the TurboTax website, he looked only at Group A. PFF ¶615. Looking at the entire survey population, 190 of his 607 respondents (or 31.3%) both incorrectly thought they could file for free and named either the TurboTax website or TurboTax advertising as a source of that belief. PFF ¶615. And only a small percentage of even *those* respondents provided answers with any reasonable degree of reliability. PFF ¶616.

Professor Novemsky also relied on only TAT240 and TAT255 to report his results, ignoring the responses to other questions in his survey—responses that both further expose the flaws with those questions and further undermine his results. As discussed, *supra* p.74, TAT240 was immediately preceded by two open-ended questions that also addressed respondents' beliefs about their ability to file for free. PFF ¶579. After Professor Novemsky omitted the answers to those questions from his results, Dr. Hauser instructed blind coders who were unaware of the parties and issues in this case to analyze those open-ended responses. PFF ¶¶580-583. That gold-standard analysis determined that 116 of the 190 supposedly deceived survey participants had provided open-ended responses that were inconsistent with their answer to TAT240, i.e., responses that suggested they were *not* deceived. PFF ¶616; *see also* PFF ¶584. For example, Respondent ID 9900's answers to the open-ended questions were, "[t]here is a free option, but my filings require paid," and "[a]nyone filing a basic 1040" can file for free using TurboTax, PFF ¶585—answers making clear that the participant did not expect to be able to file for free and understood that TurboTax's free offers were only available for simple returns. Yet Professor Novemsky treats Respondent ID 9900 as being under a definitive misimpression because he or

she answered "I think I can file … for free" in response to TAT240. PFF ¶585. For that participant and the others who gave inconsistent responses, the open-ended responses cast significant doubt about the reliability of their response to TAT240, such that Professor Novemsky has no way of validly concluding that they are actually under a misimpression. PFF ¶587. Professor Novemsky, again, elided all this by simply (and without justification) ignoring the answers to all but two of his questions when reporting his results.

Of the remaining 74 participants, 40 of them—more than half, that is—selected a response(s) to TAT255 (the question asking them to identify the source of their understanding that they could file for free) in addition to "TurboTax advertisements" and TurboTax website." PFF ¶617. The survey results for those 40 participants were also unreliable, because Professor Novemsky did nothing to identify the *principal* source of those participants' impressions, or otherwise attempt to disentangle the relative roles played by the multiple sources identified. PFF ¶¶618-619.

Even if all the other flaws with the survey were set aside, only 34 participants—or 5.6% of the total population of 607 respondents—provided even potentially relevant responses. PFF ¶¶620-622. That percentage falls well short of what is required to prove deception. *See Telebrands*, 140 F.T.C. at 446-448 ("FTC cases suggest that the Commission would be justified in considering levels of ten percent net takeaway sufficient," and citing cases holding similarly).

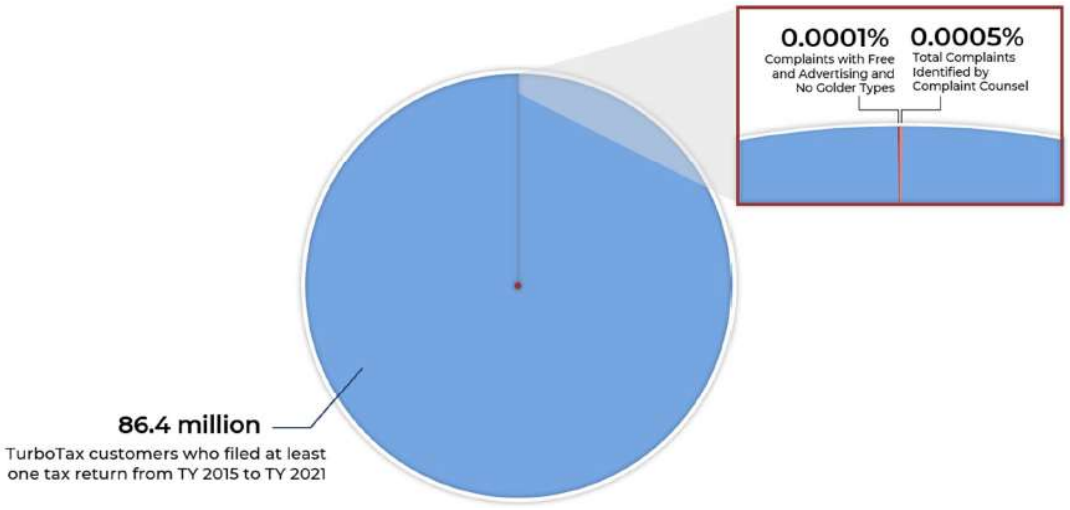
2. The paltry number of consumer complaints lodged over Intuit's ads proves that no significant minority of reasonable consumers was likely deceived

If, as Complaint Counsel contends, Intuit had engaged in a wide-ranging multi-year marketing campaign that was deceptive, Intuit "would be overwhelmed with complaints, in every channel." PFF ¶647. That is because a hallmark of deceptive advertising is a large number of consumer complaints relative to the number of users of the product. PFF ¶¶624-625. As

Professor Golder explained, consumer complaints are a "clear signal" of any alleged deception—consumers who expect to receive a product for free but ultimately have to pay for it because they were misled would naturally be angry, and such anger would manifest itself in a high rate of consumer complaints. PFF ¶625. But here there is no flood of complaints—not by a longshot. Complaint Counsel identified only 228 complaints filed over the course of six years (between January 1, 2016, and March 28, 2022) in the FTC's Consumer Sentinel database, which collects complaints made not only directly to the FTC but also to many others, including state attorneys general, the BBB, and other federal and state agencies. PFF ¶¶627-630. These complaints—which constitute an infinitesimal fraction of the millions of consumers who saw the challenged ads—do not establish that a significant minority of reasonable consumers was likely deceived. The small number of complaints is in fact strong evidence to the contrary. PFF ¶¶625-626, 639.

As an initial matter, Complaint Counsel overstate the number of consumer complaints that are relevant to the alleged deception. As noted, Complaint Counsel point to 228 complaints. PFF ¶630. But Professor Golder's independent coding analysis confirms that the majority of those are potentially irrelevant—either because the substance of the complaints are unrelated to the allegations here or the relationship of the complainants to TurboTax suggests some other bias. PFF ¶636. In fact, Professor Golder's analysis of the 396 complaints that Complaint Counsel originally contended were relevant revealed as few as 120 potentially relevant complaints over a six-year period—0.0001% of the 86.4 million TurboTax customers during that same time, as shown below. PFF ¶636.

Figure 9
Complaints Identified by Complaint Counsel and Independent Coders as a Share of TurboTax Customers Who Filed At Least One Return
TY 2015 – TY 2021

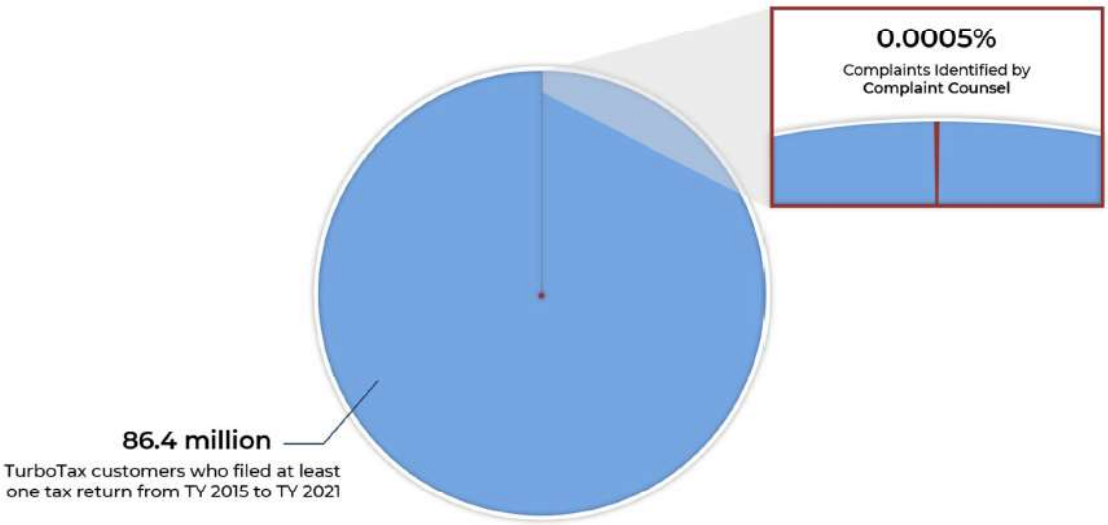


Given the questionable relevance of many of the complaints, verifying them was a natural (and imperative) step in order for them to have any probative value. PFF ¶633; *see also* PFF ¶¶634-635. But Complaint Counsel's efforts to verify these complaints was "minimal to nonexistent." PFF ¶633. In fact, Ms. Shiller attempted to contact just twelve complainants, and ultimately spoke to only *two*. PFF ¶918. Not only that, but Ms. Shiller did not even *read* most of the complaints she compiled. PFF ¶917. Given all this, there is no support for finding that even the 228 consumers actually complained that they were deceived by any of the challenged ads.

But even if all 228 complaints are relevant and reliable, that small number proves that no significant minority of reasonable consumers was deceived. PFF ¶631. The 228 complaints represent just 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period (or, as shown below, 0.0005% if the slightly

larger set of 396 complaints that Complaint Counsel previously relied on is considered). PFF ¶¶631-632. When calculated in terms of complaints per 1,000 consumers, the complaint rate would be only 0.0025—much lower than the range of 0.35 to 143.8 found in other FTC consumer-protection cases. PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646. And when calculated based on Complaint Counsel rebuttal expert Erez Yoeli's contention that over 100 million consumers in one year could have been deceived, the complaint rate is so low that Mr. Yoeli said he "can't keep track of the zeros." PFF ¶645. This miniscule rate is orders of magnitude too small to support a finding that a significant minority of reasonable consumers was deceived. PFF ¶¶623, 631-632.

Figure 6
Complaints Identified by Complaint Counsel as a Share of TurboTax Customers Who Filed At Least One Return
TY 2015 – TY 2021



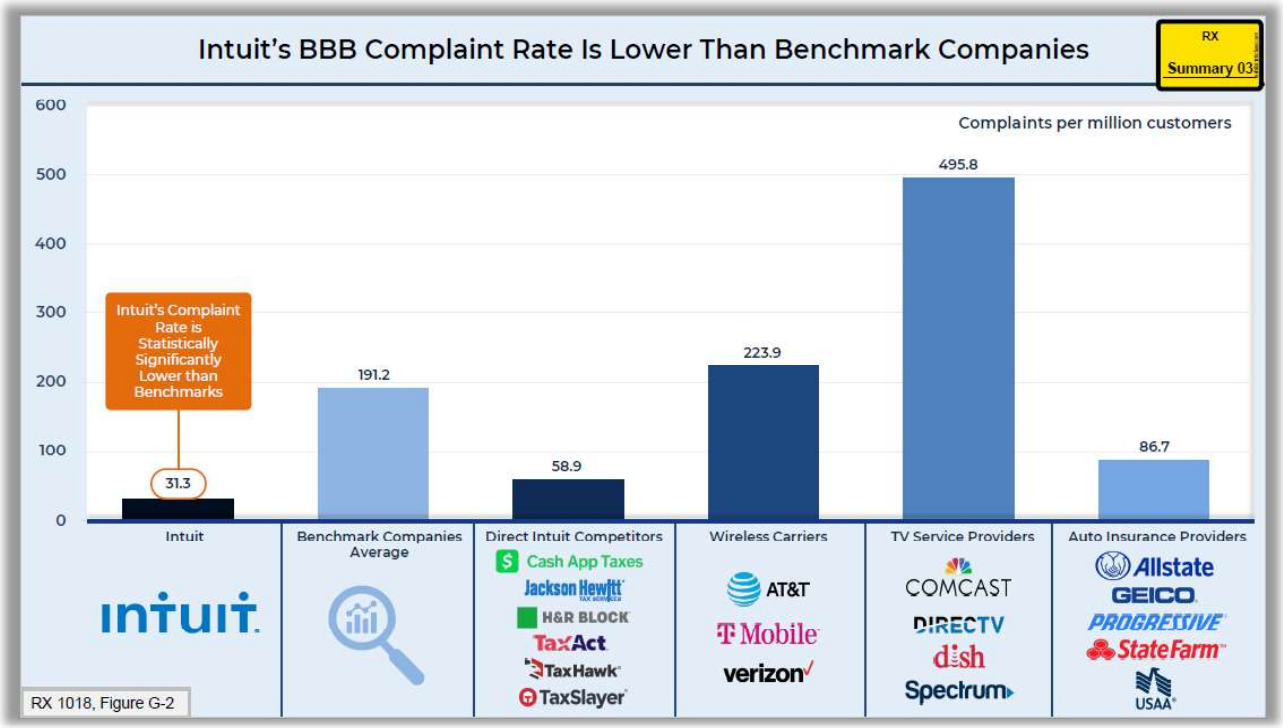
PFF ¶631.

The tiny number of complaints is especially inconsistent with the allegation of widespread deception given how many times the challenged ads ran. Over the six-year period in

which the 228 complaints were submitted, the challenged ads were distributed tens of *billions* of times. PFF ¶637. Even considering only the advertisement clicks from Tax Years 2020 and 2021, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 228 complaints amounts to just 0.000175% of those who clicked on a TurboTax ad. PFF ¶637. Complaint Counsel have cited no case in which deception has been found in the face of a complaint rate even remotely that low, and to Intuit's knowledge there is no such case. That is undoubtedly because common sense makes clear that if ads displayed billions of times were deceptive, more than (at most) 228 consumers would have complained.

To confirm this logical intuition, Professor Golder performed a complaint-benchmarking analysis, which confirms that the number of complaints is entirely inconsistent with Complaint Counsel's theory of deception. Professor Golder compared Intuit's rate of complaints on the BBB website with the rate for each of 18 benchmark companies (including direct tax-preparation service competitors such as H&R Block, TaxAct, TaxSlayer, FreeTaxUSA, and Cash App Taxes). PFF ¶638. Intuit's rate of (31.3 complaints per million customers) was statistically significantly *less* than that of other companies (191.2 complaints per million customers). PFF ¶638. That far fewer consumers complained about Intuit relative to other companies further undermines the suggestion that Intuit engaged in a deceptive advertising campaign, much less a widespread and long-term one. PFF ¶639; *see also* PFF ¶¶625-626. In contrast, Professor Golder pointed to well-known instances of recent deception that resulted in "substantially higher" numbers of complaints. PFF ¶640. And any suggestion that consumers are lazy "misers" who are unlikely to complain, *see* PFF ¶927, is not only a surprising sentiment from the nation's consumer protection agency, but also plainly belied by the fact that there are far more

complaints for the other businesses examined, and in real instances of deception, the complaint volume is much higher.



3. Data concerning consumers' experiences show that reasonable consumers were not deceived

a. ***Metrics.*** Numerous other metrics concerning consumers' experiences with TurboTax provide strong evidence that those experiences were consistent with consumers' expectations, including expectations created by the challenged ads.

Complaint Counsel tried to suggest that consumers starting but not finishing using TurboTax Free Edition is evidence of deception, PFF ¶655, but the data say otherwise. The abandonment rates for TurboTax's paid and free products are the same, 22%. PFF ¶656. That symmetry shows that consumers are abandoning TurboTax not because they feel misled about whether they could file for free (a reason specific to free products), but instead for a reason (or reasons) common to all products—such as losing confidence in their ability to file on their own,

because they are only using the software to double-check what they are being told by another tax-preparation provider, or because they are comparing different tax-preparation options. PFF ¶657; *see also* PFF ¶658. If consumers felt misled by Intuit's advertising, one would expect many of them to abandon TurboTax returns once they were told it was not free, resulting in a higher abandonment rate for free products. PFF ¶657.

Intuit's data also show that Intuit is successful at reaching qualifying consumers with its free TurboTax ads and, more broadly, getting consumers to start in the right SKU. Each year, [redacted]. PFF ¶659. In Tax Year 2018, for example, [redacted] did so. PFF ¶659. And in Tax Year 2020, [redacted] did. PFF ¶659. Those figures outpace the 50% of consumers in the online tax industry who qualify to file for free, PFF ¶129, demonstrating that eligible consumers are getting the message that Free Edition is free, PFF ¶660. Moreover, data show that most consumers—[redacted] between Tax Years 2014 and 2021—start and finish in the same SKU. PFF ¶661. That holds true for Free Edition: Between Tax Years 2014 and 2021, [redacted] of consumers who started in Free Edition finished in it. PFF ¶82. Even for consumers who did not use the SKU selector before selecting Free Edition, approximately 75% who started in that product finished with it. PFF ¶434. These percentages are especially impressive given that third-party review websites like the New York Times' Wirecutter recommended that consumers "start with Free Edition" even if they know they do not qualify. PFF ¶¶433, 662.

TurboTax's high customer-retention rate also reflects that consumers were not misled into believing that all TurboTax was free or that they themselves could file for free when that was not the case. If consumers were lured to TurboTax with false or misleading promises, it is unlikely they would keep coming back. PFF ¶649. To the contrary, if Intuit had engaged in the

wide-ranging and long-running deceptive ad campaign alleged, consumers would be angry and less likely to return to TurboTax, resulting in a lower retention rate. PFF ¶649.

But TurboTax customers do keep coming back. In fact, TurboTax's retention rate for paid TurboTax SKUs is 83%. PFF ¶650; *see also* PFF ¶92. This compares favorably to TurboTax's competitors, who, on average, have a retention rate [redacted]. PFF ¶91. Intuit's high retention rate for paid SKUs contradicts Complaint Counsel's claim, because these paying users are the ones Complaint Counsel would argue were somehow deceived by Intuit's free advertising, and therefore the ones who would be least likely to return year after year—if there were any deceptive advertising. PFF ¶650; *see also* PFF ¶651.

TurboTax's consistently high customer ratings and positive reviews—by independent reviewers as well as by consumers on the TurboTax website—also suggest the absence of deception. PFF ¶652. If consumers were misled into using a free TurboTax product for which they are not eligible, they would express that frustration, including in product ratings and reviews. PFF ¶652. But the record does not reflect anything of the sort; instead, both paid and free TurboTax products have consistently received overwhelmingly positive customer feedback. PFF ¶¶653-654. For example, in Tax Year 2021, hundreds of thousands of customer reviews of TurboTax's products generated average ratings between 4.4 and 4.9 out of 5 stars. PFF ¶653.

b. Data regarding Intuit's Tax Year 2021 customer base. Intuit's internal customer-level data reflecting actual customer behavior further contradict any claim that a significant minority of reasonable customers was likely deceived by the challenged ads.

To assess whether there was direct evidence of widespread deception in the manner alleged, Mr. Deal analyzed data on the roughly 55.5 million Intuit consumers who created or logged into a previously created TurboTax online account on the TurboTax website. PFF ¶¶663-

664. He found that most consumers filed for free, did not file with TurboTax, or based on their previous experience using TurboTax or awareness of their own tax situation were unlikely to have believed that TurboTax was free for them. PFF ¶663.

In the first phrase of his analysis, Mr. Deal found that approximately 97.6% of the 55.5 million Intuit customers in Tax Year 2021 exhibited characteristics or behaviors inconsistent with the deception Complaint Counsel allege. PFF ¶674. At the outset, 13.4 million customers used TurboTax to file their federal and state tax returns for free in Tax Year 2021. PFF ¶665. These customers could not have been deceived by Intuit's advertisements because, to the extent they formed an expectation that they could file for free, those expectations were met. PFF ¶665. An additional 17.6 million customers examined by Mr. Deal accessed or created a TurboTax account in Tax Year 2021 but did not complete a return with TurboTax. PFF ¶666. None of these consumers paid any fees to Intuit in connection with preparing their taxes. PFF ¶666. Nor did these consumers spend significant time on the TurboTax website—in fact, 6.8 million of them did not even start a tax return. PFF ¶¶666, 668; *see also* PFF ¶667. As for customers who did start a return with TurboTax, they typically were told they did not qualify for Free Edition (assuming they did not abandon for another reason) within 30 minutes of starting their return. PFF ¶668. And that 30-minute figure likely overstates how long consumers were actively using the product, as Mr. Deal considered elapsed time between when the return was started and the time when the consumer encountered a message telling them they did not qualify for Free Edition. PFF ¶668. If a consumer stepped away to take a ten-minute phone call, for example, those ten minutes would still count towards the elapsed time. PFF ¶668. There is no evidence that any of these consumers were materially deceived. PFF ¶¶666, 668.

Among the remaining 24.4 million customers who paid to use TurboTax in Tax Year 2021, the overwhelming majority (22.1 million) had previously used or been recommended to use a paid TurboTax product in the prior two tax years. PFF ¶¶669-670. Reasonable consumers familiar with Intuit's paid TurboTax SKUs and their own tax situations were unlikely to believe either that all TurboTax products were free or that TurboTax necessarily would be free for them. PFF ¶671. Many of these same 22.1 million customers were also among the 7.3 million paying customers identified by Mr. Deal who elected to purchase additional optional, paid TurboTax services. PFF ¶672. This behavior is inconsistent with deception, because if a reasonable consumer were misled into believing they could file their tax return for free when they could not, it would make little sense for them to voluntarily pay even more. PFF ¶672. Finally, approximately 4 million paying customers elected to upgrade from Free Edition to a paid TurboTax SKU to itemize deductions and maximize their tax refunds, despite being eligible to use Free Edition. PFF ¶673. These consumers were free to file their taxes for free, started in the TurboTax free product, but ultimately chose to switch. It can hardly be said that the challenged *advertisements* deceived them. PFF ¶673.

In the second phase of his analysis, Mr. Deal further examined the remaining 1.3 million paying customers to identify the group most susceptible to the deception alleged by Complaint Counsel and to determine whether there was any direct evidence they actually were deceived. PFF ¶675. To do so, Mr. Deal focused on the 43,776 *new* Free Edition customers unfamiliar with the product, who found the product *through a TurboTax advertisement*, spent a *material amount of time* using the product (60 minutes) before being told they were not eligible for Free Edition, and ultimately decided to upgrade to a paid SKU. PFF ¶678. But when he examined the actual behavior of those specific customers, Mr. Deal found no evidence of widespread

deception. Just 510 of the 43,776 customers he examined even potentially viewed themselves as having been deceived. PFF ¶¶679-682. Those 510 customers—far less than 1% of Intuit's Tax Year 2021 customer base—do not support finding that a significant minority of consumers were likely deceived, and there is no logical reason to believe there would be greater rates of negative customer sentiment evidencing widespread deception among the less-impacted, less-vulnerable groups Mr. Deal identified as being unlikely to have been deceived earlier in his analysis.

The significance of Mr. Deal's testimony is perhaps best illustrated by the feeble rebuttal offered by Complaint Counsel's rebuttal witness Erez Yoeli. Mr. Yoeli used an idiosyncratic definition of deception that excluded materiality and offered by his own account the "not … very strong" opinion that the customers identified by Mr. Deal as unlikely to have been deceived "could" have been deceived. PFF ¶930. Mr. Yoeli was entirely unfamiliar with the record, reviewing only five produced documents, none of the challenged ads, and none of the Intuit employee depositions or testimony. PFF ¶930. He also reviewed only a small subset of the materials Mr. Deal reviewed, PFF ¶930, a peculiar and problematic choice when offering a rebuttal opinion. His rebuttal is entitled to no weight, and the fact that this was the best Complaint Counsel could do to rebut Mr. Deal is quite telling.

4. Reliable consumer testing and survey evidence reflect that no significant minority of reasonable consumers was likely deceived

Intuit has presented credible and scientifically sound evidence, from both fact and expert witnesses, regarding the effect the company's advertising had on consumers' understanding and behavior. This evidence confirms that Intuit's advertising did not likely deceive a significant minority of reasonable consumers.

a. TY2020 NPS Study. A Net Promoter Score survey from Tax Year 2020 (the "TY2020 NPS study") demonstrates that TurboTax advertisements did not mislead a significant

minority of reasonable consumers into believing that all TurboTax is free or that it was free for them. The study asked over 2,000 TurboTax customers whether they were aware of a free TurboTax product "[redacted]" TurboTax. PFF ¶716. Roughly half of respondents (48%) answered affirmatively, which was barely more than the 44% of respondents who had actually filed their taxes for free with Free Edition. PFF ¶717. By contrast, only [redacted] of respondents who had used a paid TurboTax product indicated that they were aware that TurboTax had a free offering before they chose to use TurboTax. PFF ¶719.

These results demonstrate that Intuit has largely been successful in having its free TurboTax advertisements reach qualifying consumers. PFF ¶720. They also demonstrate that consumers who come to the TurboTax website expecting to file for free *are* filing for free, while consumers who visit the website expecting to pay to file their taxes are finding TurboTax's paid offerings. PFF ¶721. That consumers' experiences closely match their expectations refutes Complaint Counsel's argument that TurboTax advertising misled consumers into erroneously believing they could use TurboTax to file for free.

b. Disclosure Efficacy Survey. In his Disclosure Efficacy Survey, Dr. Hauser used a test-control design to test whether a number of changes to TurboTax's ads and website would affect consumer behavior—and found that they would not. PFF ¶¶722-723. Dr. Hauser showed one group of participants (the "Original Disclosures Group") ads and webpages that mirrored TurboTax advertising from Tax Year 2021, with the only change being that the TurboTax brand was replaced with a disguised brand name (Vertax) to prevent respondents' pre-conceived views from affecting the results. PFF ¶¶725-727, 733. He showed a second group of participants (the "Revised Disclosures Group") Vertax ads and webpages that were revised in several ways to address Complaint Counsel's allegations in this matter—namely, reducing the repetition of and

emphasis on the word "free" and adding additional and more prominent information about Free Edition's qualifications. PFF ¶¶728, 730, 734. After being shown the ads and webpages, members of each group were asked three questions: (1) whether they would consider filing their taxes with Vertax; (2) if so, which product they would choose from the Vertax product line-up (which replicated TurboTax's line-up); and (3) how likely they would be to actually start in that product. PFF ¶¶735-736, 739, 741.

If the challenged ads in this case were deceptive, one would expect that changing them to reduce the emphasis on "free" and provide consumers more information about Free Edition's qualifications would discourage consumers from considering the brand and from starting in Free Edition. PFF ¶742. But the Disclosure Efficacy Survey shows otherwise: modifying TurboTax's marketing to address Complaint Counsel's allegations had no effect on consumer behavior. PFF ¶722.

Confronted with these results, Complaint Counsel have resorted to arguing that the survey's revised ad was just as deceptive as the original ad. PFF ¶731. That contention defies credulity: On its face, the revised ad survey conspicuously informed participants (verbally and in written text) that "Not all taxpayers qualify" and invited them to "See if they qualify at Vertax.com." PFF ¶¶730, 731. The disclosures in the revised ad, moreover, were comparable to those in the actual ads that Intuit subsequently produced for Tax Year 2022—which copy testing conclusively demonstrates are not deceptive. PFF ¶731. Because the revised ad caused no change in consumer behavior compared to the original ad (which was substantively identical to the challenged ads), the Disclosure Efficacy Survey is strong evidence that the challenged ads were not deceptive either.

c. Kirk Fair survey. The survey conducted by Rebecca Kirk Fair—a survey expert the FTC has previously retained, PFF ¶905—further confirms that Intuit's ads were not deceptive. Her survey presented participants with a Free Edition advertisement and instructed them to imagine they had begun filing their tax returns in Free Edition. PFF ¶750. While working on their returns, respondents were told they did not qualify to use Free Edition and shown one of three upgrade screens, one of which mirrored the screen Intuit used and two of which were test upgrade screens that contained more or less information than the actual one. PFF ¶¶750-753. After respondents were presented with one of the three screens, they were asked questions about different tax-preparation solutions they would consider using, including Free Edition and alternatives beyond TurboTax. PFF ¶754.

If Complaint Counsel were correct that consumers start using TurboTax because they are deceived into believing they can file for free, one "would expect to see a substantial, statistically significant reduction in respondents' selection of a TurboTax paid product after learning of [an] additional free option." PFF ¶755. The survey, however, showed the opposite, as there was no statistically significant difference among the responses of the three different screen groups. PFF ¶756. The survey thus demonstrates that consumers shown Free Edition ads did not feel they were misled after being told they did not qualify.

Relatedly, the fact that consumers recognized they could use non-TurboTax products but still largely remained with TurboTax is inconsistent with the notion that they explored only TurboTax because they believed they could file for free. PFF ¶759. Regardless of which upgrade screen they saw, respondents in the Kirk Fair survey said they chose a TurboTax paid product primarily because of their particular "tax situation," followed by their trust in the TurboTax brand and the features in TurboTax products. PFF ¶759.

E. Detailed Information Is Clear, Upfront, And Ubiquitous At TurboTax.com

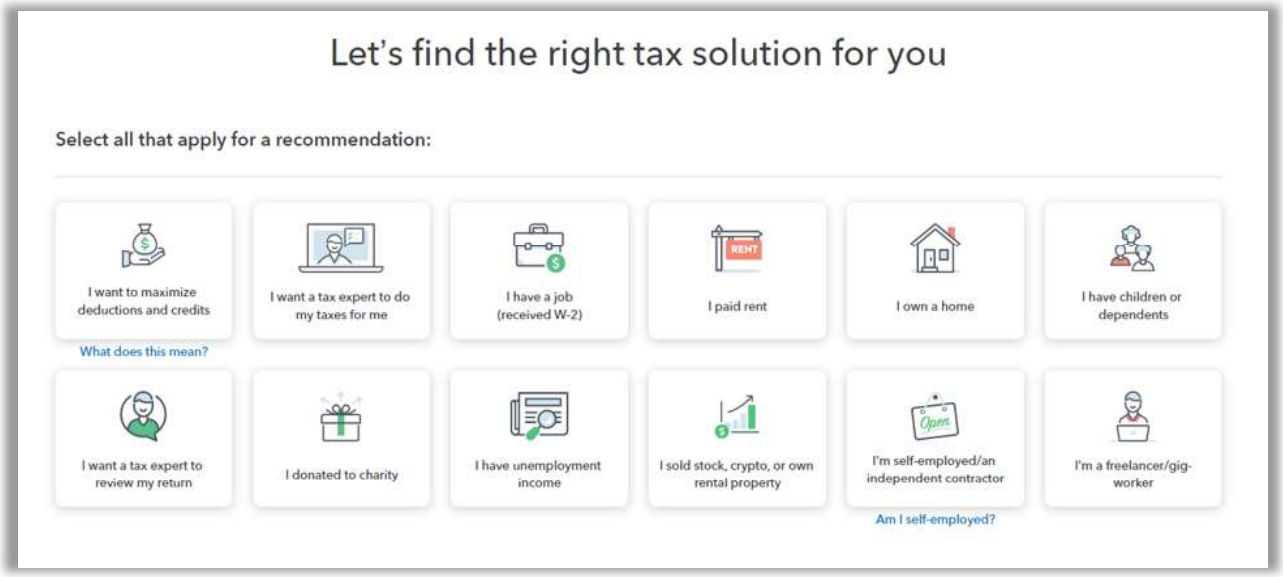
To the extent consumers were uncertain or confused about whether a free TurboTax offer being advertised was qualified or whether it was free for them, TurboTax's website would have promptly made clear both the existence and the specifics of the qualifications for the offer. Considering the information provided on the website, as required here, *see supra* p.43; Part II.A, it is plain that the website helped ensure reasonable consumers were not somehow misled into believing that all "TurboTax is free" or that it was necessarily "free for them."

At the TurboTax website, consumers were (and are) presented with clear, prominent, and repeated information about the qualifications for TurboTax's free offers. Thus, it is unsurprising that several of Complaint Counsel's witnesses acknowledged the extensive nature of the website's disclosures and how quickly consumers would see the qualifications for free TurboTax offers. PFF ¶369.

When consumers clicked a "simple returns" hyperlink on any of the TurboTax webpages, a window detailing the qualifications for the free offer in question popped up on the screen. PFF ¶¶379, 391, 415. Two factors drove Intuit's decision to include these details in a pop-up screen. First, using a pop-up is "a way of disrupting the consumer's viewing pattern to draw their attention to something that's really important." PFF ¶383. Second, keeping the detailed qualifying information in the pop-up screen, as opposed to on the home or landing page, avoids overwhelming consumers with "too much information to really read and comprehend." PFF ¶383. By allowing "consumers [to] control the pace at which they see that information," Intuit's strategy of combining hyperlinks announcing the existence of qualifications with pop-up windows that provide the details when the hyperlinks are clicked decreased the likelihood that consumers would "tune out and not try to process something that's an overwhelming message." PFF ¶379. In other words, by structuring the website's disclosures how it did, Intuit *increased*

the chances that consumers would notice, and comprehend, the qualifications for TurboTax's free offers.

If consumers took steps to start preparing their tax return using TurboTax, they were taken to the Products & Pricing page, which all new consumers see before they begin preparing their taxes with a TurboTax product. PFF ¶¶408-409. That page provided additional details about each TurboTax product, including the prices of each and relevant qualifications, PFF ¶¶413-414, and multiple disclosures stating that TurboTax Free Edition is available for "simple tax returns only," PFF ¶¶415-416. The Products & Pricing also included a "SKU selector" tool, which enables consumers to receive a recommendation for the TurboTax SKU most likely suited to their tax situation. PFF ¶¶419-420. When the SKU selector recommended TurboTax Free Edition, the website again disclosed that Free Edition is "For simple tax returns only." PFF ¶427. A screenshot of the SKU Selector from Tax Year 2022, RX1532, is displayed above (at p.24), and again below:



PFF ¶421.

All of this taken together means that consumers who arrived at the TurboTax website could easily and quickly learn the full details of the qualifications to file for free with TurboTax, see the full range of products on offer, and use tools and other information to assess the appropriate TurboTax product for their tax situation. Quite simply, it would make *no* sense to run deceptive advertisements and then provide all of this information on the website before a customer even provided TurboTax with their name, let alone before they paid to use TurboTax. More importantly, a reasonable consumer who went to the TurboTax website (as one must to use the products at issue in this case) would not have been misled. That is dispositive.

* * *

Complaint Counsel bore the burden to prove that a significant minority of reasonable consumers was likely to be deceived by the challenged ads. But Complaint Counsel offered little evidence on that issue, and none that satisfies their burden. Professor Novemsky's survey is flawed many times over and cannot be relied on to draw any conclusions about how consumers responded to the challenged ads, which none of the participants saw. And the consumer complaints that Complaint Counsel introduced actually disprove their claim, showing that only a miniscule fraction of consumers complained. Those complaints—which amount to almost nothing considering Intuit's customer base, how many times the ads were shown, and complaint rates in other cases—reflect that the challenged ads in fact did not deceive reasonable consumers. Intuit, meanwhile, has offered an abundance of evidence, including data that shed light on consumers' expectations and experiences, consumer testing, and reliable expert surveys, all of which confirms that no significant minority of reasonable consumers was likely deceived.

III. COMPLAINT COUNSEL FAILED TO PROVE MATERIALITY

Complaint Counsel have not satisfied their burden to prove that any alleged deception was material, that is, "likely to affect a consumer's choice of or conduct regarding a product,"

FTC Policy Statement on Deception, 103 F.T.C. at 182. Complaint Counsel have not argued that any misleading claim allegedly conveyed by the challenged ads "was likely to influence consumers' purchasing decisions," *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 68 (2d Cir. 2016), nor offered any evidence that any such claim was likely to affect other relevant conduct. In fact, reflecting Complaint Counsel's substantial neglect of the materiality element, their own expert testified at trial that he was unaware that the "legal definition of deception includes materiality." PFF ¶780.

Complaint Counsel's theory is that the alleged deception was material because consumers were drawn to the TurboTax website by the challenged ads and thus wasted time, effort, and in some cases money, amounting to harm that "can't be remedied by subsequent disclosures," PFF ¶781. That is untenable for multiple reasons.

To start, consumers do not make a decision about whether to purchase a TurboTax product until they have completed their tax return and are about to file it, which occurs *after* seeing the TurboTax website, any upgrade screens encountered within a TurboTax product (if any), and a final summary of the products they are purchasing. PFF ¶782. As Complaint Counsel themselves have conceded, "consumers learn that TurboTax Free Edition is not free for them prior to purchasing a paid version of TurboTax." PFF ¶782. And as Professor Golder explained, consumers have not "already made their purchase decision" when they arrive at the TurboTax website, in part because the selection of a particular tax-filing method entails "a high-involvement purchase process," which consumers approach with "care and consideration" and "in a thoughtful, deliberative manner." PFF ¶782. Complaint Counsel have offered no evidence proving that advertisements seen before arriving on the TurboTax website are material to consumers' ultimate purchasing decision. PFF ¶779.

Moreover, Complaint Counsel did not establish that any allegedly misleading claim in the challenged ads was responsible for driving consumers to the TurboTax website, let alone driving consumers to pay for TurboTax. To the contrary, unrebutted evidence indicates that when the challenged ads invited consumers to visit the TurboTax website, they were "just reinforcing what consumers [were] inclined to do anyway." PFF ¶784. And other unrebutted evidence shows that consumers do *not* rely solely (or even primarily) on ads when making decisions to try or purchase a tax-preparation product, but rather consult multiple sources, including friends and family, internet research, third-party reviews, and the IRS website. *See* PFF ¶¶505, 786-787. Consistent with that, Dr. Hauser's Disclosure Efficacy Survey demonstrates that revising the challenged ads as Complaint Counsel suggest would not have made consumers any less likely to consider or start using TurboTax Free Edition. PFF ¶¶736-742. That undermines any notion that claims in the ads were material.

Complaint Counsel's theory independently fails because even if the claims allegedly conveyed by Intuit's ads *did* drive consumers to the TurboTax website, that does not establish materiality. As noted, Complaint Counsel's expert conceded that it took only "a few seconds" to access the TurboTax website, and that once on the website it took only "five to ten seconds" to encounter full eligibility information for free TurboTax offers. PFF ¶790; *accord* PFF ¶793 2022) (Complaint Counsel admitted that "consumers with income-related disqualifiers … are likely informed that they do not qualify for Free Edition as quickly as 10 minutes into the process of completing their tax returns"). As Mr. Rubin confirmed, moreover, this full product information was always accessible before consumers "ha[d] to input their name or any other personal information." PFF ¶791. And for consumers who did input information to start the process of filing a return, they typically encountered a required upgrade screen, if at all, within

just 30 minutes. PFF ¶¶792-793. And even that 30-minute figure likely overstates how long consumers were actively using the website. PFF ¶668. Complaint Counsel have failed to explain—as was their burden, *see* 16 C.F.R. §3.43(a)—how, under these circumstances, merely causing consumers to visit the TurboTax website establishes materiality as to statements in the challenged ads. PFF ¶794.

Finally, contrary to Complaint Counsel's contention (Pretrial Br. 35 n.47), the challenged ads are not presumptively material simply because they mention the word "free." PFF ¶795. Even assuming that claims about the cost of a product are presumptively material, the products advertised in the challenged ads were in fact free to everyone who qualified to use them. PFF ¶795; *see also* PFF ¶¶69, 109-110. Thus, any alleged misrepresentation was not about the *cost* of the advertised product, but rather about its *qualifications*, i.e., about particular consumers' ability to use the product (at the accurately advertised free price). PFF ¶795. Complaint Counsel have cited no case applying a presumption of materiality in these circumstances, which starkly distinguish this case from the one Complaint Counsel highlighted at trial (*see* Evans (FTC) Tr. 29). In that case—*Book-of-the-Month Club*, 48 F.T.C. 1297 (1952), *aff'd*, 202 F.2d 486 (2d Cir. 1953)—a "free" claim was deemed material because the product *was not actually free*; rather, consumers had to either "assume the obligation to purchase at least four books … over a period of a year," or subsequently "pay[] for the so-called 'free' book," *id*. at 1299. Here, TurboTax's free SKUs are genuinely free; it is impossible to pay to use them. This distinction is yet another reason Complaint Counsel fail to prove materiality.

IV. NO CEASE-AND-DESIST ORDER IS WARRANTED

The sole remedy available here is "an order requiring [Intuit] to cease and desist from using any act or practice found to be deceptive." 15 U.S.C. §45(b). Complaint Counsel bore the burden of "satisfy[ing] the court that [such] relief is needed." *United States v. W. T. Grant Co.*,

345 U.S. 629, 633 (1953), *quoted in Benco Dental Supply Co.*, 2019 WL 5419393, at *75 (F.T.C. Oct. 15, 2019). But a cease-and-desist order is appropriate only "to prevent illegal practices in the future," *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), not "to fasten liability on [Intuit] for past conduct," *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948). In other words, the Commission "is not empowered to issue a cease and desist order as punishment for past offenses." *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964). Accordingly, Complaint Counsel had to prove the existence of "some cognizable danger of recurrent violation, something more than the mere *possibility* which serves to keep the case alive." *W. T. Grant*, 345 U.S. at 633 (emphasis added). They did not do so, and hence even if they had established that the challenged ads were deceptive, no cease-and-desist order would be warranted.

Complaint Counsel's failure to show that any cease-and-desist order should issue is not surprising, given that they presented *no* evidence on the question. In fact, Complaint Counsel expressly acknowledged that Intuit's current ads were not "at issue," PFF ¶336, leaving Intuit's past conduct (which as just described is not what this proceeding is designed to act against) the sole focus of Complaint Counsel's basis for liability. Intuit on the other hand presented ample evidence—including the May 2022 Consent Order with state attorneys general and the changes made to Intuit's marketing practices for Tax Year 2022 to comply with that order—to support its avowal that it "is not attempting and does not intend to violate the law," *New Standard Publishing Co. v. FTC*, 194 F.2d 181, 183 (4th Cir. 1952). That evidence confirms the unavailability of prospective relief here.

A. Complaint Counsel Do Not Challenge Intuit's Current Ads And Unrebutted Evidence Shows That Those Ads Are Not Deceptive

The parties agree that Intuit's current free product ads are "relevant to remedy." PFF ¶803. But Complaint Counsel offered no evidence that those ads are deceptive. Their fact

witnesses, Ms. Shiller and Ms. Baburek, did not testify about Intuit's current free TurboTax ads. *See* PFF ¶336. And Complaint Counsel's primary evidence of deception, Professor Novemsky's (flawed) survey, tested consumers' perception as of March 2022, before the current ads ever ran. *See supra* p.29. Accordingly, his survey offers no support for an argument that TurboTax's current free ads are deceiving anyone.

In contrast, Intuit offered unrebutted evidence that those ads are not deceptive. Ms. Ryan, for example, testified at length about consumer "copy testing" from Tax Year 2022 (the "TY22 Test"), which established [redacted]. PFF ¶¶702-713. That testing focused on [redacted]." PFF ¶¶702, 705. Given that makeup, Ms. Ryan expected that [redacted]. PFF ¶706. Yet [redacted]. PFF ¶¶709-711. If Tax Year 2022 ads deceived consumers into believing that "TurboTax is free" or "free for them," the [redacted]. PFF ¶¶709-711. But [redacted]. PFF ¶709. The [redacted] PFF ¶¶695, 709-711, 804. That disparity likewise shows that consumers were not deceived into believing TurboTax was free for them.

Intuit's Tax Year 2022 copy testing confirmed what the ads themselves make plain: None are deceptive. Not only do these ads have the same features that rendered past ads non-deceptive—identifying the specific SKU being advertised, noting that the offer is only for simple tax returns, and informing consumers that more information can be found on the TurboTax website, *supra* §D.2—but those features have also been enhanced. For example, Tax Year 2022 ads now include written *and* verbal disclosures for all video ads longer than eight seconds. PFF ¶¶337-338, 343, 825. The verbal disclosures say that the offer is only available to consumers "filing a simple return" and tell consumers to "see if you qualify at turbotax.com." PFF ¶¶338, 343. Furthermore, Intuit has increased the size of the written disclosures in many of its ads. A screenshot from one such disclosure is shown below. PFF ¶340. The reference to simple returns is impossible to miss.

B. Intuit's Free TurboTax Advertising Is Already Subject To Injunctive Terms Enforceable By Every State And The District Of Columbia That Prohibit All The Conduct Complaint Counsel Seek To Enjoin

Because Intuit's current ads are not deceptive, Complaint Counsel had to find something else to establish the "cognizable danger of recurrent violation" that is required for prospective

relief, *W. T. Grant*, 345 U.S. at 633. They did not do so—because, as explained in the balance of this Part IV, any potentially deceptive conduct that might hypothetically occur in the future is *already enjoined*, and Intuit is committed to clarity and transparency in its advertising.

Since June 2022, Intuit has been required by the legally binding Consent Order to comply with certain restrictions on its advertising. *See* PFF ¶809. Those restrictions preclude Intuit from engaging in the advertising practices challenged here. For example, the "Free, Free, Free" television ads—which Intuit had already voluntarily pulled from the airwaves, PFF ¶¶7-8—are specifically barred by the Consent Order. *See* PFF ¶213. Additional provisions of the order require "Clear and Conspicuous" disclosures in Intuit's advertising, including written disclosures that not all taxpayers qualify and, in all video ads 8 seconds or longer, corollary verbal disclosures. *See* PFF ¶¶809-819.

The Consent Order's injunctive provisions moot this case. "[A] suit becomes moot[] 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). That is the case here. Because of the Consent Order, "[t]here is nothing for this court to enjoin." *Wold v. Robart*, 2018 WL 1135396, at *5 (E.D. Wis. Feb. 28, 2018). Certainly Complaint Counsel have offered no basis for the Court to have a "reasonable expectation" that the complained-of conduct could recur even though the Consent Order bars it. *South Carolina State Board of Dentistry*, 138 F.T.C. 229, 262 (2004) (citing *W. T. Grant*, 345 U.S. at 632); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 97 (2013) (holding a case moot in light of a "covenant promising" no future violations of the type alleged); *iMortgage Services, LLC v. Louisiana Real Estate Appraisers Board*, 2023 WL 2254528, at *2-5 (M.D. La. Feb. 27, 2023) (deeming a case moot because any relief would be

"redundant" with an FTC consent decree, and the prospect of FTC enforcement "preclude[d] a reasonable expectation that the wrong w[ould] be repeated").

Intuit, by contrast, offered evidence foreclosing any reasonable expectation of the alleged deception occurring in the future. Ms. Ryan testified, for example, that since the Consent Order took effect, Intuit has complied with its restrictions on TurboTax marketing, and that Intuit will continue to do so in the future. PFF ¶¶823-828. Since the Consent Order took effect, she explained (and indeed since *before* it took effect), Intuit has not run the "Free, Free, Free" video advertisements or any other video ads that similarly repeat the word "free." PFF ¶824. Intuit has likewise complied with the Consent Order's provisions governing display ads—and in fact had included qualifying language and hyperlinks directing consumers to a TurboTax webpage that details the qualifications of the free TurboTax product or offer, as required by the Consent Order, prior to that order taking effect. PFF ¶¶826-827.

Mr. Rubin's testimony about Intuit's compliance policies and procedures further confirms that there is no cognizable danger of Intuit engaging in any deceptive advertising in the future. As he explained, Intuit has charged an internal team with ensuring that all TurboTax advertising continues to comply with the Consent Order, PFF ¶821. Intuit also prioritizes employee training for compliance with that order, such that all the relevant Intuit employees receive clear and comprehensive training on its provisions. PFF ¶822.

In light of this testimony, and the lack of any contrary evidence, the notion that Intuit might fail to comply with the Consent Order's terms in the future is pure speculation. That does not avoid mootness. *See iMortgage Services*, 2023 WL 2254528, at *4. And even if the Consent Order did not fully moot this case, it would assuredly "provide[] [powerful] assurances of [Intuit's] future compliance" with the FTC Act, eradicating any "cognizable danger" of future

violations and precluding prospective relief. *TRW v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981). As noted, the Consent Order is part of a binding California-court judgment, enforceable against Intuit by the 51 attorneys general. Under these circumstances, there is "no reasonable expectation" of future violations of the sort challenged in this proceeding, *W. T. Grant*, 345 U.S. at 633.

C. Intuit Is, And Has Always Been, Committed To Clarity In Its Free (And Other) Advertising

Unrebutted trial testimony demonstrates that Intuit both never intended to run deceptive ads and has a genuine and resolute "intent to comply with the law in the future," *Benco Dental*, 2019 WL 5419393, at *75. This lack of both past and future intent to deceive cuts strongly against entry of a cease-and-desist order, *see id.* at *75, particularly given that the challenged ads are "substantially outdated," *FTC v. Merchandise Services Direct, LLC*, 2013 WL 4094394, at *3 (E.D. Wash. Aug. 13, 2013); *see also id.* (denying the FTC's motion for a temporary restraining order because the Commission relied on "'stale' information"). At the very least, because "deliberateness of the violation" is a factor "used by the Commission to determine" the proper scope of relief, *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994), the lack of deceptive intent here means that capacious order Complaint Counsel are seeking cannot issue.

Complaint Counsel admitted before trial that there is no evidence Intuit intentionally tried to deceive consumers, PFF ¶175. Unrebutted trial testimony confirmed that admission, as to both the past and the future. Intuit always intended that the challenged ads communicate that the particular free TurboTax SKU being advertised was free and only available for consumers who qualify.

Mr. Johnson's testimony, for instance, set forth Intuit's foundational values, long-term goals, and strategies for the TurboTax brand—values, goals, and strategies that are inconsistent

with deception. *See* PFF ¶¶30, 33-38, 174, 850-852; *supra* pp.30-31. He explained that if at any time during his Intuit tenure he had believed that any Intuit advertisement was misleading consumers in the manner suggested by Complaint Counsel, Intuit "would have stopped the ad" and pulled it from circulation. PFF ¶174. He also explained if the goal is (as in Intuit's case) to "build future growth and have a healthy franchise," managing a brand (such as TurboTax) requires executives "to have a high … say:do ratio"—i.e., to communicate clearly and "believabl[y]" with consumers, and to match their words to their actions. PFF ¶167. Consistent with that ethos, Intuit gave its ad agencies "mandatory" instructions to "drive absolute clarity around who … TurboTax Free Edition was meant for." PFF ¶¶172-173. That commitment to clarity demonstrates that Intuit never intended to engage in deceptive advertising, providing assurance that it will not engage in deceptive advertising in the future.

The evidence further shows that Intuit is committed to clarity in its advertisement going forward and its intent not to engage in any deceptive conduct. Like Mr. Johnson, Ms. Ryan and Mr. Rubin testified that they did not intend to deceive consumers through TurboTax advertising and that they would stop distributing ads if there was any indication that they were doing so. *See* PFF ¶¶169-174, 176, 769, 860, 870; *supra* pp.31-32, 47-48 (discussing this testimony). Ms. Ryan and Mr. Rubin also both testified that running deceptive ads would undermine Intuit's business interests. PFF ¶¶73, 647. Ms. Ryan further testified that Intuit stopped running its "Free, Free, Free" ads in Tax Year 2021 voluntarily after a March 2022 meeting with Chair Khan in which concerns about that ad campaign were expressed. PFF ¶¶7-8. Intuit did so, she explained, even though the process of removing the ad campaign from circulation "was extremely disruptive" and required Intuit to "work[] across multiple agencies and across hundreds of contacts across [its] media partners." PFF ¶8. Both Ms. Ryan and Mr. Rubin also

testified about Intuit's efforts to aim as much of its TurboTax Free Edition advertising as possible at a target audience of those who qualify, i.e., taxpayers who have simple U.S. returns and thus qualify to use Free Edition. PFF ¶¶191-198.

Moreover, Ms. Ryan explained how Intuit has voluntarily improved its TurboTax ads over the years, with the goal of communicating even more clearly than before the qualifications of free TurboTax products and offers. *See* PFF ¶¶353, 363. Starting in Tax Year 2019, for instance, Intuit updated the title card of its video ads to display the "TurboTax Free Edition" logo and increased the font size and contrast of the written disclosures. PFF ¶357. And in Tax Year 2022, Intuit added voiceovers in both video and display ads stating that the free offers were for "simple tax returns only" and inviting consumers to "see if you qualify at TurboTax.com." PFF ¶338. Those improvements exemplify Intuit matching its words with its actions, reinforcing the company's stated intent to be clear with consumers.

Consistent with all this fact testimony, one of Intuit's expert witnesses, Mr. Deal, testified that Intuit's business strategy and economic incentives are inconsistent with using deception to earn revenue in the short term. As he explained, because the tax-preparation industry has a "largely fixed set of consumers," and because of the "very low marginal costs and [the] annual requirement to file taxes," Intuit derives far greater value from exceeding customer expectations and earning repeat business than it does from one-off transactions. PFF ¶¶39, 89. Courts have likewise recognized the "the importance of reputation and brand in driving consumer behavior in purchasing" in the online tax-preparation industry. *H&R Block*, 833 F.Supp.2d at 75. Those incentives provide further still assurance that Intuit will not engage in deceptive advertising in the future.

This lack of deceptive intent, both past and future, weighs against a cease-and-desist order. "[T]he character of the past violations" should be considered when assessing the ongoing risk of future abuse. *W. T. Grant*, 345 U.S. at 643. To that end, courts have relied on an alleged wrongdoer's intent to break the law as a justification for forward-looking relief. *E.g.*, *FTC v. Walmart Inc.*, 2023 WL 2646741, at *21 (N.D. Ill. Mar. 27, 2023); *FTC v. Shkreli*, 581 F.Supp.3d 579, 639-640 (S.D.N.Y. 2022). Here, that bad intent is entirely missing. In fact, the *only* evidence regarding intent is that Intuit's intentions were to be fully honest and transparent. As explained in this section, the same values and economic self-interest that safeguarded against Intuit engaging in deliberate deception in the past will continue to militate against deception going forward. These facts provide yet another basis to deny a cease-and-desist order.

D. The Proposed Order Would Be Harmful To Consumers

Finally, Complaint Counsel's proposed remedy here is unwarranted because it would harm consumers and would not further the public interest. *See ECM Biofilms, Inc.*, 159 F.T.C. 276, 646 (2015) ("the absence of any proof of consumer harm … militates against a broad remedial order").

As an initial matter, Complaint Counsel have offered no evidence that the proposed order would help consumers better understand free TurboTax advertising. PFF ¶832. And Dr. Hauser's Disclosure Efficacy Survey shows that consumers' decisions to start filing their taxes with Free Edition were unaffected by more detailed disclosures. PFF ¶772. As he explained, moreover, many of Complaint Counsel's desired changes have already been implemented in Intuit's Tax Year 2022 advertising. PFF ¶728. Because the relief sought would not improve consumers understanding of Intuit's advertising, and would be largely redundant of Intuit's current advertising practices, no such relief is warranted.

But beyond being unhelpful, Complaint Counsel's proposed relief would affirmatively harm consumers. The proposed order Complaint Counsel sought in connection with their motion for summary decision seemingly would have required Intuit to include the content of its "simple returns" pop-up (including the specific tax situations covered and not covered by Free Edition) in all "free" TurboTax advertisements. PFF ¶839. But explaining all of Free Edition's qualifications in a 30-second television ad—much less the shorter ads typical of platforms like YouTube or TikTok—would likely constitute "information overload." PFF ¶¶138, 383, 834-835; *supra* pp.55, 67. Even Professor Novemsky agreed that he would not try to give consumers "lots of or complicated information" in a 30-second television ad, for fear that consumers would not process the information effectively and would be left more confused than informed. PFF ¶841. Professor Golder made a similar point, explaining that including all of Free Edition's qualifications in an ad (i.e., the 157 words found on the TurboTax website's "simple returns" pop-up, *see supra* p.23) and stating that the majority of taxpayers do not qualify to use Free Edition would likely decrease consumers' engagement with the ads. PFF ¶¶842, 844.

Intuit's fact witnesses offered similar testimony, drawing on their years of marketing experience to explain that consumers would be worse off if Intuit added overly detailed or technical qualifying language to TurboTax ads. PFF ¶833. Mr. Johnson, for example, explained that "includ[ing] each and every detail regarding various tax situations" covered by free TurboTax offers "would be incomprehensible" to consumers, in part because the font would need to be "so small," and that doing so would be inconsistent with consumer behavior and expectations because consumers were not yet "looking for that information." PFF ¶846. Ms. Ryan likewise testified that including the full eligibility details for free TurboTax products in ads would be impractical because they simply would not fit, and that consumers would not even

know which tax forms they use. PFF ¶846. Mr. Rubin, meanwhile, stated that providing more detailed qualifications, such as identifying specific tax forms, would "be more confusing for consumers" because tax forms can change year to year, and it is difficult to understand lengthy qualifications in a short ad. PFF ¶846. Complaint Counsel did nothing to rebut any of that testimony.

Complaint Counsel's proposed remedy could also exacerbate the skepticism that reasonable consumers already bring to offers for free products or services, again resulting in fewer consumers filing for free. As Professor Golder explained, telling consumers that most taxpayers cannot file for free with TurboTax (as Complaint Counsel's proposed order would require, PFF ¶831), would cause them to assume—in many instances, incorrectly—that they do not qualify for the free TurboTax product. PFF ¶843. That too would result in harm rather than any benefit to consumers.

Finally, Complaint Counsel's proposed order would run afoul of the constitution and must be rejected on that basis too. While under current law, the government may compel certain disclosures in commercial speech, it may do so only if the speech at issue is "noncontroversial and not unjustified or unduly burdensome." *National Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018). As discussed, Complaint Counsel's proposed order, and in particular its requirement to affirmatively disclose in all advertisements that a majority of taxpayers do not qualify to use TurboTax Free Edition fails both these elements. The parties vigorously dispute whether the entire taxpayer population is the appropriate metric for measuring TurboTax Free Edition's qualifications. And imposing such a requirement on TurboTax to the exclusion of its competitors would, on this record, be unjustified—certainly Complaint Counsel made *no* attempt to justify it. "The Supreme Court made clear in *NIFLA* that a government-

compelled disclosure that imposes an undue burden fails for that reason alone." *American Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019). The disclosures sought by Complaint Counsel impose such a burden and should be rejected for that reason too.

V. THE STATUTE OF LIMITATIONS AND LACHES BAR CONSIDERATION OF OUTDATED ADVERTISEMENTS

A. Statute Of Limitations

The outdated advertisements from Tax Years 2014-2017 that Complaint Counsel challenge cannot support the relief sought for the additional reason that any claims related to those ads are untimely. Section 5 claims are subject to a three-year statute of limitations. Thus, any advertisements that last ran before January 5, 2019—three years before the date of the tolling agreement in this case, PFF ¶5—may not be considered.*

Although section 5 does not include an express statute of limitations, it is wrong to "assume that" this absence means "Congress intended that there be no time limit on actions." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). Instead, "where there is no federal statute of limitations expressly applicable," courts "'borrow' the most suitable statute or other rule of timeliness from some other source." *Id*. Typically, that source is "the most closely analogous statute of limitations under state law." *Id*. But a related federal law may also supply the limitations period. *See Reed v. United Transportation Union*, 488 U.S. 319, 324 (1989) (citing cases). Here, analogous state and federal laws both point to a three-year statute of limitations. *See* Cal. Civ. Code §1783; D.C. Code §28-3904; N.Y. C.P.L.R. §214(2); 15 U.S.C. §57b(d).

* A full list of challenged advertisements (identified in Complaint Counsel's pretrial brief) that ran before the three-year statute of limitations period is provided in Appendix A to this brief.

Complaint Counsel, however, have cited various cases for the proposition that section 5 is not subject to *any* statute of limitations. *See* Complaint Counsel's Opp. to Intuit Mot. *In Limine* To Exclude Outdated Advertisements at 3 (Fed. 24, 2023). But those decisions all "fail[] to mention the widely recognized rule from *DelCostello*," an oversight for which at least one court has already faulted the FTC, *FTC v. Centro National Corp.*, 2014 WL 7525697, at *7-8 (S.D. Fla. Dec. 10, 2014). Complaint Counsel have also argued that federal equitable claims never borrow statutes of limitations. *See* Complaint Counsel's Opp. to Intuit Mot. *In Limine* To Exclude Outdated Advertisements at 3-4. But the Supreme Court has never so held (Complaint Counsel cite to dicta from distinguishable cases, *infra* p.115), and appellate precedent is to the contrary, *see, e.g.*, *Held v. Manufacturers Hanover Leasing Corp*., 912 F.2d 1197, 1200-1201 (10th Cir. 1990) (borrowing a state-law statute of limitations for an equitable cause of action under the Employee Retirement Income Security Act). Moreover, the tolling agreement Intuit entered into with Complaint Counsel belies any notion that section 5 claims lack a statute of limitations; if there were no limitations period, the tolling agreement Complaint Counsel itself sought and then espoused would not have been necessary.

Complaint Counsel's assertion that the FTC Act has no statute of limitations, when combined with their position that laches is unavailable, *see infra* Part V.B, presents significant constitutional problems. The Supreme Court has long "used particularly forceful language in emphasizing the importance of time limits" on government enforcement actions. *Gabelli v. SEC*, 568 U.S. 442, 452 (2013). Over two centuries ago, for example, Chief Justice Marshall explained that it would be "utterly repugnant to the genius of our laws" if government enforcement actions could "be brought at any distance of time," noting that "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that

an individual would remain forever liable" for a far lesser offense. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). Consistent with those views, the Supreme Court later declared that time limits are "an almost indispensable element of fairness." *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946). Complaint Counsel's position that *no* time limitations apply cannot be reconciled with this principle. Because courts do not lightly "assume that Congress intended to infringe constitutionally protected liberties," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988), this Court should not hold that Congress intended to exempt section 5 from the general rule that where no statute of limitations is expressly stated, an analogous statute of limitation (here, three years) is borrowed.

The due-process imperative to apply *some* time limit also undermines Complaint Counsel's argument that borrowing a statute of limitations is inappropriate in federal equitable cases. To support that proposition, Complaint Counsel rely on dicta from *DelCostello* that merely paraphrased an earlier decision explaining that statutes of limitations should not be imported to actions *where laches applies instead*. *See DelCostello*, 462 U.S. at 162 (paraphrasing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). If Complaint Counsel are right that laches does not apply, then their argument that a statute of limitations cannot be borrowed in equitable cases is even more unsustainable.

B. Laches

The doctrine of laches independently bars any attempt to punish Intuit for outdated ads of which the FTC has long been aware. To prevail on a laches defense, a defendant must show "unreasonable, prejudicial delay" by the plaintiff in commencing suit. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014). Here, the FTC began investigating Intuit in 2019 (over four years after the first ad Complaint Counsel challenge ran, in the Super Bowl no

less), PFF ¶1; *see* PFF ¶214, but then allowed nearly three whole tax seasons to pass before initiating an action in 2022, PFF ¶6. This delay occurred, moreover, even though—as Judge Breyer observed at the 2022 preliminary-injunction hearing—the conduct in question was "known to the FTC for a considerable period of time," PFF ¶14. It is inequitable to penalize Intuit for outdated ads when the FTC waited years and years, across three different administrations, before filing this case.

Complaint Counsel have not argued that the circumstances here do not satisfy the requirements for applying laches. Instead, they assert that laches is categorically unavailable against the federal government. *See* Complaint Counsel's Pretrial Br. 49. They are wrong. Laches applies against the government—including the FTC—when it unreasonably delays bringing an enforcement action to the defendant's detriment. *See FTC v. DirecTV, Inc.*, 2015 WL 9268119, at *3 (N.D. Cal. Dec. 21, 2015); *FTC v. Hang-Ups Art Enterprises, Inc.*, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995); *see also United States v. Lindberg Corp.*, 882 F.2d 1158, 1164 (7th Cir. 1989). Indeed, the D.C. Circuit—citing cases involving the federal government—recently rejected an argument that "'sovereigns' are exempt from laches." *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 296 (D.C. Cir. 2023) (citing Supreme Court cases).

VI. THIS PROCEEDING IS UNCONSTITUTIONAL

Even if none of the foregoing arguments had merit, Complaint Counsel could not prevail because this proceeding is unconstitutional, in four ways. First, the FTC's administrative processes violate due process. Second, the separation of powers both requires FTC commissioners and judges to be subject to direct presidential control and prohibits combining the functions of all three branches of government in a single agency directly accountable to no one. Third, the non-delegation doctrine bars Intuit from being subjected to an administrative proceeding based on a black-box system in which the Commission has the unchecked legislative

authority to allocate some cases to agency adjudication and others to federal court. Fourth, because the Commission itself is not neutral, Intuit has been denied its due-process right to a final administrative determination by a neutral arbiter.

To the extent this Court cannot grant relief on any of these constitutional arguments, Intuit presents each to preserve them for further review.

A. The FTC's Administrative Process Violates Due Process

Due process requires "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality). And "an unconstitutional potential for bias" inevitably exists "when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). For example, the Supreme Court has held that a Pennsylvania Supreme Court justice who had served as a prosecutor could not constitutionally adjudicate an appeal involving a defendant against whom the justice had, while a prosecutor, authorized the death penalty to be sought. *Id.* at 4. Similarly, here, the FTC authorized the filing of the complaint against Intuit and, at the same time, will ultimately decide the merits of that complaint. The potential for bias in such circumstances is unmistakable.

The commissioners' "tendency to overwhelmingly agree with their … agency's decisions," *Axon Enterprise, Inc. v. FTC*, 143 S.Ct. 890, 907 n.1 (2023) (Thomas, J., concurring), provides strong evidence of a biased institutional process that is incompatible with basic tenets of due process. *See Hamdi*, 542 U.S. at 533 (plurality). As a former commissioner remarked in 2015, the fact that "the Commission has ruled in favor of FTC staff and found liability" in "100 percent of cases" where the Commissioners voted out a complaint—regardless of the decision by the administrative law judge ("ALJ")—is "a strong sign of an unhealthy and biased institutional process." PFF ¶934. That extraordinary win rate remains in place. As the

Ninth Circuit colorfully observed two years ago, the "FTC has not lost a single case [in administrative proceedings] in the past quarter-century. Even the 1972 Miami Dolphins would envy that type of record." *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021), *rev'd*, 143 S.Ct. 890 (2023). Indeed, just last month, the Commission again (dubiously) reversed this Court to rule in favor of itself. *See* Order of the Commission, *Illumina, Inc. & GRAIL, Inc.*, No. 9401 (F.T.C. Apr. 3, 2023).

In defending the validity of this biased forum, Complaint Counsel have cited (Pretrial Br. 50) *Withrow v. Larkin*, 421 U.S. 35 (1975), which held that the combination of a federal agency's investigative and adjudicative functions, "without more," does not violate due process, *id*. at 58. To the extent *Withrow* would require rejection of the argument here, Intuit preserves for further review that it was wrongly decided. But Intuit submits that *Withrow* does not require rejection of the argument here, because the Court there recognized that "special facts and circumstances present in the case" may demonstrate "that the risk of unfairness is intolerably high." *Id*. The FTC's concentration of governmental power, coupled with the copious evidence of case-specific prejudgment in this matter discussed below, makes plain that the serious risk of unfairness here is intolerable—in fact, that risk has materialized into reality.

The due-process problem with the FTC's adjudication is amplified by the fact that this case implicates Intuit's right to liberty, *see Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part) (describing "advertising" as "integral" to "liberty"), which is a "private right[]," *Axon*, 143 S.Ct. at 907 (Thomas, J., concurring); *see also id.* (defining "core private rights" as "rights to life, liberty, and property"). "[W]hen private rights are at stake, full Article III adjudication is likely required," because "empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights" would violate

due process. *Id.* at 907, 910. For Intuit's private rights to be adjudicated by a biased forum offends due process.

B. The FTC's Structure Violates The Separation Of Powers

The FTC's structure contravenes article II of the Constitution because the commissioners and the FTC's ALJ are each impermissibly insulated from presidential removal. *See Seila Law v. CFPB*, 140 S.Ct. 2183, 2191 (2020); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 484 (2010).

Article II vests "[t]he executive Power … in a President.". And a core feature of this executive power is the president's ability to supervise and remove "those who wield executive power on his behalf." *Seila Law*, 140 S.Ct. at 2191. Yet FTC commissioners, who exercise executive power, *see Morrison v. Olson*, 487 U.S. 654, 690 n.28 (1988), are shielded from at-will presidential removal, *see* 15 U.S.C. §41. That is unconstitutional.

Although the Supreme Court upheld the FTC's removal structure in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court has repeatedly undermined that case in the subsequent 85-plus years. *Seila Law*, for example, "repudiated almost every aspect of *Humphrey's Executor*," 140 S.Ct. at 2212 (Thomas, J., concurring in part and dissenting in part), by refusing to apply the decision to an agency with only a slightly different structure to the 1935 FTC, *id*. at 2206. Indeed, two justices in *Seila Law* went so far as to call *Humphrey's Executor* "a direct threat to our constitutional structure" that should be overruled. *Id*. at 2211-2212 (Thomas, J., concurring in part and dissenting in part). Intuit preserves that argument for further review.

The FTC's structure also unconstitutionally shields ALJs from removal, in derogation of the separation-of-powers principle that the president may not "be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer,"

Free Enterprise Fund, 561 U.S. at 484. FTC ALJs are insulated from executive oversight by both 5 U.S.C. §7521(a), which provides that "[a]n action may be taken against an [ALJ] … only for good cause established and determined by the Merit Systems Protection Board ["MSPB"] on the record after opportunity for hearing before the Board," and 5 U.S.C. §1202(d), which provides that MSPB members are removable "by the President only for inefficiency, neglect of duty, or malfeasance in office." ALJs accordingly enjoy two layers of protection from the president. As *Free Enterprise Fund* makes plain, that structure violates Article II. *See* 561 U.S. at 492, 496. Indeed, relying on *Free Enterprise Fund* and *Lucia v. SEC*, 138 S.Ct. 2044, 2053 (2018), the Fifth Circuit recently held that ALJs at the Securities and Exchange Commission ("SEC"), who do not differ in any material respect from FTC ALJs, are officers who cannot constitutionally enjoy two layers of removal protection. *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

Complaint Counsel have argued, however (Pretrial Br. 51-52), that any defect in the president's power to remove commissioners (Complaint Counsel do not make this argument as to ALJs) is harmless because the commissioners have been properly appointed. That is wrong. Proper appointment does not salvage the actions of an officer with unconstitutional removal protection if that protection contributes to any harm inflicted. *See Collins v. Yellen*, 141 S.Ct. 1761, 1789 (2021). That is the situation here. If the commissioners (and ALJs for that matter) were accountable to the president, the prospect that Intuit would be subjected to a skewed proceeding would be significantly reduced, as the president could ensure that the commissioners decided this case based on the evidence rather than their desire to vindicate their initial decisions to initiate the investigation and file a complaint. Indeed, it seems unlikely that commissioners would rule for themselves in every instance (overturning ALJ decisions as necessary) if the

threat of removal required them to set aside their prior determination that a suit was appropriate and assess the evidence offered during the administrative proceeding.

C. Congress Unconstitutionally Delegated Legislative Power To The FTC

The Supreme Court has held that the power to choose whether to assign disputes to agency adjudication or to an Article III tribunal is "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co v. Stranahan*, 214 U.S. 320, 339 (1909). Yet Congress has given the FTC plenary authority to make that choice—and has done so without providing any intelligible principle (indeed, any principle at all)—to guide or constrain that choice. *See* 15 U.S.C. §§45(b), 53(b). That constitutes an unconstitutional delegation of legislative authority. *See generally Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019) (plurality); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

In fact, the Fifth Circuit recently held that Congress violated the non-delegation doctrine when it gave the SEC authority "to bring securities fraud actions … within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so." *Jarkesy*, 34 F.4th at 461. As with the SEC, "Congress has said nothing at all" about how the FTC should exercise its "exclusive authority and absolute discretion to decide whether to bring … enforcement actions within the agency instead of in an Article III court." *Id.* at 462. Such a "total absence of guidance is impermissible under the Constitution." *Id*.

Complaint Counsel's rejoinder, that the choice of forum is merely an exercise of prosecutorial discretion (Complaint Counsel's Pretrial Br. 51), is unavailing. As *Jarkesy* explained, "[t]hat position reflects a misunderstanding of the nature of the delegated power" because "Congress did not … merely give the [agency] the power to decide whether to bring enforcement actions in the first place"; rather, Congress "effectively gave the [agency] the power to decide which defendants should receive *certain legal processes* (those accompanying Article

III proceedings) and which should not." 34 F.4th at 462. "Such a decision," the court explained, "is a power that Congress uniquely possesses." *Id*.

The history of this case underscores why the FTC's unchecked discretion to determine the forum in which it will proceed—and, therefore, which legal processes will govern—is so problematic. Before this proceeding began in earnest, Complaint Counsel unsuccessfully sought relief in federal court against the same ads challenged here. Having failed there, Complaint Counsel are wielding core legislative authority to get a second bite at the apple in an administrative proceeding. By the looks of it, the principle guiding Complaint Counsel's decision to proceed here is simply that, having been rejected in the district court, this forum would hopefully prove friendlier. Such considerations should not, and under the Constitution cannot, play a role.

D. Intuit's Due-Process Rights Have Been Violated By The Reality Or Appearance Of Prejudgment

The Due Process Clause prohibits an agency from "'adjudg[ing] … a particular case in advance of hearing it.'" *Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022). To determine whether due process has been violated through prejudgment, courts ask "whether a disinterested observer may conclude that the agency has in some measure" prejudged the case. *Id*. Here, the comments and actions of the FTC Chair would lead a disinterested observer to conclude that the "ultimate determination of the merits" improperly "move[d] in predestined grooves." *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589-590 (D.C. Cir. 1970).

In particular, actions and statements from Chair Khan demonstrate that one member of the body that will be the ultimate administrative decisionmaker here may have prejudged the case. On March 29, 2022, while the Part 3 "wall" was up and the Commission was thus required

to play the role of neutral adjudicator, Chair Khan tweeted about Intuit's "deceptive Turbotax 'free' filing campaign" and the need for an "immediate halt to Intuit's deceptive ads." PFF ¶932. That tweet, importantly, is not the same as the agency's issuance of the press release included in the tweet: By re-tweeting the content of the press release from *her* Twitter account, the Chair amplified and indicated her support for that content, including the proposition that Intuit's ads were "deceptive." Chair Khan's tweet is no different for these purposes from a federal judge re-tweeting a plaintiff's press release announcing a pending case. That would clearly violate the admonition that "judge[s] should not make public comment on the merits of a matter pending or impending in any court." Code of Conduct for U.S. Judges Canon 3(A)(6) (eff. Mar. 12, 2019).

Not one month later (with the Part 3 wall still in place), Chair Khan reinforced the perception of prejudgment by once again publicly suggesting, this time in a widely watched interview, that Intuit had engaged in "law-breaking." PFF ¶933. Although she described the purported conduct as "alleged," a reasonable observer can see the bias inherent in identifying Intuit as her chosen exemplar of an unqualified lawbreaker against whom it was "incredibly important" for the Commission to take prompt action. PFF ¶933. She made these public statements before Intuit had an opportunity to defend itself, moreover, and at a time when FTC rules (and broader due-process principles) required her to remain—and appear to remain—neutral. Again, a federal judge could not sit for a public interview and point to the conduct at issue in a case pending before that same judge as conduct necessitating an enforcement action. *See United States v. Cooley*, 1 F.3d 985, 990 (10th Cir. 1993) (judicial recusal required where a judge told the press that abortion protesters who he had enjoined from blocking a clinic, but who intended to disregard his order, were "breaking the law"). The rules for Chair Khan are no

different. *See Intel Corp.*, 149 F.T.C. 1548, 1152 (2010) (reasoning that the standard governing judicial disqualification applies where "'Commissioners act[] as judges'").

Courts have invalidated FTC actions tainted by statements far less problematic. For example, in *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), Chair Paul Rand Dixon had, when previously serving as counsel to a Senate subcommittee, investigated similar "facts and issues" in preparing a report that criticized companies facing antitrust scrutiny, *id*. at 763, 767. On appeal, the Sixth Circuit invalidated an FTC antitrust order in which Chair Dixon had participated, explaining that FTC proceedings "must be attended, not only with every element of fairness but with the very appearance of complete fairness," and that "[w]herever there may be reasonable suspicion of unfairness, it is best to disqualify." *Id*. at 767.

The D.C. Circuit embraced this reasoning in *Cinderella*. There, Chair Dixon made public statements appearing to condemn particular industries as engaging in deceptive practices while a matter concerning a member of that industry was pending before the FTC. 425 F.2d at 584-585. The FTC subsequently found that company liable. In vacating, the court explained that commissioners may not "make speeches which give the appearance that the case has been prejudged." *Id*. at 590. Such conduct "ha[s] the effect of entrenching a Commissioner in a position which he had publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id*.

Like Chair Dixon, Chair Khan made public statements asserting that a company being investigated (and then sued) by the Commission broke the law. She publicly embraced the conclusion that Intuit engaged in "deceptive" conduct, and reinforced that perception when, weeks later at an academic conference, she named Intuit as an example of alleged "law-

breaking" that it was "incredibly important" for the FTC to stop. PFF ¶933. A disinterested observer would reasonably conclude that Chair Khan meant what she said: that she already considered Intuit's ads deceptive and would vote to halt them. And even if Chair Khan reached a different conclusion after hearing Intuit's side of the story, her prior comments would likely "have the effect of entrenching [her] in [the] position which [s]he had publicly stated," *Cinderella*, 425 F.2d at 590. As a result, and as a result of the Chair's decision not to recuse herself from this matter after making such public statements, Intuit has been deprived of its right to a hearing "with every element of fairness" and with the "appearance of complete fairness." *American Cyanamid*, 363 F.2d at 767. That violates due process.

CONCLUSION

The Court should find in Intuit's favor and dismiss the Complaint.

Dated: May 23, 2023

Respectfully submitted,

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APPENDIX A

No.	Exhibit Number	Description	Tax Year
1	GX 321	2015 Super Bowl ad “Boston Tea Party” (adage.com) 60-second Video (Video)	TY14
2	RX 200	TY14 TV Advertisement re: “Boston Tea Party”	TY14
3	GX 323	2016 Super Bowl ad "Never A Sellout” (adage.com) 30-second Video (Video)	TY15
4	GX 388	TY16 Email Absolutely Free (Adamson Depo)	TY16
5	GX 389	TY16 Email Absolute Zero (Adamson Depo)	TY16
6	GX 390	TY16 Email Refund in Pocket Free (Adamson Depo)	TY16
7	RX 024	Screenshot of TY16 TurboTax Homepage	TY16
8	GX 324	30-second “Fish” [INTUIT-FFA-FTC-000169116]	TY17
9	GX 325	15-second “Fish” ad [INTUIT-FFA-FTC-000528212]	TY17
10	GX 344	15-second "Guzman" ad (INTUIT-FFA-FTC-000528209)	TY17
11	GX 345	30-second "Cruise" ad (INTUIT-FFA-FTC-000169117)	TY17
12	GX 346	15-second "Baby" ad (INTUIT-FFA-FTC-000528210)	TY17
13	GX 347	45-second "Anthem Launch" ad (INTUIT-FFA-FTC-000528211)	TY17
14	GX 371	TY17 "File Your Taxes for $0" (Bansal Depo)	TY17
15	GX 374	TY17 Email Absolute Zero (Schulte Depo)	TY17
16	GX 375	TY17 Email Absolute Zero (Schulte Depo)	TY17
17	GX 376	TY17 Email File Free Today (Schulte Depo)	TY17
18	GX 668	1208_GUZMAN_15_01_16_18_540pm.mov	TY17
19	GX 774	15s-turbotax-absolute-zero-baby-1672974.mp4	TY17
20	GX 775	15s-turbotax-absolute-zero-guzman-featuring-luis-guzmn-1689586.mp4	TY17
21	GX 776	29s-turbotax-absolute-zero-fish-1682138.mp4	TY17
22	GX 777	29s-turbotax-cruise-1672400.mp4	TY17
23	GX 785	30s-turbotax-pez-espada-spanish-1673035.mp4	TY17
24	GX 786	45s-turbotax-absolute-zero-hey-at-least-your-taxes-are-free-1671922.mp4	TY17
25	RX 023	Screenshot of TY17 TurboTax Homepage	TY17
26	RX 025	Screenshot of TY17 TurboTax Website Pop-Up Disclosure Screen	TY17

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2023, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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The Honorable D. Michael Chappell
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that on May 23, 2023, I caused the foregoing document to be served via email to:

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The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

Dated: May 23, 2023

Respectfully submitted,

/s/ Derek Woodman
Derek Woodman
Counsel for Intuit Inc.